

Special Standing Committees in both Houses

Research Paper 96/14

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The recent controversy over the appropriate form of committee stage for the *Asylum and Immigration Bill* last month has highlighted the availability of the 'special standing committee' procedure for bills in the Commons. This Paper provides some background to the procedure, and its use in the last 15 years. The 'equivalent' Lords procedure of the special public bill committee is also considered.

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Summary

Of all the stages of the Parliamentary legislative process, it is perhaps the Commons committee stage which is most frequently criticised by commentators and Parliamentarians alike. This is the stage at which a bill is intended to receive its detailed line-by-line scrutiny by Members sitting alone either in Committee of the Whole House or, more usually, in standing committee. No other people are directly involved (although officials are available to brief Ministers, and other Members may have their own assistance) in contributing formally to the deliberations. As a mini-version of the Commons Chamber, standing committees on contentious legislation, usually Government bills, often reproduce many of the characteristics of the Westminster adversarial system, which, it is frequently alleged, is not an appropriate or effective method of scrutinising proposed legislation in sufficient detail.

This Paper does not seek to analyse in detail the whole legislative process (including the pre- and post-Westminster policy and administrative processes), and it should be borne in mind that concentration on a particular stage of the process does not mean that it, or proposed or actual changes to it, are necessarily central to the overall process. Consideration of the special standing committee technique has arisen, in part, because of the apparent dissatisfaction over many years with the Commons standing committee stage.

The history and use of special standing committees is described, as well as the issue of what forms of bill are most suited for this procedure, a question which has arisen very clearly this session over the *Asylum and Immigration Bill*.

The House of Lords' special public bill committee procedure -- roughly equivalent of the Commons special standing committee -- is also examined, in the context of a number of changes that that House has made recently to its legislative processes.

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I Introduction

The legislative process, very broadly defined, can be considered as stretching from the initial policy-making and consultation and drafting stages that precede the introduction of a bill (or SI) to post-legislative stages, including commencement provisions¹. However this Paper is concerned with the Parliamentary legislative process, which has frequently been under criticism. This is obviously linked to the quantity and quality of legislation produced by this process, although the definition of these two characteristics is by no means a simple task, especially 'quality', as it is as often applied to the (usually politically contentious) subject-matter of legislation as to its drafting, format or clarity.

These criticisms are often linked to the party political adversarial nature of Parliamentary activity, as such partisan activity is said to detract from the 'proper' level and degree of scrutiny that is required to fulfil the task of law-making to an effective and acceptable degree. Thus many reforms tend to seek to reduce this adversarial element by using consensual procedures and structures, and there are often suggestions for more effective and formalised pre-legislative procedures, by way of greater consultation on draft legislative proposals,² and within Parliament, for 'select committee' - type legislative scrutiny arrangements such the special standing committee, the subject of this Paper.

Informed analyses of the legislative process will generally recognise that the party-political, or, more accurately, Government-Opposition or Government-Parliament nature of the legislative process, especially in the Commons, is an inevitable part of Parliamentary life, and that any proposals for reform have to take account of this reality. See for example the following passage from the 1992 report of the Hansard Society's Commission on the legislative process, *Making the law*:

310. We begin by setting out our conception of the legislative functions of Parliament and of its two Houses. Parliament does not "make the law". That is essentially done by the Government which performs the decision-taking role in the constitution, and secures the approval of Parliament for its legislative decisions through its control over the majority party in the House of Commons'. In practice, Parliament's main role in relation to UK legislation is to call Ministers to account for their proposals for changing the law by close and detailed scrutiny of both bills and delegated legislation.

¹ The importance of which became dramatically apparent recent in the *Fire Brigades Union* case concerning the non-implementation of a statutory Criminal Injuries Compensation Scheme (see Research Paper 95/94, 22.5.95).

² Miers and Page claim that the development of such extra-parliamentary processes "is one of the most important contributory factors to the contemporary sense of a decline in the importance of Parliament in the legislative process": *Legislation*, 2nd ed., 1990, p95.

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311. For its fulfilment, this requires opportunities in Parliament, in both Houses, to require information and explanation; to argue the policy; to press alternative policies and solutions; to examine how the law will be applied or implemented; to identify obscurities, ambiguities and other drafting problems; to seek to improve bills; and in general to carry out effective scrutiny of legislation.
312. The particular role of Members of the House of Commons is to speak for the people and to articulate the concerns of their constituents and of other affected groups, bodies or interests, including the policies, doctrines and interests of the political party they represent. This means there will always be an emphasis on the political aspects of legislation - seeking to highlight and publicise Governments' successes and failures - rather than simply trying to improve bills.

and

315. We see a need, if parliamentary scrutiny of legislation is to be effective, for the House of Commons to move away from the largely party-political confrontation, substantially orchestrated by the front-benches and Whips on both sides, that at present characterises debates on bills, and to move towards a more considered approach whereby Members, from all parts of the House, could be enabled better to inform themselves and look collectively, in a more systematic way, at the Government's legislative proposals.

Miers and Page have emphasised that "any assessment of the parliamentary stages of the legislative process must start from the twin recognition that first, Parliament is not an independent decision-making body and that, secondly, what is presented to Parliament in the form of a Bill is in substantial measure a finished product to which the government is committed. Both of these factors restrict opponents' capacity to secure the rejection of proposals or their substantive amendment."³

Such discussion usually concentrates on the legislative norm, the controversial Government bill. Many pieces of Government legislation may not conform to this model: some will be non-controversial; others may reveal intra-party rather than inter-party divisions. Some will be generally acceptable in most respects but with one or two controversial provisions. Private members' bills will not always be party-political, but many may well deal with social or moral issues that will cause intra-party disagreements. This Paper will, in general, like most of the academic analyses, consider the legislative process in terms of the controversial Government bill. Note also that, even within the traditional Westminster model, there are special situations, such as the treatment of Scottish legislation, which for a combination of legal, political (and geographical) reasons, is often different from the treatment of UK/GB/English legislation. Indeed both instances of the current revival of the Commons special standing committee procedure have been in relation to Scottish bills.⁴

³ Op cit, pp94-5

⁴ This is considered further in the section of this Paper on types of bills suitable for the procedure.

It is almost traditional, when discussing the Commons standing committee stage, to include Richard Crossman's well-known diary entry:⁵

Oh dear, the whole procedure of a Standing Committee is insane. What is the sense of starting at the beginning and working line by line through each clause when in many cases there is no one there who understands what they mean? If we had a Select Committee at which I could be cross-examined on the main policy and the Committee could get down to discussing the controversial issues, that would be far more constructive. Under the present system there is no genuine committee work, just formal speech-making mostly from written briefs. All the Opposition can do is to read aloud the briefs they get from the city or county treasurers and I then read back to them the brief I get from my Department. Talk about Parliamentary reform. This is an area where it is really needed.

Miers and Page considered the theory and practice of the committee stage:⁶

The theory underlying the committee stage is that it provides an opportunity for the consideration of the details of the Bill and their amendment consistent with its principle as approved on second reading. Nevertheless, there is a clear conflict between this essentially technical conception of its function and the opportunity which it also provides "to extend political advocacy and opposition beyond the Second Reading stage into the details of legislation." The Opposition's desire to make the passage of government legislation more difficult, the government's unwillingness to allow such obstruction to affect its timetable, and the emphasis of both parties on electoral considerations, may all affect the way in which the task of scrutinising the details of the proposed legislation is approached.

Committee stage can, like the Chamber itself, operate in a number of ways, depending on the bill before it; the attitude of the Parliamentary parties to it and to its amendment, their tactics and so on. For example, an Opposition may regard it as a mark of political honour to delay the progress of a bill as long as possible in order to disrupt a Government's legislative timetable, perhaps forcing it to resort to a guillotine motion, or alternatively may wish to be seen within and outwith Parliament to have been acting in as constructive and cooperative a manner as possible by not obstructing unduly the Government's legislation. Opposition may be to the very heart of a bill; to aspects of the legislative scheme, or even to the chosen legislative remedy to an accepted policy problem. Omnibus bills, such as those on criminal

⁵ *The diary of a Cabinet Minister*, vol 1, p561 (5 July 1966). See also the equally trenchant entry for 28 April 1970, vol 3, p903.

⁶ *Op cit*, pp81-2.

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justice, dealing with a number of discrete subjects, may present unique problems and opportunities for members of a standing committee, as they may permit scope for the inclusion of new proposals (if they are in order) at the initiative of backbenchers or the Opposition, or produce varying groupings of opponents to different clauses of the bill.

There are many reasons why there is claimed to be a lack of effective scrutiny in the standing committee stage. There is the common caricature in the media and academic literature of backbenchers (especially on the Government side) spending some of their time reading or dealing with their constituency correspondence, under instruction from their Whips to keep generally silent.⁷ A more recent illustration is the proceedings on the *Family Homes and Domestic Violence Bill* at the end of last session, when some Members on the Government benches apparently claimed, according to some press reports, that, despite being members of the standing committee, they did not fully appreciate the import of the bill's provisions because of its swift legislative passage, especially in committees, through both Houses.

⁷ See, for example, *Making the law*, para 345.

