



Chapter 4 – Making the law

4.1 It is not surprising that the House of Lords, as one chamber of a bicameral legislature, spends roughly half its time considering primary legislation. Such legislation is the main vehicle for introducing significant changes of policy in all areas except foreign affairs. It therefore follows that the scrutiny and revision of primary legislation is also a central part of holding the executive to account, by requiring it to explain and justify its policy choices.

4.2 The relative power of the two Houses of Parliament in relation to primary legislation is of fundamental political and constitutional significance. In this chapter we consider how the reformed second chamber could help to improve the quality of primary legislation but we start by reviewing the powers which we believe the second chamber should have in this key area.

Powers

4.3 Until 1911, the United Kingdom Parliament was fully bicameral, except in respect of the Commons' financial privilege. Following the House of Lords' effective destruction of much of the Liberal Government's 1906–1908 legislative programme, capped by the rejection of Lloyd George's Budget in 1909, the Parliament Act 1911 restricted the House of Lords' powers in two ways. First, the House of Lords formally lost the power to delay certified Money Bills for more than a month, except with the consent of the Commons. Second, any other public Bill passed by the Commons in three successive sessions, with at least two years between Commons' Second Reading in the first session and Commons' Third Reading in the third session, could be presented for Royal Assent once it had been 'rejected' by the Lords in the third session. (The only exception was a Bill to extend the maximum duration of a Parliament beyond five years: in respect of any such Bill the House of Lords retained its original absolute veto.) The Parliament Act 1949 reduced the operative period of a Lords veto from three sessions to two and from at least two years (between Commons' Second Reading in the first session and Commons' Third Reading in the last) to at least one.

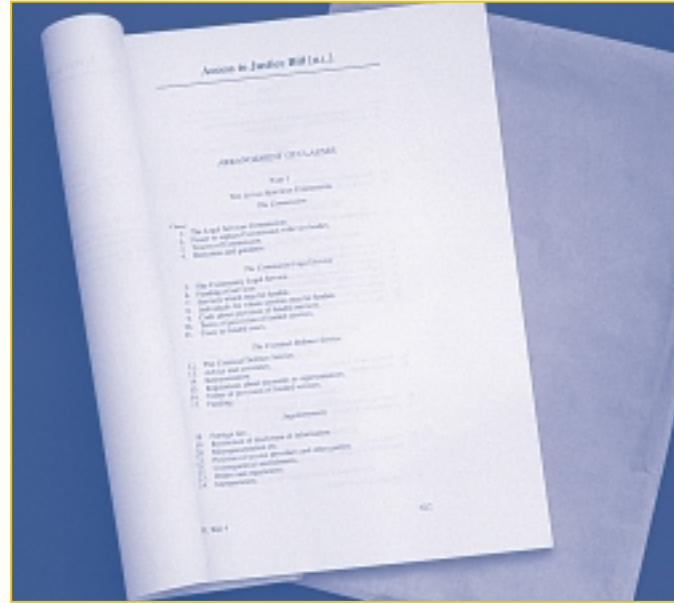
4.4 In the event, only five Bills have been enacted under Parliament Act procedures.¹ However, other Bills have been rejected by the House of Lords and not subsequently reintroduced.² Others have eventually been agreed to by the House of Lords after having been passed by the House of Commons for a second time.³ Overall, it is probable that decisions – by both the Government and the House of Lords – about the handling of most contentious Bills over the past 88 years have been influenced by the existence of the Parliament Acts. The threat of using, or the ability to override, the House of Lords' power of veto has influenced attitudes towards individual amendments to Bills as well as their overall principle. The Parliament Acts have been an important part of the political calculus.

¹ The Government of Ireland Act 1914, which was suspended on the outbreak of war and repealed by the Government of Ireland Act 1920; the Welsh Church Act 1914, which was also suspended on the outbreak of war and given effect by the Welsh Church (Temporalties) Act 1919; the Parliament Act 1949; the War Crimes Act 1991; and the European Parliamentary Elections Act 1999.

² For example, the Representation of the People Bills 1917 and 1931.

³ For example, the Trade Union and Labour Relations (Amendment) Act 1976 and the Aircraft and Shipbuilding Industries Act 1977.

4.5 The most important questions to be considered are: whether the formal relationship between the two chambers of Parliament (as reflected in the terms of the Parliament Acts) is right or whether it should be adjusted; and whether the device of leaving the second chamber with a ‘suspensory veto’ over most primary legislation is necessarily the best way to express that relationship. The answer to these questions is complicated by the fact that the formal balance of power between the two Houses is only part of the story. The present House of Lords has consciously observed a series of conventions, including, in particular, the so-called ‘Salisbury Convention’. These have constrained the House of Lords’ use of the formal powers which it retains; but a second chamber which had greater political legitimacy might feel free to exercise its powers more robustly in ways which would alter the *de facto* situation.



4.6 In practice, the issue is not the resolution of conflicts between the two Houses of Parliament but the relationship between both of them and the Government, which still initiates most legislation. It is that trilateral relationship which needs to work properly. For the reasons set out in Chapter 3, we believe it is important that the second chamber should continue to be in a position to challenge the Government’s legislative proposals and force it to justify them to the House of Commons for at least a second time. It is against that background that we have considered the balance of formal power between the two Houses in respect of primary legislation.

