
The legislative process

SUMMARY

This chapter describes the process by which legislation is passed by Parliament. It highlights the dominant role played by the executive and the declining influence of backbench MPs. It outlines the advantages and disadvantages of strong governmental control and the difficulties of modernising the parliamentary process.

- 5.1 Whereas in the past there were large areas of the criminal and civil law which were wholly regulated by case law, most are now covered by legislation, whether primary (passed by Parliament) or secondary (created by Government under powers delegated in primary legislation). Case law, increasingly, consists of the interpretation of legislation. The amount of new primary legislation being passed is, in practice, limited by the timetabling restraints on Parliament. Although the number of statutes passed each year only increased slightly during the twentieth century, the length of each Bill has grown enormously (Zander, 1999). Some Bills are now very large indeed. The Criminal Justice Bill 2003, for example, was introduced to the Commons with 273 clauses and left it with 307 and 32 schedules. As a result of this trend, there is strong competition for parliamentary time and it is common for legislation put forward by members of Parliament to fail to reach the statute books for lack of time.
- 5.2 In practice, it is only those proposals which have the strong support of the Government which will be passed. Even then, some will fail to get through the following long and time-consuming process. Most Bills must complete all their stages within one session of Parliament, which ends each year in late October/early

November. However, it is also possible for the Government to circumvent the full legislative process and drive through statutes at great speed. Emergency terrorism legislation, for example, has in the past gone through all its stages in a matter of days with little debate and scrutiny.

The Whitehall stage

- 5.3 All Acts of Parliament start life as a Bill which must pass through Parliament. We tend to think of this stage as the main legislative process. But equally, if not more important, is what happens before a Bill reaches Parliament.
- 5.4 Almost all Bills are Public, that is, they affect the whole country. But a few are Private and only affect a local area or institution such as a company. These must be distinguished from Private Members' Bills which are Public Bills proposed by backbench MPs. Public Bills originate from a number of different sources. The majority are proposed by government departments in Whitehall. Surprisingly, relatively few of these have been set out in a manifesto. Most are devised by ministers and civil servants without having been put to the electorate for specific approval. Some proposed legislation originates from the findings of special commissions or official inquiries, or from reports of the Law Commission, which is a permanent body set up to review areas of the law which might need change. The Government decides whether or not to agree to these proposals and put them before Parliament.
- 5.5 Once a department has decided that it wishes to ask Parliament to pass legislation on a certain topic, it will undergo a consultation process with interested parties. The extent of this process will differ depending on the complexity, importance and urgency of the matter. It may take many months or a few days. The first stage is often a consultation document called a Green Paper which sets out in general terms what the Government is seeking to do and asks for views. Once these are received and taken account of (or not) the Government will produce a White Paper, which sets out the proposals decided upon and the reasons for the legislation. These two stages may be contracted into one.
- 5.6 These stages are not fixed by formal rules and are subject to change. For example, it is increasingly common for draft Bills to be drawn up and circulated for consultation before being formally laid before Parliament, an example being the Mental Health Bill 2002. Occasionally Bills are scrutinised by Parliamentary Committees before being formally introduced.

Drafting

- 5.7 At the point where a department has decided on the provisions it wishes to pass these are passed to civil servants called Parliamentary Counsel, lawyers who are experts in drafting techniques. A long or complex Bill may take many months to draft, with regular meetings between Parliamentary Counsel and the department responsible for the Bill to ensure that the wording accurately reflects what is proposed. Once the Bill is drafted it is ready to be presented to Parliament.
- 5.8 One effect of the need for Bills to be tightly drafted legal documents is that they are often difficult for non-lawyers to understand. In order to address this problem and so to increase the accessibility of legislation, a ‘plain English’ summary of the purpose and content of the Bill is now published alongside the more formal and legally drafted overview. The Coroners Bill 2006 that proposed changes to the coroners’ system was the first Bill to include the new plain English section.

The Westminster stage

- 5.9 In order to be given time in Parliament, a Bill must have been approved by the Future Business committee. This is a cabinet committee which decides which Bills will be put before Parliament in the following session. Thus, a department wishing to pass legislation must normally seek space in the timetable from the committee the year before it will be ready to be passed. In this way, there is a rolling programme of proposals and Bills at different stages of preparation. At any one time Parliament will know what is due to come before it for the current and future session.
- 5.10 All Bills must be passed by both the House of Commons and the House of Lords. They can start in either, but most start in the Commons and pass through the following stages:

First reading

- 5.11 This is a formal stage whereby the Bill is laid before the House and is ordered to be printed. There is no debate on its content.

Second reading

- 5.12 At this stage, the Minister sets out the policy objectives of the Bill and a debate is held in the House on its merits in broad terms. It is rare for there to be a vote on the Bill at this stage or for a Government Bill to be defeated.