II Development of special standing committees

In his 1974 study of the legislative process, Griffith proposed a new committee stage procedure which referred back to a memorandum submitted by the Clerks to the Procedure Committee in 1970-71 on the use of select committees for public bills.⁸ Griffith saw his procedure as one for "bills which form the principal part of the Government's legislative programme [which] would be, in large or small part, controversial between the parties. The atmosphere would often be partisan and votes would need to be taken from time to time."⁹ The select committee would operate in two stages. First it would be an inquisitorial select committee taking evidence on the bill, and questioning witnesses such as the relevant Ministers (who would not be members of the committee at this stage), departmental officials and the drafters of the bill. In the second stage, when Ministers would join the committee (matched by an equal number of Opposition Members), it would operate as a standing committee, except that the chairman would have power to restrict debate on amendments covering matters adequately debated in the earlier stage.¹⁰

The Procedure Committee in 1977-78, as part of its wide-ranging inquiry (it also led to the departmental select committee reforms of 1979) examined public bill procedure and made the following proposal in its report for what it termed "public bill committees":¹¹

Public Bill Committees

2.19 In order to achieve the objectives outlined above we propose that standing committees on bills should in future be free, before proceeding to clause by clause consideration of a bill in the normal way, to have a limited number of sittings in select committee form, calling witnesses and receiving written submissions. In order to distinguish a standing committee authorised to proceed in this way from standing committees operating under present procedure we have adopted the term "public bill committee" for the committees under the new procedure. A Standing Order would provide that all bills would automatically stand committed to such a committee after second reading, but it would be open to the Government (or any Member) to propose, without debate, immediately after second reading, committal to a standing committee of the existing kind or (as at present) to a select committee, or to a Committee of the whole House. We do not think it desirable to attempt to define the sort of bills appropriate for the public bill committee procedure but we hope that a variety of bills, including bills of some substance, would be referred to such committees in order to give the procedure a fair trial. We also hope that the public bill committee will before long become accepted as the "normal" committee to which the great majority of bills stand committed.

⁸ 2nd report of 1970-71, HC 538, appendix 1 paras 87-114.

⁹ *Parliamentary scrutiny of government bills*, 1974, p250.

¹⁰ See generally pp249-52.

¹¹ 1st report of 1977-78, paras. 2.19-2.20

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2.20 We recommend that public bill committees should be subject to the existing standing orders and rules governing procedure in standing committees on bills, with the following exceptions:

(i) the first meeting of a public bill committee would be a deliberative meeting, held in private, to determine the number of days on which evidence should be taken, the witnesses to be called, and any written evidence required by the committee. It would be open to any Member of the committee to move that up to three meetings of the committee, each of not more than two-and-a-half- hours' length, should be devoted to taking oral evidence, and, on a vote being taken, the question on such a motion would be decided in the affirmative if supported by one-third of the committee's Members (excluding the chairman);

(ii) we recommend that the investigatory sessions of the committee should be limited to three morning sittings of two-and-a-half hours each, unless the House by special resolution provided for a longer allocation. While we recognise that committees might find seven-and-a-half hours too little for some Bills, we are anxious that the House should proceed cautiously with this new and potentially most useful reform. If experience showed that the standard allocation of three sittings could be enlarged, this could be done later in the light of that experience. We also have in mind that the addition of three morning sittings for the investigative stage of each Bill would be offset by a reduction in the time taken by the later "amendment" stage whereas a longer allocation of investigative time would be bound to add considerably to the total time taken by each Bill in committee;

(iii) the meetings of a public bill committee to take oral evidence would be completed before the normal "standing committee" stage began; these meetings would be held in public, and the proceedings would be published in the Official Report; the committee would also be empowered to order the publication of any papers laid before it in the Official Report;

(iv) the chairman of a public bill committee would be appointed from the Chairmen's Panel, and would be chairman throughout, subject to the normal substitution arrangements which apply to standing committees; his role during the initial meetings of the committee would be similar to the role of the chairman of a standing committee: he would be expected to achieve a balance between the different elements of the committee in the process of questioning witnesses, but would not be expected to take any direct part in that process himself;

(v) all Members of a public bill committee (including the Member in charge of a bill) would be free to question witnesses; the Member in charge of the bill would also be subject to questioning if the committee desired; and

(vi) at the end of the proceedings a public bill committee would report the bill, as amended, to the House; they would not be free to make any additional Report or commentary on the bill.

These proposals represent an adaptation of the existing standing committee procedure, and not an entirely new departure. We do not recommend that public bill committees should have other powers normally granted to select committees, such as the power to appoint specialist advisers, or the power to travel to take evidence.

The Commons adopted proposals for a special standing committee procedure for an experimental period on 30 October 1980. The Leader of the House, Norman St John Stevas, explained the Government's thinking:¹²

The Government's view is that acceptance of the recommendation would provide a means of improving the scrutiny of some of the Bills that come before us, especially where the differences of opinion cut across party lines. What we have in mind is that we should next Session undertake an experiment with the new procedure and, if the House accepts the motion that we have tabled, select perhaps three Government Bills which raise substantial issues, not of acute party controversy, and refer them to a special Standing Committee.

The Procedure Committee itself recognised the need for any Government to retain control of the legislative timetable, and that is why the motion proposes that the new evidence-taking session should be concluded within 28 days from the date of the committal of the Bill.

It is in the nature of any experiment that the way in which it works will emerge only as we gain experience. My consultations have, however, shown a real anxiety that the new procedures should not compromise the accepted impartiality of the present Chairmen of Standing Committees. That is why we are seeking power for you, Mr. Deputy Speaker, to nominate a right honourable or honourable Member to take the chair during the new evidence-taking sessions when, if the practice of the present Select Committees is followed, the Chairman will play an active part.

I would expect that Government Departments and interested outside organisations would be invited to give evidence to the new Committees, but that is a matter for the Committees. The Minister in charge of a Bill referred to a special Standing Committee will, of course, be a member of the Committee throughout its proceedings, and be able both to take part, if that is appropriate, in the questioning of witnesses, and himself to appear as a witness at the evidence-taking sessions if that is necessary. I believe that conventions will be worked out to facilitate this novel and dual role of assistance to the Committee. Other Ministers with an interest in the Bills concerned will make themselves available to give evidence as required by the Committees.

The motion before the House provides for this experiment to be undertaken for a single Session, but we might well need to prolong it beyond that before reaching a final judgment on its effectiveness.

Enoch Powell criticised the experiment, claiming that standing committee was intended to be the House in miniature, and supported line-by-line consideration of a bill, believing it was "one of the most effective methods of examining legislation to force a Minister to debate a specific amendment on a specific line."¹³ He did not think this view was undermined by the fact that "in Standing Committee, for reasons which are well understood, one half of the Committee tends to be mute and the other to be vocal. The mute part of the Committee is not necessarily ineffective because it is mute. For one thing, it hears the arguments. [*Interruption.*] I am being generous." Mr Powell, a noted critic of the 1979 departmental committee system reforms,¹⁴ was very doubtful of the 'select committee' aspect of the

¹² HC Deb vol 991 cc725-6, 30.10.80.

¹³ c754

¹⁴ See Background Paper 298, *Select committees*, 7.9.92, section A.

proposal:¹⁵

That scrutiny, like the scrutiny on the Floor of the House, is what is called adversarial; and where the provisions of the Bill are politically charged, there will be political debate in the Committee and decisions will be taken on political and on party lines. Let the House not suppose that by having three sittings, or how many it might be, of the Committee as if it were a Select Committee, that will transform the consideration of the Bill into that kind of consideration which a Select Committee ought to undertake with the assistance of witnesses.

It will remain controversial, and the interrogation of witnesses - which will take place in public, because the proceedings of Standing Committees, being proceedings of the House, ought to be in public - the selection of witnesses and the jockeying for position in putting questions to witnesses, will be purely political and politically motivated. It will not bear other than the resemblance of a caricature to what happens in the working of a true Select Committee, nor will that be altered by giving it a different Chairman, so that he can do what the Chairman of a Select Committee does, which is, in effect, to conduct the interrogation of the witnesses.

The experimental procedure was used from 1980-81 to 1983-84. The Procedure Committee examined the scheme as part of its inquiry into public bill procedure, and reported in 1985:¹⁶

SPECIAL STANDING COMMITTEES

11. The 1977-78 Procedure Committee considered a range of options for committee scrutiny. That Committee's conclusion was that all bills should automatically stand referred to what they called "public bill committees" (which have become known as Special Standing Committees) unless the House otherwise ordered. On 30 October 1980 the House agreed by 141 votes to 11 to a Government motion which established a temporary Standing Order, to apply till the end of session 1980-81, providing for Special Standing Committees to which, on a motion moved by a Minister, Bills might be committed. These committees were empowered to "hold up to four morning sittings of not more than two and a half hours each" before the normal standing committee consideration of the bill began. The first such sitting was to be in private and the remainder, which were "for the purpose of hearing oral evidence" were to be in public. In the session 1980-81 three Bills were considered by Special Standing Committees: Criminal Attempts Bill, Education Bill and Deep Sea Mining (Temporary Provisions) Bill [*Lords*]. The Standing Order was renewed on 17 March 1982 for the remainder of that session during which the procedure was applied to only one bill: the Mental Health (Amendment) Bill [*Lords*]. Since then the procedure has been used only once more, in the 1983-84 session, when a specific committal motion was agreed to in respect of the Matrimonial and Family Proceedings Bill (*Lords*).