4.7 Our conclusion is that the current balance is about right and should not be radically disturbed. It would be wrong to move in the direction of a basically unicameral system with the second chamber able to play only a ‘revising’ role in suggesting detailed amendments. Equally, although the original impetus behind the Parliament Act 1911 – the domination of the second chamber by one political party – is now a thing of the past, it would be wrong to restore the fully bicameral nature of the pre-1911 Parliament. It is right that the House of Commons should be the principal political forum and have the final say in respect of all major public policy issues, including those expressed in the form of proposed legislation. Equally, it is right that the second chamber should have sufficient power, and the associated authority, to require the Government and the House of Commons to reconsider proposed legislation and take account of any cogent objections to it.

Recommendation 2: The House of Commons, as the principal political forum, should have the final say in respect of all major public policy issues, including those expressed in the form of proposed legislation. Equally, the second chamber should have sufficient power, and the associated authority, to require the Government and the House of Commons to reconsider proposed legislation and take account of any cogent objections to it.

4.8 We received no significant proposals during our consultation exercise that this balance should be altered. On the contrary, there was general support for the *modus vivendi* which has been reached. It is, however, necessary to work through the issues quite carefully because the ending of the right of most hereditary peers to sit in the House of Lords will subtly alter the situation. Our own conclusions on the composition of the reformed second chamber will also need to be consistent with achieving the right balance of power and authority in the trilateral relationship.

The ‘suspensory veto’

4.9 One question is whether the ‘suspensory veto’ arrangement which emerged from the constitutional crisis of 1909–11 (as amended in 1949) is the best way of achieving the right balance between the two Houses. Several other approaches were suggested during the debates which led up to the Parliament Act 1911.⁴ Joint sittings of the two Houses, or of the House of Commons and 100 peers, selected in proportion to the balance of opinion within the House of Lords, were proposed. Other suggestions included requiring a ‘super majority’ (of 50, 100 or two-thirds) in the Commons to overturn a Lords veto; distinguishing between different categories of legislation (see Chapter 5); or putting the issue to a referendum. None of these proved a match for the simplicity of the suspensory veto. The Bryce Conference, which reported in 1918, explored the concept of a Free Conference of 20 of the most experienced members of each House, plus up to ten further members of each House with an interest in or knowledge of the subject. This Committee would work in secret ‘by friendly methods’ to reach an agreed report which would be put to both Houses. If the Lords did not agree to the report in two consecutive sessions, it could be passed by the Commons alone – otherwise the Bill would fall. Like the rest of the Bryce Report, the proposal was never implemented. The party leaders’ conference of 1948 and the inter-party talks of 1968 both limited themselves to considering the duration of the suspensory veto.

4.10 Other countries with bicameral legislatures use a range of methods for dealing with disagreements⁵ including:

- arrangements whereby the lower chamber can achieve its wishes regardless of the views of the second chamber. Usually some **delay** or disruption is incurred as an incentive to compromise (Poland, Belgium, Austria, Ireland);
- provision for the lower chamber to override any decision of the second chamber with a ‘**super majority**’ vote (Japan and Spain);
- the initiation of a ‘**shuttle**’ between the two chambers until agreement is reached, although this does not in itself provide a means for resolving any deadlock. A joint committee may be convened after three shuttles (France) or shuttles may continue indefinitely until the Bill is withdrawn or the chambers finally agree (Italy);
- provision for the second chamber to request, or the Parliament to initiate, a **referendum** on an issue where there is disagreement between the two chambers (Spain, Italy, Ireland);⁶

⁴ J. Jaconelli. *The Parliament Bill 1910–1911: The Mechanics of Constitutional Protection*. In: *Parliamentary History*, Vol 10. 1991.

⁵ M. Russell. *Resolving disputes between the chambers*. Constitution Unit, the original text of which can be found on the CD-ROM enclosed with this report.

⁶ In practice such powers are resorted to very infrequently. The Irish Seanad has the right to petition the President for a referendum on a Bill ‘of national importance’ passed against their will, but has never exercised that power.

- an option for **both chambers to be dissolved**, even when the second chamber is normally elected by fractions, allowing the issue to be presented to the electorate and possibly leading to a change in the political balance of either or both chambers (Australia);
- calling a **joint session** of the two chambers, with the outcome determined by a simple majority vote (India, Australia); and
- referring the issue to a **joint committee**, meeting off the floor of the two chambers and perhaps allowing a less confrontational atmosphere to develop (France, Germany, Japan, Russia, South Africa and the United States).

The success of this last method appears to vary. Key factors may include:

- whether the lower chamber can insist on its view after the committee has reported;
- whether the members of the committee are permanent, and whether they are senior members of the respective chambers;
- whether the political balance on the committee is the same as in the two chambers; and
- whether the committee’s proposals can subsequently be amended.

