



Law Society
of Scotland

House of Lords Constitution Committee Inquiry into the Legislative Process

The Passage of Legislation through Parliament

23 July 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to respond to the Inquiry by the House of Lords Constitution Committee into The Legislative Process: the passage of legislation through Parliament. The Sub-committee has the following comments to put forward for consideration

General Comments

The legislative process in Parliament does require review. Significant developments have been and are occurring in the UK; these include changes relating to the constitution such as withdrawal from the European Union and further devolution to Scotland and Wales. There are also changes in Society at large and in the ways in which people live, learn and work caused by a number of factors including globalisation and the increased use of technology. It is right therefore that Parliament considers whether its legislative processes are fit for the present day.

How effectively does Parliament scrutinise bills at the various stages of the legislative process, in both the House of Commons and the House of Lords?

In order to begin an answer to this question there is a background question which is "what is legislative scrutiny for?"

Put simply it is to help make good law

Legislation makes Government policies into binding rules which affect us all. If legislation is to achieve this purpose, it must reflect those policies and express them clearly to those who are subject to the law.

Parliament, or more correctly, The Queen in Parliament is the sovereign body which, (subject to EU law and devolved matters) scrutinises the policies and proposals for law which are brought forward by Government and through the processes applicable to policy scrutiny and law making holds Government to account and examines bills and draft subordinate legislation before passing them into law.

Scrutiny by each House of Parliament

Parliament is ‘both the supreme legislative body for the United Kingdom, and the sole body with power to enact statutes for England and Wales’. (English Public Law Ed Feldman paragraph 2.47).

Subject to the exceptions under the Parliament Acts, Acts of Parliament require the consent of both the House of Commons and the House of Lords and the Royal Assent before they can become law.

House of Commons

Second Reading in the House of Commons is a necessary step and an opportunity for the House to express its approval of the principle behind a bill. In the recent past only one second reading, that of the Shops bill of 1986 has been defeated. The fact that no other bills have been rejected in more than 30 years might indicate that the process is not robust - on the other hand it is more likely to suggest that the Government normally has an inbuilt majority and that opposition parties in the House of Commons recognise that a Government has a mandate to implement its manifesto.

Few would contest that, under the current arrangements, the most significant scrutiny takes place at the Committee stage of a bill (whether before a committee of the Whole House or by assignment to a public bill committee) when it is subjected to what is described as “line by line” scrutiny. Clearly a significant amount of time is devoted to debate in Committee overall but the latest published Sessional Returns (Session 2016–17 18 May 2016–3 May 2017) indicate that the time allocated to public bills varies from bill to bill from 1 session on a bill to as many as 8 sessions.

In respect of Committees of the Whole House the bills which have greatest impact on the UK attract the most time.

Therefore in the Returns the most amount of time in Session 2016/17 was allocated to the European Union (Notification of Withdrawal) bill with 24 hours 36 minutes (consideration on 3,6 and 7 February) whereas the least was the Health Service Medical Supplies (Costs) Bill which occupied the legislative grand committee for 1 hour 17 minutes.

Amendments were tabled on a number of important aspects of the EU (Notification of Withdrawal) bill notification and exit process yet despite the considerable debate all new clauses and amendments were defeated and the Bill was not amended at committee stage.

The extent to which a Government operating with a majority can reject amendments is a cardinal feature of legislative scrutiny in the House of Commons.

The approach of the House of Commons to debates on a bill can be distinguished from the approach of the Scottish Parliament. In the Scottish Parliament when a bill (irrespective of whether it is a Government bill or a member’s bill) is introduced it is allocated to a lead committee which then begins the legislative process at Stage 1. There are three Stages to a Scottish Parliament bill: Stage 1 (involving consideration and debate on the principle of the bill) Stage 2 (involving line by line scrutiny and consideration of amendments)

and Stage 3 (the final stage in the process, roughly corresponding to Report and Third Reading at which amendments can be proposed and a final debate for approval of the bill takes place).