12. Virtually all the evidence we received about the operation of Special Standing Committees was enthusiastic. Perhaps the most persuasive

¹⁵ c755

¹⁶ 2nd report of 1984-85, HC 49, April 1985, pp viii-x (footnotes omitted)

evidence was submitted to us by the Solicitor General. He had been the Minister in charge of two bills considered under the procedure (Criminal Attempts Bill and Matrimonial and Family Proceedings Bill [*Lords*]) and had given evidence to the committee on the Mental Health Amendment Bill [*Lords*]. He described in his memorandum how part of the Criminal Attempts Bill was recast after the completion of the committee's evidence meetings. He wrote:

"I had the salutary experience of cross-examining two of the leading authorities on criminal law, Professor Glanville Williams and Professor Smith, as to the likely effect of a Bill about whose provisions I was already experiencing a sinking feeling.

At the end of the final sitting of the special standing committee the draftsman informed me that not only did the Bill not do what it was supposed to do but that it could not be made to do it.

It is unnecessary to relate here the unorthodox and urgent steps that were then taken to recast that part of the Bill in time for the resulting vast array of amendments to be on the paper when the ordinary standing committee first met the following week. The point is that it was better that those defects became apparent before the ordinary standing committee began its examination of the Bill rather than say, half way through the process. I gratefully recognised this at the time and have never forgotten it."

13. (a) We **recommend** that permanent provision for the Special Standing Committee procedure be made in Standing Orders.

(b) We **recommend** that Special Standing Committees be given power to hear evidence as before on no more than three days. Both the Solicitor General and Mr Merlyn Rees thought three evidence meetings adequate. Although we recognise that Governments will always be anxious about the possible delays which could be caused to their legislation by using this procedure, we believe that keeping the limit of three days for taking evidence should exclude undue delays. A further safeguard is provided by another feature of the temporary standing orders which imposed a limit of 28 days from second reading for the holding of evidence meetings. Although some witnesses drew attention to the lack of flexibility this entailed, and although in the case of the last bill to be committed to a Special Standing Committee the period was later extended to 40 days, we accept the need for a limit and envisage that potential witnesses should normally be ready to attend within it. However the precedent of extending the period, for the Matrimonial and Family Proceedings Bill [*Lords*], should be preserved, and we recommend that the Standing Order provide for such extension.

(c) We **recommend** that normally the Chairman of the relevant departmental select committee should be appointed to chair the evidence meetings of the Special Standing Committee. This practice

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seems to have worked well so far. These Chairmen bring with them detailed knowledge of the subject area and, drawing on their select committee experience, are able to contribute helpfully to the selection of potential witnesses.

(d) We **recommend** that Special Standing Committees be given power to hold deliberative meetings for a period of up to half an hour before each evidence meeting. This would bring their practice more into line with that of select committees.

(e) In view of the successful application of the procedure in the past, we regret that Government has not made more use of Special Standing Committees. For the future, we hope that it will be possible for a wider range of bills to be committed to such committees. Apart from the handful of bills each session which excite great party political controversy, there are many which, though controversial in parts, involve no party commitment, but contain detailed, possibly technical provisions which have previously been little considered in any way by Parliament.

(f) It was suggested to us that parts only of bills might be dealt with in this way. We expect that in the sessions at which they hear evidence Special Standing Committees will in practice concentrate—particularly given the limited time available to them—on those parts of bills on which there is most need for extra information. There is, however, one specific case in which we believe a bill could usefully be split. If the recommendation of the recent Select Committee on Procedure (Finance) is adopted, that a Taxes Management Bill should be introduced early in each session and the Finance Bill should, so far as possible, be confined to proposals for change in rates of taxation, the earlier introduction of such a Taxes Management Bill would make it suitable (as both the then Chancellor of the Exchequer and the previous Procedure (Finance) Committee thought) for committal to a Special Standing Committee. Even if this procedure is not introduced we believe that certain parts of the annual Finance Bill are well suited to the Special Standing Committee procedure. No extra delay would ensue since we note that a period of about 28 days frequently passes after second reading of the Finance Bill and before the Standing Committee first meets. This would require an amendment to Standing Orders to enable the House to constitute the Standing Committee on the Finance Bill as a Special Standing Committee for part or parts of the Bill.

The Leader of the House, John Biffen, in his written evidence, generally supported the standing committee stage of the Commons legislative process, and appeared to envisage a limited role for special standing committees:¹⁷

¹⁷ HC 49-I, p33. The full memorandum is a neat summary of the Government's attitude to the Commons committee stage generally.

15. Finally, the Committee will no doubt be considering the future of the Special Standing Committee procedure, first introduced experimentally in October 1980. The "evidence taking" sessions provided for under this procedure have proved of some value in the case of legislation that cuts across party lines, and have helped in some instances to crystallise issues before the normal Committee stage. Even so there seems little scope for extending their use to Bills with a clear "Party political" content. In their consideration, however, the Committee may perhaps wish to take into account the possible value and practicality of some form of preliminary Standing Committee session at which Ministers might explain to the Committee what a Bill seeks to achieve, and answer questions from the Committee. Such sessions could take place either at the beginning of a Bill's Committee Stage or at the beginning of the consideration of individual parts or clauses of a Bill.

When the House in February 1986 debated Government proposals based, in part on the Committee's report, Mr Biffen, in a very brief reference to special standing committees, said that the Government had accepted that there should be permanent provision for them. For the Opposition, Peter Shore welcomed the proposed permanent status of the procedure, but criticised the Government's attitude:¹⁸

I welcome the permanent provision for Special Standing Committees. A Special Standing Committee, combining the Select Committee and Standing Committee procedures, is a valuable innovation, but I hope that it will be used more frequently in the future than it has been in the past few years. I am sorry that the Leader of the House is proposing to restrict the right to propose such procedure to Ministers. The Government have been rather halfhearted about Special Standing Committees. I would like them to be used more frequently, and, if the Opposition and Back Benchers had the same right as Ministers to propose such a procedure, I am sure that their use would be considerably increased.

Like Mr Shore, Sir Peter Emery, chairman of the Procedure Committee, supported the idea that Ministers should not retain sole right to move committal of bills to special standing committees, and his amendment, despite the opposition of the Leader of the House,¹⁹ was carried on a division.

Special standing committees are currently governed by Standing Order no. 91:

Special standing committees **91.**-(1) A special standing committee to which a bill has been committed shall have power, during a period not

¹⁸ HC Deb vol 92 c1092, 27.2.86

¹⁹ c1126

exceeding 28 days (excluding periods when the House is adjourned for more than two days) from the committal of the bill, to send for persons, papers and records, and, for this purpose, to hold up to four morning sittings of not more than three hours each. At not more than three sittings oral evidence may be given and, unless the committee otherwise orders, all such evidence shall be given in public. Oral evidence shall be printed in the official report of the committees' debates together with such written evidence as the committee may order to be so printed.

Provided that, in the case of bills certified under paragraph (1) of Standing Order No. 94E (Scottish Grand Committee (bills in relation to their principle)) and committed pursuant to paragraph (5) thereof to a special standing committee, the three morning sittings may be held in Scotland.

(2) For the sittings referred to in paragraph (1) of this order, and notwithstanding the provisions of paragraph (1) of Standing Order No. 85 (Chairmen of standing committees), the Speaker may appoint any Member other than a Minister of the Crown as chairman of a special standing committee.

(3) Except as provided in the foregoing paragraphs, the standing orders relating to standing committees and Standing Orders No. 109 (Withdrawal of documents before select committee), No. 113 (Entry of questions asked), No. 117 (Witnesses and evidence (select committee)) and No. 118 (Publication of evidence (select committees)) shall apply to any special standing committee.

(4) The question on any motion made by a Minister of the Crown to extend the period of 28 days mentioned in paragraph (1) of this order may be decided after the expiration of the time for opposed business.

Erskine May describes the procedure as follows:²⁰

Special standing committees. Standing Order No 91³ provides for the appointment of special standing committees to which bills may be committed after second reading under Standing Order No 61(2). Such committees have power under Standing Order No 91(1) for 28 days⁴ after committal (excluding periods when the House was adjourned for more than two days) to send for persons, paper and records, to hold one morning sitting in private

²⁰ p594

and to hold up to three morning sittings in public, each of not more than three hours' length, for the purpose of taking oral evidence. Unless the committee otherwise orders, evidence is given in public. It is printed in the Official Report of the committees' debates, together with any written evidence ordered by the committee to be printed.

For these sittings any Member other than a Minister can be appointed chairman; the chairman so appointed has been⁵ counted for the purpose of calculating the quorum. The chairman so appointed is in each case the chairman of the select committee relevant to the subject matter of the bill committed to the committee. After the sittings to take evidence have been concluded, a special standing committee proceeds to consider the bill in the same way as any other standing committee appointed to consider a bill. For these latter proceedings the chair is taken by a chairman nominated by the Speaker from the Chairmen's Panel (cf p597).

³ Passed on 27 February 1986, and replacing sessional orders first made on 28 October 1980 and 17 March 1982.