4.11 The idea of establishing a joint committee to help promote agreement between the two chambers has some attractions, although it might not in itself provide a means of resolving a fundamental disagreement. We consider it further below. The options considered in the past or used elsewhere for resolving disputes between the two chambers of Parliament do not seem to us to offer any significant advantages over the suspensory veto. Referring the point of disagreement to a joint session of both chambers would be inconsistent with acknowledging the pre-eminence of the House of Commons and could generate a range of practical problems. Dissolution of either or both Houses, as happened in Australia six times in the 20th century, seems unduly drastic and would only be appropriate if the second chamber were wholly elected. It would be difficult to reconcile the introduction of decisive referendums on issues of such significance with the doctrine of Parliamentary sovereignty, quite apart from the difficulty of encapsulating the issues in a simple referendum question and the risk of voter fatigue or lack of interest.

Conclusion: Other ways of resolving disputes between the two chambers of Parliament which have been considered in the past, or which are used in other countries, do not seem to offer any significant advantages over the suspensory veto.

4.12 We therefore conclude that the second chamber should continue to have a suspensory veto of the present length in respect of most primary legislation. This has the advantage of being a familiar and established part of the United Kingdom’s constitution. There was no significant support for any other approach during our consultation exercise. It strikes a generally acceptable balance between the pre-eminence of the House of Commons (and the ability of the Government to get its business through) and the ability of the second chamber to exercise a restraining influence. While its formal effect may be limited, it allows for the issues to be properly aired. It also ensures that pressure from public and media opinion, and from within the House of Commons, can be brought to bear to make the Government reconsider and adequately justify its position. We are

reinforced in this conclusion by the fact that the Parliament Act 1911 emerged from a major constitutional crisis. Any proposal to reopen the extremely difficult and sensitive issues involved could well give rise to considerable debate without, in our judgement, any compensating benefit.

Recommendation 3: The second chamber should continue to have a suspensory veto of the present length in respect of most primary legislation.

4.13 That said, we do propose one limited amendment to the Parliament Acts, which we discuss in Chapter 5. We also note that the Parliament Acts contain a number of technical weaknesses; there are other proposals to clarify their effect; and it has been suggested that the Parliament Acts be extended to cover Lords Bills as well as Commons Bills. We deal with each of these matters here.



Technical weaknesses of the Parliament Acts

4.14 The Clerk of the House of Commons, Mr W R McKay CB, has drawn our attention to some of the technical weaknesses in the Acts. There is, for example, no satisfactory definition of what changes to a Bill's text are "necessary owing to the time which has elapsed since the date of the former Bill". The Acts also contain the conundrum that a Bill can be presented for Royal Assent if the House of Lords has not agreed to it by the end of the second session but that it is not possible to get Royal Assent once the session has ended. However, these difficulties have had little practical effect and ways have been found of getting round them. There would be no point in seeking to tackle them unless wider substantive changes were proposed.

4.15 It has been argued that it should be possible to amend a Bill being reconsidered by the Commons in a second session without losing the protection of the Parliament Acts and/or that, if the Commons have to pass it in an identical form to the previous Bill, a shortened procedure would be appropriate. In fact the Parliament Act 1911 does provide a mechanism by which the House of Commons may 'suggest' amendments to a Bill which is being reconsidered in a second session. On the procedural issue, we are not convinced that any change to the present rules is needed to enable the House of Commons to adopt an accelerated timetable if it wished to do so. However, if desirable changes are identified they might best be achieved by changes to the procedures of the two chambers.

Conclusion: The technical weaknesses of the Parliament Acts have not given rise to any real difficulty in practice and there would be no point in seeking to tackle them unless wider substantive changes were proposed.

Timing consequences

4.16 Of more significant concern is the lack of clarity regarding the timing consequences of using Parliament Act procedures. At least one year must elapse between the Commons' Second Reading of the relevant Bill in the first session and the Commons' Third Reading in the second session; it must be sent up to the Lords at least a month before the end of each session; and it may be presented for Royal Assent if the Lords 'reject' it in the second session or if they do not approve it by the end of that session.

4.17 A Bill subject to Parliament Act procedure could therefore be presented for Royal Assent 13 months and a day after its Second Reading in the first session, but the delay could be much longer. The only way for the Government to guarantee the minimum delay is to bring the second session to an early end, as was done in 1948 to facilitate the passage of the Parliament Act 1949; but this could severely disrupt the rest of its legislative programme. From one point of view all this may be unsatisfactory and it might be preferable to adopt a more straightforward calendar-based system. However, we see the awkwardnesses in the arrangement as part of the current delicate balance. A calendar-based system would alter the trilateral balance of power in favour of the Government and reduce the incentive for it to seek a satisfactory resolution of the issues raised by the second chamber. In addition, any attempt to resolve the timing point would also require the whole of the Parliament Acts to be opened up for debate and amendment. As we have already said, we do not believe this would be wise. Overall, we conclude that no attempt should be made to impose what would amount to a time limit on the second chamber's consideration of 'Parliament Act' Bills in the second session.

Recommendation 4: No attempt should be made to impose a time limit on the second chamber's consideration of 'Parliament Act' Bills in the second session.