Committee stage

- 5.13 The detailed scrutiny of a Bill takes place in a Standing Committee, which, despite its name, is specially drawn up for each Bill. It is made up of about 18 MPs selected by another committee called the Committee of Selection. The purpose of the Committee is not to consider the desirability of the Bill in principle, since that has already been approved by the House during the Second Reading, but to scrutinise the workability of the detailed clauses.
- 5.14 The members of the committee must be in proportion to the representation of each party in the House overall, so that the Government will almost always have a majority. Interested parties will lobby the members and amendments will be proposed by both the opposition and government members. In practice, almost all the amendments which are successful are those which are proposed by the Government, though sometimes the members can be persuaded of the validity of a proposal for change by an opposition member.

Report stage

- 5.15 Once the Committee has agreed a draft Bill it goes back to the House. The Government may reject the changes carried out at Committee stage or, indeed, make further changes. One controversial development in recent years has been the growing tendency for the Government to seek to make significant changes to a Bill at this stage. A recent example being the Criminal Justice Bill 2003 in which 28 new clauses were produced by the Home Office at the report stage, including major policy issues such as restricting judicial discretion in relation to life sentences.

Third reading

- 5.16 The final stage is another formality, where the Bill is confirmed and is now ready to be passed to the House of Lords. No change can be made to the content of the Bill at this stage.

Process in the House of Lords

- 5.17 The formal stages in the Lords are broadly similar to those of the Commons, apart from the fact that the Committee stage is usually carried out in the House as a whole rather than by Committee, and this stage is less tightly controlled, with unrestricted debate allowed on amendments. In addition, changes can be made at the third reading stage. However, the culture of the Lords is rather different because there is less government control of the process. The party system which is

enforced through the Whips is weakened by the presence of cross-benchers who do not belong to any party and other Lords such as the Law Lords who may contribute to debate on Bills affecting the legal system. However, the capacity of the Lords to affect legislation is also limited. It can delay the passage of most Bills for a year, but will only do so in rare cases. A recent example of the Lords exercising this power arose in relation to the legislation banning fox hunting, which was finally passed on the second attempt.

- 5.18 Similarly, in 1999 the Lords twice voted against the Criminal Justice (Mode of Trial) Bill which sought to reduce the right of a defendant to elect trial by jury. As a result, the Government was forced to withdraw the Bill and decided not to reintroduce it the following session. Such a complete defeat is nowadays very rare. However, challenges to particular aspects of legislation are not. In the 2001–2 parliamentary session, for example, the Lords inflicted 57 defeats on the Government. The effect of the greater willingness in the Lords to oppose Government proposals is that it is common for the content of Bills to be amended by the Government after negotiations with peers in order to avoid defeat in the Lords. The Labour Government is currently in a small minority in the Lords which means that it must work hard to obtain support for its legislation there.
- 5.19 At present the House of Lords is in a transitional phase. In January 2000, a Royal Commission Report on the future of the House of Lords, chaired by Lord Wakeham, was presented to Parliament which proposed that the second chamber should consist of a majority of appointed members and a minority of elected members representing regions of the UK. In 1999, most of the hereditary peers were removed as the first step in the process of reforming the composition of the Lords. This change has increased the legislative authority of the Lords, but the fact that its members continue to be appointed rather than elected means that its continuing role in the legislative process is dependent on its acceptance that the Commons, as the elected chamber, must ultimately have the power to pass laws as it sees fit.
- 5.20 Since 1999, debate has continued about the exact future make-up of the House, and in particular, what should be the proportion of elected to appointed members. On the one hand, supporters of the creation of an elected second chamber argue that the current arrangements are undemocratic and limit the effectiveness of a bi-cameral Parliament. On the other hand, defenders of an appointed House of Lords claim that its less partisan culture and more loosely structured procedures, combined with the wide-ranging expertise of its members, creates a highly effective scrutinising chamber which can improve the quality of legislation passed. It is not yet clear, therefore, whether the Lords will emerge from this period of change as a

more accountable and powerful second chamber, or continue its historical trend of declining influence and relevance.

Royal Assent

- 5.21 This is the final stage in the legislative process whereby the Queen signs the Act of Parliament. It may come into force immediately or at a future stage, as stipulated in the Act. For example, the Human Rights Act was passed in 1998 but came into force in October 2000 once training and other preparations had been completed.