Stage 1 involves the lead committee taking written and oral evidence on the bill from Scottish Ministers and interested parties. The committee then prepares a report on the principle of the bill which makes recommendations which are then debated and voted upon by a plenary meeting of the Scottish Parliament. Because the Scottish Parliament is a unicameral legislature the scrutiny role at Stage 1 which the committee performs is crucial to the future passage of the bill. The process at Stage 1 is designed to front load examination of both policy and legislative issues arising from the bill and to provide the results of that scrutiny to the Parliament's plenary session.

A significant difference between the bill committees in the House of Commons (and for that matter those in the House of Lords) and Scottish Parliament committees is that those in the Scottish Parliament undertake both policy inquiries and legislative work (there is no select/bill distinction). Another difference is that Scottish Ministers are not members of the subject committees. This means that Ministers appear before committees to promote the legislation, put forward amendments and steer regulations through.

House of Lords

Procedure in the House of Lords has structural similarities to that in the House of Commons with a Second Reading stage, a Committee Stage, Report Stage and Third Reading.

There are significant differences between the House of Lords and the House of Commons including the different composition of the House, its distinct procedural rules (such as the consideration of most bills by a Committee of the whole House), its principal role as a revising Chamber, the investigative and scrutiny roles of the House of Lords Committees and different functions for example in connection with financial and taxation matters.

The absence of a guillotine or other formal timetabling in the House of Lords and the lack of an inbuilt Government majority mean that there is much greater likelihood of opposition or crossbench amendments to Government bills being successful in the House of Lords than in the House of Commons. A recent example of this aspect is the European Union (Withdrawal) bill.

House of Lords select Committees add significant value to the scrutiny work of the House by examining legislation closely and commenting on its clarity, effectiveness and accessibility in order to help create good law.

The office of the Parliamentary Counsel has expressed "good law" as law that is necessary, clear, coherent, effective and accessible. If committees keep these qualities in mind when scrutinising legislation the outcome should be better law and a better statute book.

Legislative scrutiny by either House should be designed to:

- a. Test Government Policy as expressed in the bill or subordinate orders,
- b. Make good law, that is law which is necessary, clear, accessible, coherent and effective.

It is possible to devise criteria against which the effectiveness is to be assessed:

- i. The extent to which the whole bill is subjected to close examination;
- ii. The number and type of amendments tabled for debate during committee stage in either House;
- iii. The number and type of amendments accepted by Government.

To what extent does each House have a separate role in the legislative process? How well understood are these roles?

Both Houses have separate but complementary roles.

The House of Lords Reform bill published in 2011 recognised in its summary the fundamental distinction between both Houses “We propose no change ... to the fundamental relationship with the House of Commons, which would remain the primary House of Parliament. That primacy rests partly in the Parliament Acts and in the financial privilege of the House of Commons”.

The explanatory notes for the Reform bill acknowledged the different roles in greater detail:

“The House of Lords shares responsibility for legislating with the House of Commons. Bills are debated and scrutinised in both Houses. The House of Lords has a reputation for the careful consideration of legislation and has the ability to delay and ask the Government and House of Commons to think again and, in some cases, offer alternative amendments for further consideration”.

“The House of Lords also plays a vital role in scrutinising the work of the Government and holding it to account for its decisions and activities. It does this by members asking oral and written questions, responding to Government statements and debating key issues.”

The different character of the elected House from the unelected House demonstrates the nature of these roles. MPs have a different role from Peers because they are accountable to their constituents and operate within a significantly more political environment.

On the other hand Peers have a different role as members of a revising Chamber. Peers can bring their experience and expertise to bear on legislation or Committee Inquiries in an environment which is often less politically charged than that found in the House of Commons.

As regards House of Lords committees it is generally considered undesirable for them to overlap with committees in the House of Commons. However where committees have a joint interest in a mainstream area of law or policy such as human rights it is helpful to have a joint committee.

In other areas it is important for there to be distance between the committees of both Houses. Departmental committees in the House of Commons have a different role in as much as they are

comprised of Members of Parliament who are accountable to their constituents. The committees are designed to assist in holding Government to account.

On the other hand, Peers are not subject to the same political pressures as MPs and can bring their expertise and experience to each inquiry. They can also have a wider perspective on issues, examine broader themes and adopt more holistic views.

What has been the impact of changes to the legislative process since 2004, such as the introduction in the House of Commons of public bill committees and the 'English votes for English laws' procedures?