Extension to Lords Bills

4.18 A more substantial case can be made that the scope of the Parliament Acts should be extended to cover Bills introduced into the second chamber, as well as those introduced into the Commons. As things stand, a Government Bill starting in the House of Lords which is the subject of a disagreement between the two Houses cannot be presented for Royal Assent under Parliament Act procedures, even if the House of Commons were to approve it for a second time in the second session. We agree that, in principle, in the event of such a disagreement, the views of the House of Commons should prevail, after a suitable period for reflection and reconsideration. It might also make it easier for the business managers scheduling Government business to allow a more even distribution of work between the two chambers and a more balanced workload for each chamber throughout the year. However, other considerations point a different way:

- the extension of the Parliament Acts to cover Bills introduced into the second chamber could often be side-stepped. If the members of the second chamber knew that the House of Commons was likely to make unacceptable amendments to a second chamber Bill, and suspected that the Government would then seek to push the Bill through under the Parliament Acts, they could refrain from giving it a Third Reading, ensuring that it would never reach the House of Commons;

- the extension is unnecessary as its purpose can already be achieved by another route. If a Government Bill, introduced in the second chamber, runs into such serious trouble there that the Government contemplates using the Parliament Acts to get it enacted, they can at present introduce a virtually identical Bill in the House of Commons and send it up to the House of Lords, if they do so at least a month before the end of the first session. This enables the Government to secure the Bill's enactment under the terms of the Parliament Acts in the second session;
- the present arrangements tend not to cause problems in practice. Ministers, especially Commons Ministers, tend to prefer to take major Bills in the House of Commons first and they see a tactical advantage in securing Commons endorsement for any controversial Bills before sending them to the House of Lords;
- the extension could create a situation in which the Government could force legislation through without proper scrutiny by the second chamber. A second chamber Bill sent down to the Commons could be radically amended there to produce results which conflicted with the intentions of the second chamber. The amendments would have to be considered by the second chamber but, even if it rejected them, under this proposal the amended Bill could be enacted in the next session without the second chamber's agreement. In effect, the second chamber would have had only one opportunity to look at the amendments. This is in strong contrast with the usual stages of a Bill and would clearly be inadequate;
- it would subtly alter the balance between the two Houses of Parliament, extending the pre-eminence of the House of Commons; and
- it would remove a marginal restraint on the proportion of controversial Government Bills per session.

4.19 On balance, we therefore recommend against extending the scope of the Parliament Acts to cover Bills which are introduced into the second chamber. The basic problem is that the 1911 Act is couched exclusively in terms which deal with the problem which its proponents then faced – a second chamber which had vetoed or amended a whole series of Commons Bills. If the Parliament Acts were ever to be radically overhauled it might well be appropriate to construct them in a way which secured equivalent protection for all Bills introduced by Government Ministers, whichever chamber they started in; but unless and until that point is reached, the present position in respect of second chamber Bills should be left unaltered.

Recommendation 5: The scope of the Parliament Acts should not be extended to cover Bills which are introduced into the second chamber, unless the Acts are to be subjected to a radical overhaul.

Conventions

4.20 All the above conclusions in relation to the Parliament Acts are subject to two important provisos. First, that the reformed second chamber should maintain the House of Lords convention that all Government business is considered within a reasonable time. Traditionally, the convention applies to all business, but it is particularly important that there should be no question of Government business being deliberately overlooked.

Recommendation 6: The reformed second chamber should maintain the House of Lords' convention that all Government business is considered within a reasonable time.

4.21 Second, we agree with those who argue that the principles underlying the Salisbury Convention⁷ remain valid and should be maintained. The convention amounts to an understanding that a 'manifesto' Bill, foreshadowed in the governing party's most recent election manifesto and passed by the House of Commons, should not be opposed by the second chamber on Second or Third Reading. This convention has sometimes been extended to cover 'wrecking amendments' which "destroy or alter beyond recognition"⁸ such a Bill. It has played a key part in preventing conflict between the two Houses of Parliament during periods of Labour Government. Some have argued that its main effect has been to provide a rationale for Conservative peers to acquiesce in legislation which they found repugnant; and that once the situation had been reached in which no one party could command a working majority in the second chamber there would be no need to maintain the Salisbury Convention. In our view, however, there is a deeper philosophical underpinning for the Salisbury Convention which remains valid. This arises from the status of the House of Commons as the United Kingdom's pre-eminent political forum and from the fact that general elections are the most significant expression of the political will of the electorate. A version of the 'mandate' doctrine should continue to be observed: where the electorate has chosen a party to form a Government, the elements of that party's general election manifesto should be respected by the second chamber. More generally, the second chamber should think very carefully before challenging the clearly expressed views of the House of Commons on any issue of public policy.

4.22 There is an important and delicate balance to strike here. Our proposals envisage a reformed second chamber with the authority and self-confidence to take a stand on any issue where it believes that the Government and the House of Commons should be required to think again. But the value of the reformed second chamber will be undermined if it exercises its powers indiscriminately or too frequently.

4.23 As to how the convention should be expressed, there are substantial theoretical and practical obstacles to putting any formal weight on manifesto commitments. Only a tiny minority of the electorate ever reads party manifestos; and as it is most unlikely that any voter will agree with every sentence of any manifesto, it is rarely possible to interpret a general election result as evidence of clear public support for any specific policy. In any event, manifestos are political documents, not legal texts, and proposed legislation

⁷ Enunciated by the then Viscount Cranborne in 1945, but which built on an earlier version of the doctrine of the 'mandate' developed by his grandfather the Third Marquess of Salisbury in the late 19th century. See House of Lords, *The Salisbury Doctrine*. Library Notes. LLN 97/004. 1997.