⁴ Under SO No91(4) the period of 28 days may be extended on a motion made by a Minister.

⁵ Three bills were referred to such committees in 1980--81 and one each in 1981-82 and 1983-84, CJ (1980-81) 89,115.299; *ibid* (1981-82) 256; *ibid* (1983-84) 356. Since then there has been no further such referral.

III Use of special standing committees

A. Evaluation

To date the special standing committee procedure has been used for the following bills:

BILLS COMMITTED

SESSION	BILL	COMMITTAL REF.
1980-81	Criminal Attempts Bill	19.1.81 : 997 c66
1980-81	Education Bill	2.2.81 : 998 c102
1980-81	Deep Sea Mining (Temporary Provisions) Bill (HL)	29.4.81 : 3 c884
1981-82	Mental Health (Amendment) Bill (HL)	22.3.82 : 20 c768
1983-84	Matrimonial & Family Proceedings Bill (HL)	15.2.84 : 54 c356
1994-95	Children (Scotland) Bill	16.1.95 : 252 c555
1995-96	Licensing (Amendment) (Scotland) Bill	9.9.96 : 269 c115

There have been a number of assessments of the use of the procedure in the early cases, especially by the Procedure Committee in its 1984-85 report. The committee reported that "virtually all the evidence we received ... was enthusiastic" and quoted the views of Sir Patrick Mayhew, then Solicitor General, the Minister involved in three bills subjected to the procedure:²¹

"It is very remarkable how the operation of the special procedure stimulates in the interest of the members of the committee, and brings them together even though their respective opinions may remain sharply divided. In my experience it engenders the feeling, both among members and among witnesses, that here at least the House of Commons is permitting itself to do important work in a mature manner, and is doing it well."

²¹ HC 49-I of 1984-85, para 12

The report cited the Leader of the House's view that the experiment had not saved very much time, and noted that its other witnesses claimed that it was the better *use* of time, rather than saving time as such, which was the point of the experiment: "Members were better informed as a result of the evidence sessions. Furthermore important changes were made to legislation which might not otherwise have been made."²²

The *Parliamentary Affairs* survey of public legislation for 1980-81 contained the following initial conclusion on the experiment:²³

Several MPs, speaking at the third readings of these bills, paid tribute to the value of the special standing committees: the government made significant changes to the original version of the Criminal Attempts Bill in the light of evidence given to the committee. But their main significance seems to have been in providing a new and more public conduit for pressure group inputs into the formulation of government bills - inputs that are very effective already. However, although the new procedure does nothing to alter the functional balance between government and Parliament in the legislative process, its potential value in drawing MPs into the consultative stages and increasing both their knowledge and their self-confidence as legislators is considerable. And it has been suggested that the procedure might most usefully be applied to private members' bills, in respect of which the channels for consultation are less well developed. It was announced by the government at the beginning of the 1981/82 session that there was little likelihood of the new-style committees being used again in the foreseeable future, but in fact the Mental Health (Amendment) Bill was, as we shall see in the next survey, referred to a special standing committee.

An article by Dennis on the *Criminal Attempts Bill 1980-81* claimed that the new procedure enabled academic lawyers to acquaint Members of their strong opposition to a controversial provision added by the Government to what was essentially a Law Commission bill, leading to its abandonment.²⁴ Benyon's study of the experiment also recorded that, at third reading of the first three bills, Members "were glowing in their praises of the new procedure," and examined the justification for this praise in relation to the Criminal Attempts Bill.²⁵

He noted that "on the face of it, the new procedure would appear to have improved the bill materially" by leading to "undoubtedly fairly substantial changes", but he concluded that "it is doubtful either that the making of the amendments was attributable solely to the new procedure or that it represents any major redressing of the imbalance between Whitehall and

²² para 12

²³ I. Burton and G. Drewry, "Public legislation: a survey of the session 1980/81", (1983) 36 *Parliamentary Affairs* 436, 450

²⁴ Ian Dennis, "The Criminal Attempts Act 1981", [1982] *Criminal Law Review* 5, 6

²⁵ H J Benyon, "The House of Commons' experiment with special standing committees", 1982 *Public Law* 193-8

Westminster" because the views expressed would almost certainly have been taken into account in any case. The major innovation of the special standing committee procedure was that "this consultation was now taking place openly and in public. That no doubt is a constitutional achievement, but it is a constitutional achievement of a rather different order from that claimed in the procedural debate."²⁶ Government concessions after second reading, he believed, were due to the convenience of the time when such changes could be made, during the Parliamentary stages rather than prior to the bill's introduction. The changes made which were attributed to the new procedure were due to the fact that the result of the special standing committee innovation "was less to alter the balance between Government and Parliament than to alter the balance between Government and outside interests."²⁷

Benyon suggested that the procedure could usefully be used for private Members' bills and, more generally, analysed critically the inception of the proposal in the Procedure Committee's 1977-78 report on public bill procedure in the context of the more general question of the allegedly growing imbalance between Government and Parliament in the legislative process. He claimed that the Committee "did not adopt as its objectives the checking or reversing of this trend. Instead, the Committee's objectives were rather more managerial", being too concerned with potential timing difficulties for the Government.²⁸ The new procedure did not address the more important issue of the pre-Parliamentary stage: "The overriding reason why Parliament's part in legislation is today so small is that it is virtually excluded from the formative stages of legislation."²⁹ Benyon claimed that the role of the Home Affairs Committee in what became the 1981 *Criminal Attempts Act's* provisions on the 'sus' law demonstrated that it was the then recent establishment of the departmental select committee system, not special standing committees, that was the more important development in the legislative process.³⁰

Samuels, in a brief 1989 article, also played down the initially enthusiastic reception of the experiment, but regretted its relatively infrequent use: "This is a pity. The special standing committee is undoubtedly a concept that could and should have been developed and nurtured, and adapted in particular to the continual need to improve the quality of drafting."³¹ He also supported the idea that the procedure would be suitable for private Members' bills.

²⁶ pp194, 195

²⁷ It could be suggested that the distinction Benyon makes at the end of this quote (taken with his views quoted in the following paragraph) is perhaps not quite so clear cut as is suggested. Pre-Parliamentary consultations (which will often involve Parliamentarians in any case) will feed into the Parliamentary stages of the process.

²⁸ See for example the following formulation by the then Leader of the House, John MacGregor, that "the Government will continue to consider the possible use of this procedure in appropriate cases where this is compatible with the overall management of their legislative programme" (HC Deb vol 201 c55w, 16.12.91).

²⁹ p197

³⁰ There have been other instances where departmental select committees have had, or sought to have, an input in legislation within their policy area.

³¹ Alec Samuels, "The special standing committee", [1989] *Statute Law Review* 208, 209-10

B. What types of bills are suitable for the procedure?

An important issue in the use of the special standing committee procedure is the types of bill which are appropriate for this distinct form of detailed scrutiny. This has shown to be true most recently in the controversy over this session's *Asylum and Immigration Bill*.³²

The Procedure Committee, in its 1977-78 report, said "we do not think it desirable to attempt to define the sort of bills appropriate for the public bill committee procedure but we hope that a variety of bills, including bills of some substance, would be referred to such committees in order to give the procedure a fair trial. We also hope that the public bill committee will before long become accepted as the 'normal' committee to which the great majority of bills stand committed."³³ In the 1980 debate which set up the original experiment, Mr St John Stevas proposed that its use would be suitable for what he referred to as "some of the Bills that come before, especially where differences of opinion cut across party lines" and that the 1980-81 experiment should cover "perhaps three Government Bills which raise substantial issues, not of acute party controversy."³⁴ For the Opposition, Merlyn Rees queried the Government's view of the types of suitable bill, suggesting that 'usual channels' discussions centred on non-controversial bills, and thought that subjects like nationality and broadcasting would be appropriate."³⁵ Samuels, following Mr St John Stevas' formulation, claimed that "the understanding is that the procedure is, or may be, suitable for Bills raising issues not involving acute party controversy."³⁶

In its 1984-85 report the Procedure Committee hoped "that it will be possible for a wider range of bills to be committed to such committees. Apart from the handful of bills each session which excite great party political controversy, there are many which, though controversial in parts, involve no party commitment, but contain detailed, possibly technical provisions which have previously been little considered in any way by Parliament."³⁷ These committees could consider, either by the terms of committal or in practice, only parts of appropriate bills, such as Finance Bills, if so desired. In the 1986 debate which made the procedure permanent, the Leader of the House, John Biffen, seeking to resist attempts to remove Ministers' exclusive right to move for committal to such committees, said that "the convention has arisen that the Special Standing Committee procedure should apply to Bills that raise substantial issues not of acute party controversy. Therefore, one will appreciate that there is a real interest in the Government's determining which Bills should come within that category."³⁸

³² Discussed below. The Lords' consideration of suitable bills for their special public bill committee procedure is also relevant to this discussion (see below).