Overview of the system

- 5.22 The key feature of the legislative process is that it is strongly controlled by the Government, and the bigger the Government's majority the greater that control. Almost all legislation is initiated by the Government and even backbench MPs of the party in power have relatively little scope to influence its content. Through the system of Whips, MPs who enforce party discipline, they are required to support their party line on almost all important legislative decisions. Occasionally backbenchers will revolt and vote against the Government, or threaten to do so unless amendments are made. But this is a card which most MPs can only play rarely without threatening their chances of ever being asked to join the Government, or indeed, without running the risk of having the Whip withdrawn, thus being expelled from the parliamentary party.
- 5.23 The advantage of this system of strong Government control is that the party elected can implement the manifesto on which it was given a mandate by the electorate. The disadvantage is that those who voted for another party, who may constitute a majority of the population, have almost no effective representation in the law-making process.
- 5.24 In addition, the quality of legislation may be weakened by lack of meaningful debate or unwillingness to take account of valid input from those outside the Government. There are many examples of ill-thought-out and unworkable legislation which has been rushed through by the Government in response to a perceived crisis. The Dangerous Dogs Act, for example, was passed in 1991 as a result of a few cases of serious injury caused by dog attacks. In practice, as many critics warned at the time, the Act has been almost impossible to implement because of the difficulties of identifying the particular breeds of dog certified as dangerous. Failure to take account of these comments in the rushed consultation and drafted

stage resulted in a flawed piece of law being on the statute books and unlikely ever to be repealed.

- 5.25 While such examples highlight the potential lack of sufficient checks and scrutiny in the law-making process, there is an equally strong argument for saying that the system suffers from being too slow and cumbersome. For every case of ill-thought-out legislation rushed through, there is a worthwhile and overdue statute which is not passed through lack of time in the parliamentary timetable. One reason for this is that many of the procedures in Parliament are left over from a time when the legislation passed was shorter and less complex and when many MPs had other interests and occupations which needed to be attended to during long vacations. If a law-making body was being designed from scratch it is very unlikely that it would share many of the detailed arrangements of the current Parliament.
- 5.26 In recent years there has been a drive to modernise the procedures of Parliament to address these problems. The pressure for change has also been driven by arguments that the current working arrangements discriminate against those with family responsibilities, predominantly women, who make up only 19 per cent of MPs. For example, the fact that debates and voting are often carried out in the evenings and late at night is particularly hard for parents of young children. But resistance to change among many members is strong and one of the few areas in which back-benchers still exert some power is control over the procedures of the House. To date, although some progress has been made in reforming parliamentary procedure, there is still a long way to go in modernising the way the law is made in Parliament to strike a better balance between scrutiny and the efficient use of its time.
- 5.27 One knock-on effect of the constant shortage of time available for legislation is that there is a reluctance to make time for repealing redundant legislation and passing Consolidating Acts which draw together different pieces of law on the same subject. The presence of old and overlapping law is not just untidy, it has a practical impact on the level of justice. Old Acts which have long been considered inappropriate for current conditions and so redundant have sometimes been resuscitated for questionable purposes. For example, the use of the draconian provisions of the long-dormant Vagrancy Act 1864 to stop and search black suspects on the street in Brixton in the 1980s was instrumental in leading to the inner city riots of 1981 and 1985.
- 5.28 The vast and confused state of the statute books also removes any hope that ordinary people might be able to understand the law without specialist legal help. Ignorance of the law is no defence to a criminal charge and yet most people cannot know even a tiny fraction of the law. For these reasons, the campaign for codification, at least in relation to the criminal law, has attracted considerable support. The Law

Commission has been working on a draft code for many years, though there is no sign yet of time being made available in Parliament for this to be passed.

FURTHER READING

Michael Zander *The Law Making Process* (1999, London: Butterworths), chs 1 and 2.

The Select Committee Report on Modernisation of the House of Commons: The Legislative Process (1997–1998 H C 190) (<http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmmodern/190j/md0102.htm>).

The work of the House of Lords. Parliament briefing paper (<http://www.parliament.the-stationery-office.co.uk/pa/ld199798/ldbrief/ldwork.pdf>).

The Wakeham Royal Commission on the Reform of the House of Lords *A House for the Future* (Cmnd 4534) (2000, London: HMSO) (<http://www.archive.official-documents.co.uk/document/cm45/4534/4534.htm>).

USEFUL WEBSITES

House of Commons home page http://www.parliament.uk/about_commons/about_commons.cfm

House of Lords home page http://www.parliament.uk/about_lords/about_lords.cfm

All current UK statutes since 1988 <http://www.legislation.hmso.gov.uk/>

LCD website section on House of Lords reform <http://www.lcd.gov.uk/constitution/holref/holrefindex.htm>

SELF-TEST QUESTIONS

- 1 What are the advantages and disadvantages of the strong executive control of the legislative process?
- 2 What changes might be introduced to the parliamentary procedure to improve the efficiency and effectiveness of the law-making process?
- 3 List three ways in which the law-making procedure in the House of Lords differs from that in the House of Commons.
- 4 Define the following terms:
 - Public Bills
 - Private Members' Bills
 - Private Bills
 - Consolidating Acts.