⁸ Lord Carrington, *Reflect on things past: the memoirs of Lord Carrington* (1988), page 77.

designed to implement political commitments will usually be far more detailed than, and therefore different from, what was in the manifesto. Thinking on any given issue inevitably develops or changes over time and legislation introduced in the third or fourth session of a Parliament may differ significantly from the relevant manifesto commitment. To deny such legislation constitutional protection, while providing additional safeguards for other proposed legislation simply because it happened to be truer to the original commitment, would be unreasonable. Also, issues that require legislation may arise during the course of a Parliament and could not therefore have been mentioned in the parties' manifestos.

4.24 There is no straightforward answer to these various difficulties. An updated version of the Salisbury Convention should express the new balance of political authority between the two Houses of Parliament and the Government; but it is unlikely to be possible to reduce it to a simple formula. The reformed second chamber will need to work out this new convention pragmatically. The House of Lords has been rather good at reaching generally satisfactory understandings about how business should be carried forward and we have every confidence that the reformed second chamber will be able to do the same.

Recommendation 7: The principles underlying the 'Salisbury Convention' remain valid and should be maintained. A version of the 'mandate' doctrine should continue to be observed: where the electorate has chosen a party to form a Government, the elements of that party's general election manifesto should be respected by the second chamber. More generally, the second chamber should be cautious about challenging the clearly expressed views of the House of Commons on any public policy issue. It is not possible to reduce this to a simple formula, particularly one based on manifesto commitments. The second chamber should pragmatically work out a new convention reflecting these principles.

4.25 Our recommendations regarding the powers of the reformed second chamber in respect of secondary legislation are set out in Chapter 7.

Conciliation mechanism

4.26 If the above recommendations are accepted, it should be rare for the second chamber to mount a sustained challenge to proposed legislation which has the consistent support of the House of Commons. Equally, use of the House of Commons' power to override the settled opposition of the second chamber to a piece of proposed legislation should continue to be a major step which no Government would take lightly. The emphasis should be on resolving disagreements and, in practice, the House of Commons and the House of Lords have found ways of achieving this through a variety of informal procedures. We do not underestimate the capacity of such procedures to continue to achieve the mutually satisfactory resolution of any points of disagreement, but several of the written submissions suggested that they could usefully be supplemented by a more formal conciliation mechanism. Such a mechanism would be available to replace the current 'ping-pong' procedure. It could be brought into play at the request of either House once one had disagreed with amendments proposed by the other.

4.27 Were such a mechanism thought desirable it should, in our view, take the form of a Joint Committee. Joint Committees are already employed in the consideration of Statutory Instruments and Consolidation Bills and have been used to consider draft Bills. In each case, the Committee normally has an equal number of members from each chamber and reports to both chambers. Their work is notable for the constructive and non-partisan manner in which it is conducted. While the subjects currently covered are generally not of a party-political nature, whereas a disagreement between the two chambers over a public Bill probably would be, a Joint Committee procedure should offer a means for seeking a compromise acceptable to both chambers. This approach was recommended by the Bryce Conference in 1918.

4.28 Evidence from overseas suggests that such a Joint Committee would be most effective if the majority of its members were to be senior figures, appointed at the start of each session. Representatives from each chamber would reflect the party balance in that chamber, including any independents. In addition, it might be helpful to include a small number of individuals from each chamber with particular knowledge of the issues raised by the Bill in question, as recommended by Bryce. Since the aim would be to identify a workable compromise, rather than a final decision, the Committee's proposals should be open to further amendment and subject to approval by both chambers. However, the pressure on both chambers to accept what a Committee of leading figures had agreed would be considerable. It would also provide a convenient opportunity for either side to step back from an overt confrontation without having to admit defeat.

4.29 The practical details would require further consideration by both chambers, but the option of referring a contested Bill to a Joint Committee might provide both chambers with a useful breathing space. This need not be longer than a matter of days. It would also offer both Houses an opportunity for constructive and relatively private consideration of possible ways round any sources of disagreement.

Recommendation 8: The two chambers should consider whether the current informal conciliation procedures could usefully be supplemented by the establishment of a Joint Committee designed to facilitate agreement between the two chambers over Bills.



Improving primary legislation

4.30 The rest of this chapter deals with the contribution which the reformed second chamber could make to the improvement of primary legislation. The volume and complexity of Bills have increased steadily throughout the century, yet Parliamentary procedures have not changed significantly, at least until recently. Most Bills still have to complete all their stages within the confines of a single session of Parliament.

4.31 Pressure on Parliamentary time has the effect of rationing the amount of new legislation that can be made. However, it also means in practice that Ministers and Departments tend to take the drafting of legislation seriously only when they have secured a slot in the legislative programme. By then it can often be too late to complete

the policy development work, consultation, consideration of the operational implications and drafting to an acceptable standard; but the consequences of delay (losing the whole Bill) are so great that the Bill has to proceed anyway. Much legislation in recent years has also been driven by political imperatives which require legislation to reach the statute book within a particular timescale, whether or not there is sufficient time for adequate preparation; and by Ministers' natural desire to make their mark before being moved on to a different job.