³³ First report of 1977-78, HC 538, para 2.19

³⁴ HC Deb vol 991 c725, 30.10.80

³⁵ c736

³⁶ Op cit, p210

³⁷ Second report of 1984-85, HC 49-I, para 13(e)

³⁸ HC Deb vol 92 c1126, 27.2.86

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The issue of the types of bill which are appropriate for the special standing committee procedure arose recently in the context of the current *Asylum and Immigration Bill* with Labour's proposal for the committee stage to be taken in special standing committee. The Home Secretary, Michael Howard was reported as saying in a radio interview that a "1993 White Paper" stated that the procedure should be used for non-controversial bills. This is presumably a reference to the following section of the *Scotland in the Union* white paper:³⁹

SPECIAL STANDING COMMITTEE

6.22 The Standing Orders of the House of Commons contain provision for Bills to be referred after Second Reading to a Special Standing Committee as an alternative to an ordinary Standing Committee. The Special Standing Committee may meet on up to 4 occasions over a period of 28 days taking oral evidence about the Bill. The record of that evidence, and written evidence which the Committee may order to be printed, is available as background to inform the Committee's subsequent line by line consideration of the Bill, which proceeds as in an ordinary Standing Committee. This provision has been little used - and never for Scottish legislation - being considered in general to be appropriate only for relatively non-controversial measures with a degree of cross-party support, where technical evidence from specialists or interest groups would have a particularly important part to play in the detailed consideration of the Bill's provisions.

6.23 In the Government's view the mechanism does, however, provide a particularly appropriate response to certain uniquely Scottish circumstances. There is a separate body of Scots law administered through a separate legal system. In many areas which are subject to legislation there exist in Scotland separate professional or other expert bodies with unique experience and an individual contribution to offer. They may feel remote from the Westminster process and may not have the same opportunity as their counterparts south of the Border to influence the consideration of legislation during its passage at Westminster. The Special Standing Committee procedure provides an opportunity to remedy this by establishing a mechanism for evidence to be taken, possibly in Scotland, before line by line consideration of a Bill begins.

6.24 Proposals for detailed changes to the relevant Standing Orders will be brought forward in due course. The Government envisage that these will involve a development of the existing provisions for Special Standing Committees in a number of ways to suit Scottish circumstances. The Committee would meet to agree its method of working and the range of interests from which it wished to take evidence, and would have power to hold its oral evidence-taking sessions in Scotland if it wished. Its further meetings, in Westminster, would handle the line by line examination of the Bill in the normal way. In order not to delay the consideration of legislation it would remain subject to the 28 day time limit for evidence-taking which at present applies to Special Standing Committees.

³⁹ Cm 2225, paras 6.22-24

The exchanges on Mr Howard's statement on the new Bill are instructive:

*Mr Straw:*⁴⁰

If the Secretary of State now accepts that this issue should be taken out of party politics, surely it should be the subject of cool examination by a Special Standing Committee of the House, with the intention of removing controversy? Is not the fact that the right hon. and learned Gentleman had to publish today two lengthy and complicated documents about just part of his proposals further evidence of the need for such examination?

Is the Secretary of State aware that he was misinformed when he said on radio this morning that the Special Standing Committee procedure was never designed for such measures? The right hon. and learned Gentleman, to support his claim, bizarrely quoted a 1993 White Paper, which turns out to be one on Scotland and the Union. The scrutiny of Bills is the responsibility not of the Government but of the House.

Does not the Secretary of State recall that, in 1986, the House accepted a recommendation of the Procedure Committee that the Special Standing Committee process should permanently be incorporated into the Standing Orders of the House? The Procedure Committee stated that a "wider range of Bills" should be examined by such a process. The House defeated an attempt by the Government to control the circumstances in which that procedure could be used.

Does not the right hon. and learned Gentleman appreciate that careful scrutiny is one of the best guarantors of good legislation? Its absence explains the failure of the Asylum and Immigration Appeals Act 1993. The then Home Secretary told the House that his 1992 Bill, which became the 1993 Act, would protect against fraud, provide a quicker system to deal with manifestly unfounded claims, and achieve a way of reaching prompt and fair decisions.

*Mr Howard:*⁴¹

A Special Standing Committee is a procedure suitable for non-controversial, technical Bills. We have had six immigration Bills since that procedure was introduced, and it has been used for none of them. There is no more reason why that procedure should be used for this Bill than for any other controversial measure. The Bill will receive full and cool scrutiny in Standing Committee in the normal way, and the Government will, of course, listen to the proposals that are made in that Committee.

In response to a similar request from Sir David Steel, the Home Secretary said that he had already explained "why the Special Standing Committee procedure would be quite inappropriate for legislation of this kind. It has never been used for such legislation, and it is not necessary."⁴²

⁴⁰ HC Deb vol.267 cc338-9, 20.11.95

⁴¹ c340

⁴² c342.

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During the second reading of the bill, Mr Howard said that "it has always been clear that the procedure was designed for Bills that have a degree of cross-party support. The Bills for which it has been used have been relatively technical and non-controversial." The Opposition's attitude had put the Bill outside that category."⁴³ Mr Straw rejected the notion that the procedure was exclusively for non-controversial bills, citing in part the House's vote in 1986 to deny Ministers exclusive right to move committal, and set out in detail what he saw as the benefits of such scrutiny of the bill.⁴⁴

Mr Forsyth made a similar point in his statement last November on further changes to the work of the Scottish Grand Committee:⁴⁵

Secondly, we want to use to the full the procedure under which, before Scottish Bills embark on their Committee stage, evidence can be taken by a Special Standing Committee meeting in Scotland. That was done with the Children (Scotland) Bill last Session, and was very successful. It is suited to uncontroversial Bills, and is especially relevant to Scottish circumstances.

There is in Scotland a range of professional bodies and other well informed interest groups that have less access to the Westminster process than do their counterparts in England. The use of a Special Standing Committee gives such people an opportunity to make a key impact at a formative stage of the process.

The following table lists attempts to commit bills to a special standing committee which were negatived on a division:

⁴³ HC Deb vol 268 c710, 11.12.95.

⁴⁴ See cc712-6.

⁴⁵ HC Deb vol. 267 c1229, 29.11.95. He also announced that ministers were considering a 'Scottish select committee' procedure for the House of Lords. This procedure was first used for the *Deer (Amendment) (Scotland) Bill [HL]* this session.

SPECIAL STANDING COMMITTEES

MOTIONS TO COMMIT BILLS NEGATIVED ON A DIVISION

SESSION	BILL	REFERENCE	DIVISION
1985-86	Education Scotland Bill (HL)	10.6.86 : 99 c274	180-266
1987-88	Licensing Bill	9.11.87 : 122 c110	74-247
1987-88	Housing Bill	30.11.87 : 123 c728	208-322
1987-88	Education Reform Bill	1.12.87 : 123 c863	245-348
1987-88	Merchant Shipping Bill (HL)	28.1.88 : 126 c554	52-140
1987-88	School Boards (Scotland) Bill	12.4.88 : 131 c117	198-254
1988-89	Electricity Bill	13.12.88 : 143 c871	234-299
1988-89	Football Spectators Bill (HL)	27.6.89 : 155 c932	234-326
1989-90	National Health Service & Community Care Bill	11.12.89 : 163 c767	244-312
1989-90	Broadcasting Bill	18.12.89 : 164 c118	237-303
1991-92	Education (Schools) Bill	19.11.91 : 199 c241	223-259
1991-92	Further & Higher Education (Scotland) Bill	26.11.91 : 199 c879	222-303
1992-93	Sea Fish (Conservation) Bill	8.6.92 : 209 c116	130-208
1992-93	Bankruptcy (Scotland) Bill	17.6.92 : 209 c947	262-294
1992-93	Asylum & Immigration Appeals Bill	2.11.92 : 213 c117	275-315
1993-94	Local Government etc (Scotland) Bill	17.1.94 : 235 c628	266-315
1994-95	Medical (Professional Performance) Bill	25.4.95 : 258 c752	37-133
1995-96	Asylum and Immigration Bill	11.12.95 : 268 c803	287-314

IV House of Lords

The House of Lords does not have the modern tradition that the Commons has of taking the committee stage of bills off the floor of the House. There have been select committees on bills, especially for private Members' bills, and occasionally⁴⁶ public bill committees, roughly equivalent to Commons standing committees. In 1992 a major review of the committee work of the House of Lords considered the use of legislative committees:⁴⁷

LEGISLATIVE COMMITTEES

The Practice and Procedure Committee proposals (1977)

44. The recommendations of the Committee relevant to the committee work of the House are as follows:

- "(15) While the use of Public Bill Committees would improve the quality of the legislative work of the House, the function of a Public Bill Committee would most profitably be performed within the context of a new committee structure summarized in Recommendation (16) below.

- (16) There should be a number of Select Committees matching policy areas, which would scrutinize Bills and other proposals within the relevant area. All Public Bills, except where otherwise ordered, should be considered by one of these Committees both in the manner of a Select Committee and in the manner of a Public Bill Committee; Commons Bills should be referred to the appropriate Committee after Second Reading in the House of Commons. Initially a small number of such Committees might be set up as an experiment. The Procedure Committee, or a sub-committee of that committee, should consider the detailed implementation of the scheme."

The Committee has welcomed the opportunity to re-assess the contribution which select committee procedures could bring to the consideration of legislation, and we have looked at ways in which these proposals might be adapted to the needs of the House in the 1990s.