Should there be greater Select Committee involvement in legislative scrutiny?

The introduction of public bill committees is a positive development. We advocated the taking of evidence from stakeholders under the previous procedure for Special bill Committees in the mid-1990s and supported the adoption of procedures in the Scottish Parliament where lead committees on a bill take evidence at Stage 1 from stakeholders, interested parties and Scottish Government Ministers to assist in the preparation of the Stage 1 Report on the bill for the Parliament to consider.

We have provided evidence to a number of Public bill Committees ranging from the Small Charitable Donations bill to the Trade bill and the Counter Terrorism and Border Security bill. We hope that the comments which we make are considered useful by the public bill committees.

We have had no experience of dealing with bills subject to the procedure for English Votes for English Laws

Should there be greater select committee involvement in legislative scrutiny?

Yes we believe that greater select committee involvement would be helpful in respect of legislative scrutiny.

To what extent does the UK's withdrawal from the European Union pose challenges for Parliament's scrutiny of bills?

The impact of withdrawal from the EU will have considerable impact on Parliament as a whole irrespective of whether Withdrawal takes place with an agreement or not and whether or when a future relationship is agreed.

It is even yet unclear as to what the position will be on 29 March 2019 but it is prudent for Parliament and Government as much as the whole country to prepare for there being no Withdrawal Agreement in place on exit day.

Some may believe there will be no need for an EU committee or subcommittees once the UK has withdrawn from the European Union however the effect of Withdrawal will mean the deconstruction of the Supra-national legal order and the absorption of EU law into the national legal order. This exercise will

result if not immediately then in the not too distant future in an unprecedented level of policy development and law reform.

Furthermore, the EU will remain a significant trading partner and a significant generator of policy and law which will impact on the UK in a variety of ways. Therefore it will be important for Parliament to maintain a committee which will carry out a monitoring and horizon scanning role. This will assist in alerting Parliament to EU developments.

The return of powers from the EU to UK will be considerable.

Parliament and the committees which currently scrutinise EU proposals will require to be re-orientated to scrutinise UK proposals in areas of former EU competence and where appropriate take into account views from the devolved legislatures.

Timetabling of legislative scrutiny

Does the legislative process appropriately balance time spent considering bills in the Chamber of each House with time in public bill committee/Grand Committee?

This is a difficult question to answer without considerable statistical analysis. What can be said is that as debate in committee is generated by the consideration of amendments the time spent will extend only to the completion of that task. A large number of amendments will result in longer consideration. A more complex issue is how amendments are presented. Taking it as a given that officials in both Houses make the correct decisions about scope of amendments, the time taken to present amendments can differ considerably from one bill to another. Focused speeches on the amendment under consideration is the best way to ensure that the balance between consideration in the Chamber and consideration in committee strikes the correct balance.

One issue which is related to the use of time in both Houses of Parliament is that of voting. The Parliament website explains the process:

“During a division, Members literally divide into two separate areas. These are called the Aye and No lobbies in the Commons and the Contents and Not Contents lobbies in the Lords.

As they pass through the lobbies, the Members have their names recorded by clerks and are counted by tellers. Once the lobbies are empty the Speaker (Commons) or the Lord Speaker (Lords) announces the result of the division. The whole process takes about fifteen minutes.”

Sometimes a series of votes can take up as much as an hour occasionally more as recently happened during the European Union (Withdrawal) bill.

This time could be more usefully employed on scrutiny of the measure rather than members being counted through the lobbies. We acknowledge that proposals to adopt electronic voting in Parliament have been considered but no one alternative commands sufficient support among Members.

The website states “*Many Members view the procedure of voting in person through the lobbies as an essential opportunity to speak to or lobby senior colleagues*”.

Nevertheless we advocate the adoption of electronic voting in both Houses of Parliament. This is well tried and tested in the Scottish Parliament. In that Parliament electronic voting takes a matter of seconds. MSPs are also able to lobby or speak to colleagues but this takes place at a time other than “decision time” which is the time designated for voting in the Scottish Parliament.

Does the arrangement and timetabling of legislative business work effectively?