4.32 Some of these problems have been tackled. Building on earlier initiatives, the first report of the House of Commons' Modernisation Committee:⁹

- encouraged greater use of draft Bills as a vehicle for pre-legislative scrutiny; and
- discussed the introduction of a 'carry over' procedure, so that a Bill which had not completed all its stages in one session could be reintroduced in the next session without having to start all over again.

4.33 Various options for scrutinising draft Bills have been experimented with. Two draft Bills – the draft Financial Services and Markets Bill and the draft Local Government (Organisation and Standards) Bill – have been considered by Joint Committees drawn from both Houses of Parliament. Evidence from the Clerk of Committees in the House of Lords suggests that these Committees were successful. The draft Freedom of Information Bill was considered by Lords and Commons Committees in parallel, which seems to have been a less effective way of deploying the complementary expertise of the two chambers. The House of Lords has traditionally been able to assemble committees of members with acknowledged expertise in relevant areas who have been well placed to take evidence from interested parties and conduct detailed scrutiny of legislative proposals. The less partisan atmosphere of the House of Lords has probably also facilitated such scrutiny. We intend that the reformed second chamber should also have these characteristics. It should therefore continue to be able to make a positive contribution to the consideration of draft Bills. More generally we warmly support the growing practice of pre-legislative scrutiny and would like to see it become an established feature of Parliamentary business. Apart from being more likely to produce better legislation, it should also reduce the chance of differences of view between the two chambers at a late stage in Parliamentary proceedings.

4.34 There is already a facility for the Lords to establish a Special Public Bill Committee which can take written and oral evidence on a Bill for up to 28 days before considering it clause by clause in the usual way. This option was introduced in the early 1990s following its successful use in the Commons. However, while praised by some witnesses (for example, the Law Society of Scotland), such committees have been appointed infrequently because there is a risk that their use would slow down the legislative process. Pre-legislative scrutiny may turn out to achieve the same results without the perceived disadvantages.

Recommendation 9: Pre-legislative scrutiny of draft Bills should become an established feature of Parliamentary business.

The contribution of the second chamber

4.35 The present House of Lords is often referred to as a ‘revising’ chamber. It has been widely praised for its role in securing amendments to proposed legislation.

4.36 There are several reasons why the House of Lords appears to have been relatively successful at securing amendments to Bills.

4.37 Bicameral system. In a bicameral legislature there are two sets of opportunities for Government, the Opposition, interested parties and lobby groups to secure changes to a Bill once it has been introduced. The process which needs to be gone through if a Minister decides, or is persuaded, to seek to amend a Bill after introduction takes time. It usually requires a round of policy consideration, policy clearance, operational assessment and the preparation of possible amendments. These processes often cannot be finalised within the time it takes for a Bill to complete all its stages in one House. The net result is that, in whichever chamber a Bill starts, Ministers are frequently left in a position of saying the Government will ‘reflect’ on a point which has been raised and ‘may/will return to it in the other place’. The point may then be dealt with by a Government amendment when the Bill reaches the other chamber. It is in any event essential that all the loose ends in any Bill are tidied up before it leaves the other chamber (whether that be the Lords or the Commons). By the time a Bill is approaching the end of its Parliamentary consideration the major policy questions have usually been settled but a plethora of technical or drafting points often remain to be sorted out. For these reasons, the chamber which considers a Bill second often makes the greater number of amendments. As most major Bills start in the Commons, the Lords are frequently credited with amendments which have their origins in or are consequential on points made in the Commons.

4.38 House of Lords’ timetable. By convention, the House of Lords allows certain minimum intervals between stages of Bills. This, and the fact that amendments can be made right up to Third Reading, means that the process of taking a Bill through the Lords is more leisurely than taking it through the Commons. There is often adequate time for a Minister to respond to a point raised during an early stage in the Lords’ consideration of a Bill by tabling a Government amendment before the Bill leaves the Lords. Commons Standing Committees often spend several weeks considering a Bill but subsequent stages are usually taken quite quickly. Points which arise early on in Standing Committee can therefore often be resolved in time for Report Stage, but it may be more difficult to achieve that in respect of points which arise towards the end of Committee Stage. Such points may therefore need to be attended to in the Lords.

4.39 House of Lords’ style. Taking a Bill through the Lords is very different from taking it through the Commons. Debate in the Commons is often more confrontational and party political. The Minister in charge of the Bill is usually closely identified with the policy and challenges are perceived to be politically motivated. In most debates, especially in Committee, Ministers are seen as defending their policy proposals against Opposition criticism. In the Lords the consideration of Bills is at once less partisan and more unpredictable. Debate tends to focus on the merits of particular points, without a partisan edge, and Ministers cannot rely on uncritical support from their own party. The style of the debate – less party political and more courteous – makes it easier for Ministers to agree to reconsider points without appearing to ‘lose’.