Legislative committees: possible options

45. Like the Group on the Working of the House in 1987, we found that responses by Lords to our questionnaire disclosed a division of opinion as to whether committees off the floor were desirable. Many expressed themselves entirely content with the current practice of taking all public bills in committees of the whole House. The opportunity for any Peer to take part in committee without restriction but without any requirement to attend throughout the proceedings was highly valued. This freedom and flexibility was contrasted with the proceedings of standing committees in the House of Commons where attendance was more or less compulsory and where proceedings were, to a greater degree, dictated by party affiliation and voting strength.

⁴⁶ Eight times between 1967-68 and 1993-94. See the Appendix to this Paper.

⁴⁷ *Report from the select committee on the committee work of the House*, HL Paper 35-I of 1991-92, February 1992, paras 44-7 ('Jellicoe Report'), footnotes omitted in these extracts.

46. A significant minority of Lords pointed to some of the unsatisfactory features of current committee proceedings. A small caucus of interested Lords were often required to debate amendments in the Chamber for many hours at a time and until a late hour. Those with a specialist knowledge of the bill, namely government officials and advisers to the Opposition front benches and to other Lords, were in attendance throughout but had to remain silent, communicating with their respective Lords only "by carrier pigeon" (Q 14). One way forward mentioned in evidence was for the Government, when appropriate, to convene informal meetings of Peers and advisers to discuss amendments and sort out misunderstandings and matters of detail (Q 424). This had proved particularly effective during the committee stage of the Copyright, Designs and Marks Bill in 1988. Even so, the disadvantages of committees of the whole House on bills raising technical or legal issues remained. As Lord Wilberforce put it in a speech criticising the repeated absence of law reform measures from successive Queen's Speeches, which he made in the debate on the Address in November 1991, "our present procedure of line by line discussion and examination on the floor of the House simply does not work for many, indeed most, legal bills... I am sure that given the will, there is enough ingenuity here to devise some better way...."

47. Other witnesses, including several academic observers, felt that the time had come for the House to consider the use of committees not only to save time taken in the Chamber but to give better and more effective scrutiny to bills. With these views in mind, the Committee considered four possible options for committees to consider legislation as follows:-

- (a) Public bill committees
- (b) Special standing committees
- (c) A sessional committee to scrutinise all bills and to report on provisions seeking delegated powers and perhaps other matters
- (d) A committee to assess the environmental impact of all bills.

There are, of course, many other options for considering legislation or aspects of legislation in committee. These, however, seemed the most promising to the Committee and on that basis we asked the Clerk of the Parliaments to submit a detailed blueprint for each proposal. These appear as separate memoranda at page 201 below.

Having looked at public bill committees, the Jellicoe report then considered a 'special standing committee' procedure for the Lords:⁴⁸

Special standing committees

53. Special standing committee procedure differs from public bill committee procedure in enabling a committee to take written evidence and some oral evidence on the provisions of a bill over a limited period of time, with the option of going on to consider the bill clause by clause in the same way as a standing committee in the Commons or a public bill committee in the Lords. This procedure was followed in the House of Commons on five occasions in the early 1980s and is now regulated by their Standing Order No 91, which is printed in Appendix 7, together with a list of the bills considered in this way. Since 1984 the

⁴⁸ paras 53-8. See also the Journal Office note on special standing committees, reproduced as appendix 7, pp78-81

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Government has been reluctant to refer bills to such committees because despite the time limit of 28 days from committal to the end of the evidence sessions, there is inevitably some delay to the legislative programme. Nonetheless, the Commons Procedure Committee has on more than one occasion urged that greater use should be made of the procedure: "it was", the Committee suggested in its report on the Committee system, "the best way to harness the positive attributes of select committees to the scrutiny of legislation." The most impressive support came from a former Solicitor General who had been Minister in charge of two bills considered under the procedure:

"It is very remarkable how the operation of the special procedure stimulates the interest of the members of the committee, and brings them together even though their respective opinions may remain sharply divided. In my experience it engenders the feeling, both among members and among witnesses, that here at least the House of Commons is permitting itself to do important work in a mature manner, and is doing it well.

54. The proposal that special standing committee procedure should be followed in the House of Lords on an experimental basis was recommended by several Lords and by Mr Bogdanor, Professor Norton and Mr Donald Shell of the Department of Politics, Bristol University. Some of the detailed implications of its possible application to the Lords are set out in Appendix 7 by way of a note by the Journal Office. On the assumption that the procedure would be confined, at least initially, to bills which were not overtly party political, the key points for consideration appeared to be as follows:-

- (i) Should a special standing committee confine itself to taking evidence, perhaps making a short report, and leaving the House to make use of the findings in a normal committee of the whole House; or should it follow the Commons procedure and both take evidence and later give clause by clause consideration to the bill? Whilst many Lords might prefer to retain committees on the floor, only full consideration in committee would save time on the floor of the House and avoid undue delay to the normal passage of a bill-an undoubted advantage and a crucial consideration for the Government.
- (ii) Should some time restriction be imposed for the evidence-taking sessions to avoid excessive delays to the progress of business; and would the traditional flexibility of business in the Lords and the ability of committees to meet quite intensively when required enable deadlines to be met?
- (iii) The Government has an overall majority on such committees in the Commons. But in the Lords, where no one party has a majority, committees have never been constituted in this way. What sort of membership and party composition would be appropriate?
- (iv) Members of the front benches and an appropriate Minister would presumably serve on a special standing committee. In the Commons the Minister began by giving evidence with his officials, before moving round the table and becoming one of the inquisitors.
- (v) If an important disagreement on party lines did emerge, might it be possible for a special standing committee to agree to postpone a vote to the report stage?

- (vi) Initially, and as part of an experiment, should one or two suitable bills be referred to special standing committees (convened in each case with a suitable membership); or could a single committee be appointed for a whole session, to which all bills from a particular department-probably only two or three could be referred?

55. In his memorandum to us on legislative committees (p 134) the Leader of the House indicated that he could not support the general use of special standing committees. On the whole he thought committees of the whole House worked successfully and were popular amongst members. There would be all sorts of difficulties involved in referring contentious bills, not least the composition of the committee, the undesirable prospect of witnesses whose views were firmly entrenched on either side of the political divide and the likelihood of a long and difficult report stage. Above all, there would be a risk of further delays to the legislative programme. More generally, he doubted whether select committee procedures were really all that appropriate for the consideration of government legislation: there was so little time available and the chances of the Government re-thinking major issues would probably be slim.

56. In his oral evidence, however, the Leader accepted that there might well be a case for experiments in the use of special standing committees for certain categories of non-controversial and technical legislation. He said that the Lord Chancellor was concerned at the difficulties of accommodating measures of law reform within the legislative programme and hoped that the Committee might come up with procedures to help ease the situation (Q 332). As Lord Henderson of Brompton pointed out, the work of the Joint Committee on Consolidation Bills had for years assured that consolidation bills were exempt from party political controversy and ensured a speedy passage through both Houses (Q 442). It was conceivable that detailed consideration in special standing committees might enable other categories of bill - certain Law Commission Bills, for example - to enjoy a speedier passage too.

57. The Lord Chancellor confirmed his support for special standing committee procedure at a meeting with the Chairman, an account of which appears as Appendix 8. He hoped that certain bills, for example, some of those recommended by the Law Commission and bills concerning company law or financial services, could be included in the legislative programme on the understanding that they would be referred to special standing committees in the Lords. Although some of the technical details might be contentious, the bills chosen would not be contentious in party-political terms. The Lord Chancellor saw merit in holding evidence sessions on these bills so as to permit exchange of views and to iron out any remaining difficulties. So long as the committees were able to establish a consensus, the remaining stages in Parliament might be taken quite speedily, though this would, of course, be a matter for the business managers and the usual channels.

58. The Committee understands that this proposal is currently under consideration within Government. In the meantime, we received papers from the Law Commission (p 238) and the Scottish Law Commission (p 253) enthusiastically supporting the proposal.

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It recommended an experiment with such committees, with one or two bills "of a technical nature and largely devoid of party political controversy."

132. *Special Standing Committees*: We have been impressed by the arguments in favour of special standing committee procedure (paragraphs 53 to 58) and we see advantage in the taking of evidence, at least for complex and technical legislation. We therefore make the following proposals:-

- (i) As an initial step and as an experiment, one or two bills introduced into Parliament in the House of Lords, of a technical nature and largely devoid of party political controversy, should be referred to special standing committees. We envisage that for the foreseeable future the committee stages of all main programme bills which are subject to party political controversy will continue to be taken on the floor of the House.
- (ii) We welcome, in particular, the suggestion made by the Lord Chancellor that this procedure might enable additional Government bills, such as those arising from certain Law Commission recommendations, to be included in the legislative programme; and we share his hope that through the free exchange of views at the evidence-taking stage, a consensus will emerge from the Committee, which will facilitate the speedy passage of such bills through their remaining stages in both Houses. Whilst it is true that this committee work-and the time taken considering these extra bills on the floor of the House-will represent a small net addition to the work of Parliament, we believe that this is well justified. The categories of bill envisaged by the Lord Chancellor would appear well suited to initial experiments in the use of such committees. We recommend that, if they prove successful, other categories of bill should be referred to special standing committees in the same way.
- (iii) It would be for the Leader of the House to propose to the Steering Committee at the beginning of a session which bill or bills should be referred to special standing committees. The earlier that this is agreed, the more time will be available to arrange appropriate staffing, to seek the appointment to the committees of Lords with appropriate knowledge and experience and to make the arrangements for the committees' timetable of meetings.
- (iv) As in the Commons, special standing committees should receive written and oral evidence over a limited period and subsequently consider the bill clause by clause in the same way as a public bill committee. In the experimental stage, it would be for the Steering Committee to fix the deadline for the hearing of evidence. Provided notice of a bill's reference to a special standing committee was known well in advance of second reading, so that preparations could begin at an early stage, we see no reason why the evidence stage should not be completed well within the 28 days from second reading permitted under the Commons' Standing Order.