The answer to this question will depend on whether the perspective is that of a Government Minister or Whip or that of an opposition, cross bench or backbench member.

What is the impact on the legislative process of having annual sessions of Parliament?

What difference does a two-year session, such as 2010–12 and 2017–19, make?

We have no comment to make.

Explanatory materials

How useful are the explanatory materials accompanying bills for parliamentarians and the public?

What could be done to improve the accessibility and understanding of legislation?

Changes which could be made to improve the accessibility and understanding of legislation include the use of plain language in explanatory papers and bills.

We endorse suggestions made by the House of Commons Political and Constitutional Report “Ensuring Standards in the quality of legislation” (2013 HC85). Where possible explanatory notes should be truly explanatory and not simply repetition of clauses in a bill. More bills should be self-contained, and there should be more consolidation measures bringing together series of statutes in a readable fashion. Finally, codification (where all the law on a given area is codified in a statute expressed in a way which is accessible) should be proposed. Codification is a function of the Law Commissions, but Governments will need to plan with them how this process could be taken forward to statutory legislation.

Initiatives such as the “Good law” project from the Cabinet Office and Office of the Parliamentary Counsel and “Drafting Matters!” the Guidance on the drafting of primary legislation from the Scottish Government’s v Parliamentary Counsel Office are welcome and need constant reiteration.

How effective is Parliament’s scrutiny of impact assessments and other Government documents accompanying legislation?

We have no comments to make

Public engagement

To what extent, and how effectively, are the public and stakeholders involved in the scrutiny of legislation as it passes through Parliament?

To what extent does stakeholder involvement prior to the introduction of a bill have an impact during the legislative process?

What could be done to increase or improve engagement with the public and stakeholders?

The factors which inhibit effective engagement include the large number of consultations, the timescale for responses, the number of inquiries and policy issues which require significant resources on the part of stakeholders to identify, analyse and respond to. The lack of resources generally amongst stakeholders means that legislation and policy matters are prioritised in order of impact on the stakeholder which may restrict the number of responses made. It is relatively easy for professional organisations, campaigning bodies, experts in the relevant fields, and those accustomed to civil service and political structures to respond to consultation papers. It is less easy for those whose interaction with government or legislative authorities is sporadic. There are issues concerning the language used in consultation papers, the assumptions made of prior knowledge and understanding of the constitutional and legislative backdrop militate against a broad range of participation from a broad range of people. Some may be intimidated by the machinery of government or the image presented by Parliament. Some potential consultees may be put off by a sense of political detachment documented in reports such as the Hansard Society's regular Audits of Political Engagement; For example in the most recent Audit, only 7% of those polled said they had participated in a public consultation (Hansard Society, Audit of Political Engagement 13: the 2016 Report).

Technology

How might Parliament's website be improved to communicate the workings of the legislative process more effectively?

Technology could be used to support the development and scrutiny of legislation by allowing for further and better consultation for example by video with consultation groups and through social media. Witnesses should also be able to provide evidence by video link on bills to Parliamentary Committees such as the Grand Committee, Select Committees or Public bill Committees.

The use of technology to engage with the public at large and specialist users should not be underestimated. Outreach through the internet, blogs and social media about the existence of consultation, how to participate, where to participate and within what timescale would improve this aspect of the legislative experience. In particular government departments could conduct consultation meetings on important pieces of legislation in localities across the country and engage on a one to one basis with the communities affected by the proposed policy or legislative changes.

Are there opportunities to display more clearly the way bills change through the process and the impact of proposed amendments at each stage?

How can new technologies enhance the quality of bill scrutiny and understanding of the legislative process?

We believe that the Parliamentary website could improve the way bills are displayed in order to more clearly show the changes which take place during a bill's passage. For example coloured highlighting could be used - such as the EU Commission highlighted the draft Withdrawal Agreement.

Furthermore where a bill amends a section contained in earlier legislation the website could provide an indicative version of the section as it will be amended in order to aid comprehension.

Where bills refer to ministerial order making powers Government could help by regularly publishing draft orders as the bill is passing through Parliament. This too would assist in explaining how a bill will work if it becomes law.



For further information, please contact:

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131 4768163

michaelclancy@lawscot.org.uk