4.40 The composition and characteristics of the Lords. The blend of experience and expertise found among members of the House of Lords means that on any given issue there are usually a number of peers with relevant practical experience and knowledge or with long experience of grappling with the same policy issues. Such members usually have extensive contacts with the relevant interest groups. They can present their case forcefully and well. In the absence of strong party discipline and with a reasonable proportion of Cross Benchers, Ministers need to win the argument to be sure of winning the vote. In any event, the issues certainly get a thorough airing. A further factor is that the members of the House of Lords are equipped and prepared to take on the relatively unglamorous task of scrutinising the detailed wording of Bills and raising relatively minor, non-political and technical points.

4.41 House of Lords' procedure. The fact that members of the House of Lords are relatively free from procedural constraints also contributes to the House of Lords' effectiveness as a revising chamber. All stages of most Bills are taken on the floor of the House (or in a Grand Committee which any peer can attend). Any member can insist on an amendment being considered at virtually any stage and as there is no selection of amendments, all amendments can be debated. Groupings are more focused than in the Commons and members may in any event insist on their amendments being voted on individually. Above all, the Lords are more willing to devote time to discussion of detail and do not have any guillotine to cut off debate.

4.42 Lobbying. All the above factors make the Lords a more attractive and receptive target for lobbying than the House of Commons. A campaigning organisation or interested party can usually find a peer who supports their point of view or one with at least some knowledge and experience of the issue concerned who is ready to table and speak to amendments and press the Government to justify or change its position.

4.43 These points illustrate how a bicameral legislature with distinct characteristics can play a useful role in improving proposed legislation. We intend that these characteristics should be preserved in the reformed second chamber so that Parliament can continue to derive these benefits. We recognise, however, that these advantages could, in principle, be secured in other ways, even within a unicameral system. The primary constitutional importance of the second chamber's role in making law – as we argued in Chapter 3 – is not that it should carry out a 'revising' function but that it should provide a potential check on the ability of the Government of the day to bring about controversial or ill-conceived political and legislative changes without proper consideration.

4.44 It is important to note here the valuable work of the Delegated Powers and Deregulation Committee of the present House of Lords.¹⁰ This Committee, initially established in 1992, has in effect been given the task of policing the boundary between primary and secondary legislation. It seeks information from sponsoring Departments and produces a Memorandum on every Bill introduced in the House of Lords. These Memorandums analyse the delegated powers (i.e. to make secondary legislation) which are being sought and comment on the extent to which they are proportionate and justified. They pay particular attention to 'Henry VIII' Clauses which make provision for primary legislation to be amended by secondary legislation. They draw attention to cases where the delegated powers sought seem excessive or where the degree of Parliamentary

supervision of the exercise of those delegated powers might be considered insufficient. As a consequence, Ministers may be asked for assurances about the exercise of particular powers, or the degree of Parliamentary oversight may be increased. For example, this can be done by making the exercise of a particular power subject to the positive approval of both Houses of Parliament, rather than subject to annulment if either of them disagrees with it. The Committee has become influential. Its members have always commanded respect for their blend of legal expertise, administrative experience and pragmatism: its recommendations are usually accepted. Its legal adviser is frequently consulted informally by Departments when they are drawing up proposed legislation. The Committee's function is far from being eye-catching, but it plays a very important quasi-constitutional role in relation to primary legislation, which ensures the maintenance of an appropriate balance between the authority of Parliament and the powers of the executive in this area.

4.45 Our only comment on the existing role of the Committee is that its work tends to consist of resisting or restricting the grant of delegated powers. It may be that the Committee's role could evolve to include making recommendations that some provisions of Bills would be dealt with more appropriately in secondary legislation. It could also seek to build in greater flexibility for the future, for example by recommending that in exercising particular delegated powers Ministers might be given a choice between affirmative and negative procedure (as, for example, in Section 2 of the European Communities Act 1972). Alternatively, delegated powers might be granted on the understanding that when first exercised the Statutory Instrument concerned would be subject to affirmative resolution, with the option to make later instruments subject to negative procedure. (An approach on these lines was adopted when the student loans scheme was introduced.) Use of such options would give the Committee a broader role in helping to secure the benefit of less cluttered primary legislation and striking an appropriate balance between primary and secondary legislation.

Recommendation 10: The Delegated Powers and Deregulation Committee's role could evolve to include making recommendations which would encourage greater flexibility in the use of delegated powers, making it easier to strike an appropriate balance between primary and secondary legislation.

Possible changes to legislative procedures

4.46 We received very few proposals for substantial changes to the way in which primary legislation is currently handled. Many of those which we did receive would have lost some of the technical benefits described above or undermined the second chamber's ability to play the important constitutional function we have outlined. We therefore have only a few minor observations to make in this area (in addition to the support we have already given to greater use of pre-legislative scrutiny).

4.47 The use of Grand Committees off the floor of the House to consider certain Bills has been widely regarded as a success. Any member of the House has been able to table amendments and participate in the debates. The level of scrutiny has therefore been as high as for Bills taken in a Committee of the whole House, but with a considerable saving of time on the floor of the House. Although no votes can be taken, the mood of the Grand Committee is usually clear and the issue can ultimately be determined at Report Stage. The Grand Committee's approach could provide a model for conventional Committee Stages. Votes at Committee Stage are relatively rare in any case and a practice

of deferring votes until Report Stage might leave members freer to concentrate on the substantive issues.