- (v) The composition and party strength of special standing committees should follow the well-established principle that the Government do not enjoy an overall majority. Nonetheless, we believe that there is a case, both on public bill committees and special standing committees, for the Government to have a majority over the political party opposition. This would require only a very small adjustment to the composition of recent committees. In the case of technical bills a rather smaller membership of perhaps ten to twelve Lords would seem appropriate. Members of the front benches and an appropriate Minister would be appointed and, as in the Commons, the proceedings would begin with the Minister giving evidence with his civil servants.
- (vi) We do not propose any formal procedure to permit special standing committees to postpone votes on party political matters to the report stage, but they may from time to time consider this desirable. We note that this already often happens on the floor of the House in so far as divisions on important issues often take place at report rather than committee stage.

When the House debated the report in June 1992, Earl Jellicoe briefly summarised his committee's proposal:⁴⁹

Secondly, we propose special standing committees able to take a limited amount of evidence from interested parties and later to consider the Bill concerned clause by clause. We believe that this procedure would be particularly suitable for certain Bills, largely devoid of party political controversy, initially at least introduced in this House - that is, legal and technical Bills but nonetheless important ones such as those embodying Law Commission recommendations or dealing with intricate matters like company law. We were encouraged by the response which we received from the noble and learned Lord on the Woolsack and I am particularly glad that he will be answering our debate later this evening. My personal belief is that this House has an important, albeit perhaps unspectacular, role to play in this rather special area.

⁴⁹ HL Deb vol 537 c901, 3.6.92. See the note of the meeting between Earl Jellicoe and the Lord Chancellor (select committee report, appendix 8, pp82-3.)

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The recommendation was agreed by the House in July 1992,⁵⁰ and this form of committee procedure is often called the 'Jellicoe procedure'. The *Companion to the standing orders* briefly describes the procedure of the special public bill committee:⁵¹

Special Public Bill Committees

On an experimental basis, special public bill committees may be appointed to consider bills. Such committees may receive written and oral evidence on a bill within a period of 28 days after the appointment of the committee. At the end of this period, the committee takes the form of a public bill committee and considers the bill clause by clause.

A Lords *Information Sheet* in 1994 describes the procedure of special public bill committee, with particular reference to the *Law of Property (Miscellaneous Provisions) Bill [HL]*:⁵²

2. A Special Public Bill Committee takes written and oral evidence on a bill from interested parties, within a period of 28 days after the appointment of the committee. This period is extended in the case of any adjournment of the House for more than three days. The committee then considers the bill clause by clause in the same manner as a Public Bill Committee. The committee organises its own programme of evidence within the 28 day period but is subject to no formal constraint on the time taken in considering the bill Clause by Clause, insofar as this is compatible with avoiding undue delay to a Bill.
3. Evidence taken is published, but the committee need not produce a report on the bill. Instead it reports the bill to the House after consideration clause by clause. When it considers a bill Clause by Clause, the Chair is taken by the Chairman of Committees or one of his deputies and the committee has power to amend the bill. The Department sponsoring the Bill is required to produce a summary of consultation undertaken, with an indication of representations received and changes made.
4. The procedure is (to quote the Procedure Committee report) "well suited to the proposals put forward by the Lord Chancellor to facilitate the introduction of certain legal and technical bills, for example certain bills proposed by the two Law Commissions...".
5. The Government has a majority over the other political parties on a Special Public Bill Committee, with the Crossbenchers holding the balance. The Committee has no power to appoint a specialist adviser.

⁵⁰ HL Deb vol 538 cc1271-95, 9.7.92

⁵¹ 1994 ed., p132

⁵² "Special public bill committees", *House of Lords Information Sheet 15*, 30.11.94 (footnotes omitted).

6. The first bill to be considered under the new procedure was the Law of Property (Miscellaneous Provisions) Bill. The Bill was read a first time on 10th April 1994 and had its second reading on 5th May. The Committee was appointed by the House on 9th May and held six meetings as follows:

- 11th May - Deliberation.
- 17th May - Oral evidence from the Lord Chancellor, the Public Trustee and the Law Commission.
- 24th May - Oral evidence from the Law Commission.
- 25th May - Oral evidence from the Law Commission and the Law Society.
- 6th June - Deliberation.
- 7th June - Consideration of Bill Clause by Clause.

7. The deliberative meetings lasted about 1 hour 30 minutes in total; the evidence about 5 hours; and the consideration of the bill 1 hr 3 minutes. The Proceedings of the Committee (together with the bill as amended) were published as HL Paper 62 (ISBN 0-10-485994-6). The Committee received written evidence from the Law Commission, the Law Society and eight other witnesses. Thirty-four amendments were made by the Committee and the Lord Chancellor brought forward twenty further amendments at the Report Stage on 20th June, nineteen of which were agreed to (one not arising directly from the Committee's proceedings was withdrawn). The Report Stage took twenty-two minutes. Third Reading was formal, without debate. The Bill passed the Commons with a minimum of debate and without amendment other than the removal of the formal 'Privilege Amendment'.

8. The Committee's sessions of oral evidence were transcribed by the Official Shorthand Writer (Gurney's) while Hansard undertook the task of producing the Official Report of the Committee in its consideration of the bill Clause by Clause. The formal Minutes of the Committee's proceedings were published each day as an appendix to the Minutes of Proceedings of the House.

9. The new procedure ensured that the Bill was subjected to a great deal of detailed scrutiny. Changes made to the Bill as a result ranged from minor drafting amendments to significant changes of substance. Some amendments were brought forward to meet the concerns of the Committee; others (according to the Lord Chancellor) arose "out of the process of consideration necessitated by the preparation of those amendments. The scrutiny provided by the new procedure was different from usual as Peers were able to talk directly with the experts in the relevant area of the law. The procedure also saved time on the floor of the House, by taking business elsewhere, although it could be argued that it in fact allowed the introduction of a bill that would otherwise not have been brought forward.

The chairman of the Law Commission, Mr Justice Brooke, has described the early history of the Lords experiment in a 1995 article, noting that the Commission's hope for two bills to be taken through the 'Jellicoe procedure' in 1992-93 foundered because of the uncertain situation in the Commons due, in part, to the Maastricht legislation.⁵³ The first bill to be sent to a committee was in 1993-94, the *Law of Property (Miscellaneous Provisions) Bill [HL]*, and Brooke claimed that it "was generally regarded as a success."

⁵³ "Special public bill committees" 1995 *Public Law* 351-6.

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In July 1994 the Lords Procedure Committee reviewed the brief experiment:⁵⁴

In its First Report, Session 1992-93, the Committee endorsed the view of the Government that two or three Bills might be considered in this way, with the Committee thereafter assessing the results of the experiment. The Committee will accordingly make a full report when one or two more Bills have been dealt with in this way. At this stage the Committee makes the following observations and recommendations:

- (1) The procedure has already proved a valuable addition to the scrutiny function of the House.
- (2) The relevant Department should be invited to produce with each Bill a summary of consultation undertaken, with an indication of representations received and changes made.
- (3) The twenty-eight day period within which the Committee may take evidence should in future run from the date on which the Committee is appointed, instead of from the Second Reading of the Bill, and should be extended in the case of any adjournment of the House for more than three days.
- (4) Although the consideration of evidence has to be completed within the twenty-eight day period, the Committee need feel under no obligation to hasten the subsequent proceedings in the Public Bill Committee.
- (5) The formal Minutes of Proceedings of the Committee should continue to be published as an appendix to the Minutes of Proceedings of the House.
- (6) The name "Special Standing Committee" is misleading because such a Committee is in no way a Standing Committee. In future the term "Special Public Bill Committee" should be used.

Analysing the two 1994-95 bills sent to special public bill committees, Brooke, in his *Public Law* article, said that the proceedings on the *Private International Law (Miscellaneous Provisions) Bill [HL]* "showed the strength of this new Parliamentary animal when asked to tackle really difficult technical issues."⁵⁵ The other bill, the *Family Homes and Domestic Violence Bill [HL]*, gave the new procedure "a thorough testing", and he said that "once again the procedure demonstrated its value, and a very good bill was improved still further when exposed to highly expert scrutiny."⁵⁶ Brooke concluded his brief review as follows:⁵⁷

The great strength of these committees is that they seek to reach well - informed consensus across party lines on what are often very difficult technical issues. Lord Colville of Culross Q.C., a circuit judge with immense parliamentary experience, expressed a general view very clearly in the final session on this third bill:

⁵⁴ *Third report of the select committee on procedure of the House*, HL Paper 81 of 1993-94, para 2. Note the proposal to use the term 'special public bill committee' (para 2(6)).

⁵⁵ Op cit, p354

⁵⁶ p355

⁵⁷ p356

The complexity of the points that are contained, and indeed resolved, in this group of amendments are fairly substantial, and I am confident that it would have been absolutely impossible to get to the stage that we have now reached . . . if it had had to be done on the Floor of the Chamber.

The Special Public Bill Committee undoubtedly makes great demands on those who take part in it, and these are still very early days. Its creators envisage that one day it may be used for bills that do not come from the Law Commissions, provided that they fall within the class of bills originally identified by Earl Jellicoe's committee. To an outside observer they reveal Parliament at its very best. By their consultation processes the Law Commissions have always tried to involve more and more people in the law-making process. This new procedure enables Parliament itself to hear direct from very knowledgeable people in the course of its own law-making function. The auspices are very encouraging for the future quality of the statutes that are submitted to this process.

The Procedure Committee's first report in 1995-96 considered legislative committees of the Floor of the House said that the use of special public bill committees in the previous session were successful "and we confirm the view which we took in 1994 after the first experiment that the procedures have proved a valuable addition to the scrutiny functions of the House. The Committee also repeated its view that the procedure should be used not only for Law Commission bills but for other bills.⁵⁸ It recommended that committees should be named before second reading "to enable the Members to agree a request for evidence and consider a programme of work at the earliest opportunity ..."⁵⁹

During the brief debate on the report Lord Brightman, who had chaired such special committees, made a strong plea for the wider use of the 'Jellicoe procedure', and not simply for non-controversial bills. "While the Jellicoe procedure is obviously inappropriate for a Bill which is party political, or one that would be subject to a party Whip, I believe that a Bill should not be disqualified merely because it is controversial. The Jellicoe procedure provides an admirable forum for the proper resolution of some controversial problems for the simple reason that evidence is taken and, therefore, voting takes place in the light of that evidence."⁶⁰ In response the Chairman of Committees, Lord Boston of Faversham, said the suitability of bills "is a matter for the usual channels and the House itself to consider rather than the Procedure Committee" and pointed out that "it would possibly not be the best procedure for a wide-ranging Bill, bearing in mind the fact that there is limited time to take evidence." He accepted that "the fact that a bill is controversial in some way does not necessarily exclude it from consideration under these procedures. Indeed the fact that there is a certain amount of controversy -- I do not refer to party political controversy but controversy as regards the

⁵⁸ HL Paper 8 of 1995-96, para 1.1

⁵⁹ Para 1.4

⁶⁰ HL Deb vol 567 c1285, 13.12.95

merits of the matters being proposed -- gravitates a little towards this procedure as it may permit us to iron out difficulties and save your Lordships' time in your Lordships' House."⁶¹

The Government's legislative programme for 1994-95, and the Opposition's response to the experiment, appears to mean that there is a consensus for a rolling programme of law reform legislation, unimpeded by the package of more contentious Government bills, taking advantage of second reading committees, special public bill committees, special standing committees, and other procedures designed to ensure appropriate and effective scrutiny. However the fate of the *Family Homes and Domestic Violence Bill [HL]* at the end of the 1994-95 may be a warning against use of special⁶² Parliamentary procedures for what may be regarded by some, inside and outwith Parliament, as inappropriate legislative proposals, especially where it is felt that socially or morally controversial changes are taken through as 'law reform' measures scrutinised to a significant degree (especially in the Lords) by lawyers.

The consideration during the second reading of the *Arbitration Bill [HL]*, the latest bill to be committed to a special public bill committee, is of interest, and may possibly presage some change of policy and practice on the use of such committees in certain cases.⁶³ The minister, Lord Fraser of Carmyllie, said that the purpose of committal to a special public bill committee "is to allow further views to be sought and to give your Lordships the opportunity to examine the matters carefully", but he recognised that some peers had reservations about it. He did point out that it "would be the first time that the procedure has been used for a Bill other than those arising from recommendations of the Law Commission, a development which was recommended by the Procedure Committee and endorsed by your Lordships."⁶⁴

Several Peers, especially senior lawyers, were doubtful of the need for a special public bill committee for a bill which had been subject to consultation and drafting since 1989, including the DTI's advisory committee on arbitration law. Lord Donaldson of Lynton said the committee "would inevitably duplicate a vast amount of work already undertaken by the advisory committee and possibly risk creating confusion where no confusion presently exists."⁶⁵ Lord Wilberforce made a similar point, saying that the proposal "would involve the taking of evidence and the opening of many questions which have been settled with difficulty, but still settled," and suggested the alternative of a normal Committee of the Whole House.⁶⁶ Lord Mustill, a former chairman of the advisory committee and a member of the

⁶¹ cc1287, 1288

⁶² These procedures are often described as 'streamlined' or 'fast-track', but this is inappropriate and confusing if it is intended to refer to the speed of the Parliamentary process. The aim of these processes is to provide thorough scrutiny, suitable to the subject-matter and nature of the proposed legislation, and to ensure Parliamentary time for its passage reasonably unhindered by time and other limitations imposed by the main legislative programme. Lists of bills subjected to the various Lords committee procedures in recent years are set out in the Appendix.

⁶³ HL Deb vol 568 cc760-94, 18.1.96

⁶⁴ c763

⁶⁵ c768.

⁶⁶ c779

Procedure Committee, said he was a "keen proponent" of the special committee procedure but agreed with other Peers "that the matter could profitably be given another look."⁶⁷

For the Opposition, Lord Peston (noting he was the only non-lawyer to participate in the debate), said that until he heard the debate he was unaware that that form of committee procedure could lead to delay. "Quite the contrary; I had thought that it would operate expeditiously and quickly. Speaking as a busy person who must also earn his living, I would regard that as an absolute prerequisite of how we carry on." Although he personally saw no problem, but was willing to consider Lord Wilberforce's suggestion that the House put off the committal decision for a later day.⁶⁸

In reply, Lord Fraser of Carmyllie said that he wished to propose the committal motion.⁶⁹

I am obviously open to further observations from your Lordships, but I should like to move my Motion this evening, not least because it is a procedure that has been recommended to your Lordships by the Procedure Committee indicating it should be used for Bills other than Law Commission Bills. It was one that the usual channels had identified as being a suitable candidate for the procedure. I would hope the procedure would provide an opportunity for careful, informed scrutiny in essentially a non-adversarial forum. The contributions this evening seem to me to indicate that that is certainly possible. It does not follow from committing it to this procedure that there necessarily has to be - nor indeed can there be - an unlimited period for the taking of evidence. What I would propose is to move my Motion unless I receive a clear indication from the House that that would not be acceptable. I suggest that in the course of the next week we might consider in an informal way whether what I have proposed is desirable and whether there is a sufficient restriction that can be put on the proceedings of the committee to make it acceptable to one and all.

When he proposed the motion, several peers intervened to question him further, but he received support from Lord Lester of Herne Hill who said that in the committee under Lord Brightman on the *Private International Law (Miscellaneous Provisions) Bill 1994-95* "there was controversy and evidence was taken, but it was dealt with in an expeditious way" He concluded:⁷⁰

⁶⁷ c783

⁶⁸ cc786-7

⁶⁹ c792

⁷⁰ c794

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The great advantage of that procedure is that there would be a specialist committee, not composed only of lawyers and judges but nevertheless specialists. Provided it was skilfully chaired, as I am sure it would be, and provided that the proper safeguards were built into the procedure, I see no reason why it could not be—in the words of somebody else—dealt with on oiled castors, speedily, with more expert consideration than might be possible on the Floor of the House. My view is that that seems a sensible way forward.

The motion to commit the bill to a Special Public Bill Committee was then agreed to, without a division.

HOUSE OF LORDS COMMITTEES

PUBLIC BILL COMMITTEES

SESSION	BILL	COMMITTAL REF.
1967-68	Gaming Bill	26.6.68 : 293 c1394
1968-69	Development of Tourism Bill	7.7.69 : 303 c764
1970-71	Highways Bill	26.4.71 : 317 c917
1970-71	Civil Aviation Bill	12.7.71 : 322 c5
1974-75	Lotteries Bill	10.6.75 : 361 c121
1986-87	Pilotage Bill (HL)	25.11.86 : 482 c493
1991-92	Charities Bill (HL)	27.11.91 : 532 c1317
1993-94	Trade Marks Bill (HL)	6.12.93 : 550 c771

SPECIAL PUBLIC BILL COMMITTEES*

SESSION	BILL	COMMITTAL REF.
1993-94	Law of Property (Misc. Prov) Bill (HL)**	5.5.94 : 554 c1279
1994-95	Private International Law (Misc. Prov.) Bill (HL)	6.12.94 : 559 c848
1994-95	Family Homes and Domestic Violence Bill (HL)	23.2.95 : 561 c1272
1995-96	Arbitration Bill (HL)	18.1.96 : 568 c794

* 'Jellicoe procedure' ** Special Standing Committee.

**COMMITTEES OF THE WHOLE HOUSE OFF THE
FLOOR OF THE HOUSE*****

SESSION	BILL	COMMITTAL REF.
1994-95	Children (Scotland) Bill	9.5.95 : 564 c58
1995-96	Reserve Forces Bill (HL)	28.11.95 : 567 c556

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Research Paper 96/14

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