Recommendation 11: The reformed second chamber should consider whether the practice of deferring votes until Report Stage, which has been a feature of the use of Grand Committees off the floor of the House to consider certain Bills, should be extended to conventional Committee Stages.

4.48 We have received suggestions that the reformed second chamber should play a greater role in reviewing the quality of the statute book and keeping the law up to date. This is undoubtedly an important and desirable objective but we have some reservations about recommending that it should be a primary function of the second chamber. Much technical work in this area is already carried out by the Law Commissions and any more substantial review of the state of the law in particular areas would be bound to trespass into a consideration of policy issues. In our view, the initiative for such reviews should lie with the Government or with the Departmental Select Committees in the House of Commons. However, if any specific aspects of the law on a particular issue were identified – either in debate or by one of the Commons Select Committees – as meriting detailed consideration, it might well be appropriate for the second chamber to establish an *ad hoc* Committee for that purpose.

Recommendation 12: Reviewing the quality of the statute book and keeping the law up to date should not be a primary function of the second chamber. However, if any specific aspects of the law on a particular issue were identified as meriting detailed consideration, it might well be appropriate for the second chamber to establish an *ad hoc* Committee for that purpose.

4.49 The House of Lords already plays a leading role in respect of Consolidation Bills, which are designed to tidy up and improve the statute book without creating any new law. Relevant Bills¹¹ are introduced into the House of Lords and referred after Second Reading to a Joint Committee, by convention chaired by one of the Lords of Appeal in Ordinary. Once the Committee reports, subsequent stages in both Houses are usually treated as a formality. We recommend that these arrangements should continue.

Recommendation 13: The current arrangements for dealing with Consolidation Bills should continue.

4.50 The Chairman of the Law Commission for England and Wales, Mr Justice Carnwath, in his evidence to us, pointed out that there was a backlog of law reform proposals awaiting consideration. He and others have urged that a fast-track procedure, perhaps involving the second chamber in particular, should be developed to help reduce this backlog, especially for those Law Commission Bills dealing with ‘non-controversial’ matters. We agree in principle that this is something to which the reformed second chamber should give careful consideration. However, we have some reservations about

¹¹ Bills prepared pursuant to the Consolidation of Enactments (Procedure) Act 1949; Bills to consolidate enactments with amendments to give effect to Law Commission recommendations; Consolidation Bills, whether public or private; statute law revision Bills; and Bills prepared by one of the Law Commissions to repeal enactments which are no longer of any practical utility.

the suggestion that Law Commission Bills should automatically benefit from the adoption of a fast-track procedure. One person's tidying up of the law can be another's assault on fundamental values, and it is not always easy to tell which Law Commission proposals are controversial or how controversial they will turn out to be.

4.51 In its Report on the Government's proposals for amending the Deregulation and Contracting Out Act, the Delegated Powers and Deregulation Committee suggested that law reform proposals from the Law Commissions might be taken forward in a procedure analogous to that used for Deregulation Orders. This suggestion was taken up by the Government in its response.¹² The case for this is pragmatic. It would provide a means of tackling the backlog of law reform Bills through a process which has been shown to deliver real opportunities for proper consultation. However, it would result in law being made by Statutory Instrument in areas where primary legislation would often be more appropriate. A more formal process of pre-legislative consultation on the draft Bills enclosed with Law Commission law reform proposals might achieve the same objectives without running the same risk. Consideration might then be given to developing an accelerated procedure where those draft Bills were shown to be non-controversial.

Recommendation 14: The reformed second chamber should consider what steps might be taken to expedite the Parliamentary consideration of law reform Bills proposed by the Law Commissions.

4.52 Another category of legislation on which the second chamber might be invited to play a greater role is private legislation. As the House of Commons has waived its financial privilege which formerly limited the categories of private Bill on which the House of Lords could lead, those Private Bills which are received are divided evenly between the two Houses. Since the passage of the Transport and Works Act 1992 there have been fewer private Bills. It may be that the characteristics of the reformed second chamber will make it appropriate for a larger proportion of such Bills to be considered first by the second chamber. Those private Bills which apply to individuals – 'personal Bills' – are invariably considered first by the House of Lords.

Conclusion: The characteristics of the reformed second chamber may make it appropriate for a larger proportion of private Bills to be considered first by the second chamber.

4.53 Finally, several witnesses suggested to us that the second chamber should have some responsibility for post-legislative scrutiny – checking that legislation fulfils its intended purpose. We acknowledge the importance of such scrutiny but doubt whether there is a distinctive role for the second chamber. The Government or the Departmental Select Committees in the House of Commons may be better placed to take the lead.

Conclusion: There is no distinctive role for the second chamber in post-legislative scrutiny.

¹² Select Committee on Delegated Powers and Deregulation. Proposed extension of the Deregulation and Contracting Out Act 1994, Session 1998/99. Fourteenth Report. April 1999. HL55; and Proposed Amendments to the Deregulation and Contracting Out Act 1994 – Government response and Further Report. Session 1998/99, Twenty-Eighth Report. October 1999. HL111.