

2002 DENNING LECTURE

delivered by Lord Williams of Mostyn Q.C.

The Role of the House of Lords in legislative scrutiny – a process of evolution

AFTER the record attendance in 2001 for the lecture which Lord Williams was advertised to give but which he had to miss at the last minute, it was disappointing that he should have a relatively poor turnout in 2002. A Tube strike meant that only about two fifths of those who applied for tickets were able to attend. An edited version of the lecture is included in this report.

BACFI President Lord Slynn welcomed Lord Williams and Michele Parnell chaired the lecture which was held in Grays Inn Hall. Traditionally, the lecture begins with one or two “Denning anecdotes”. (“Are you going to write a book? Good Lord no – but on a pension a little extra comes in handy.”) Lord Williams then proceeded to de-bunk the two common House of Lords stereotypes:

- It has as much relevance to the public as a tableau in Madame Tussauds.

- It is “a faithful, arthritic old hound of little practical utility, waking periodically to scratch persistent fleas”

In fact, Lord Williams had experienced seriously high quality debate in the chamber – much of which (he cited the recent debate on Iraq) was never reported other than in the pages of Hansard. He proceeded to urge the case for a second chamber to revise, scrutinise and give second opinions on legislation “too important to be left entirely to the House of Commons”.

Lord Williams continued: “The Lords could and did make a government with an otherwise overwhelming majority pause, and sometimes abandon its course. The Lords could ensure decided policy objectives were faithfully and fairly translated into effective legislation. For example, the Anti Terrorism, Crime & Security Bill took two and a half days in the Commons and over eight days in the Lords.

Recent reforms included a new code of conduct, a substantial increase in state funding for the opposition and, in July 2002, a whole new raft of working practices. Such reforms

might be unsexy, but they were proving invaluable. Generally, the Lords spends 50% of its time discussing Bills, in comparison with the one third of parliamentary time devoted to Bills in the Commons. Most major Bill start life in the Commons but the real detail is addressed in the Lords.

The crucial point is that there is no mechanism to circumvent committee stages in the Lords – there is no “guillotine”. Members can look at legislation in greater detail, there is no selection of amendments which can be made late or in manuscript and must be discussed. Lords can amend Bills as late as the 3rd reading and can ensure they are put to the vote; subject to the informal conventions that reflect the

general recognition that the government is entitled to have its business (e.g. Salisbury Convention, 1945).

These and the Parliament Act can produce tensions. The House of Lords is increasingly the “business” chamber; in 1958 the average daily attendance was 140 – by 1998 it had topped 446 (admittedly for the debates on reform!).

Current 2002 figures average 398, sitting for 192 days.

Over the past decade a significant change in the way legislation is considered has developed: Grand Committees.

Grand Committees were proposed in 1994 by a group which reviewed the sittings of the House and was chaired by Lord Rippon of Hexham.

Lord Rippon’s Group noted that about a quarter of the House’s time was being spent in committees of the Whole House. His group recommended that significant savings of time could be achieved by taking the committee stage of bills, except the most important Government bills, in a Grand Committee off the floor of the House.

The Rippon Group made it clear that Grand Committees are not a device to help the Government get more legislation more



Stimulating: Lord Williams

quickly. Their aim is to improve the scrutiny and quality of legislation. Deferring votes until Report stage might help members concentrate on issues of importance.

There are no nominations to Grand Committees, all members of the House may attend and participate fully and the procedures are identical to those of a committee of the Whole House except that divisions do not take place. Grand Committees also have more flexible timetables and more consideration can be taken of the diaries of the main players when scheduling Grand Committees.

Grand Committees go some way to easing the legislative log jam that can occur under the House of Lords' procedures. They allow more time in the chamber to be used for debates and scrutiny at Report and Third Reading. The use of Grand Committees is something I support very much and is the cornerstone to the reform of working practices which I will be discussing today".

Lord Williams moved on to:

Reforms in the area of scrutiny of human rights legislation

Background Until January 2001, Parliament had no means of systematically monitoring the UK's compliance with human rights. The absence of parliamentary scrutiny on human rights grounds was particularly acute in relation to legislation.

The arrangements for raising human rights issues depended on members with special expertise being available at the right moment in either the House of Lords or the House of Commons, and having had the opportunity to consider the proposed measure; or on the work of interested non-governmental organisations in briefing members on human-rights points, and the willingness of members to take up the points.

The passage of the Human Rights Act 1998, coming into force on 2 October 2000, made more pressing the need for new processes to allow Parliament to protect human rights.

Although the Act carefully preserves the legislative supremacy of Parliament, the courts have a duty under section 3 of the Act to 'read and give effect' to all legislation, so far as possible, in a manner compatible with Convention rights, and superior courts may make a declaration of incompatibility under section 4 if it proves impossible to interpret primary legislation in a compatible manner.

Parliament, when legislating, therefore needs to be aware of the possible implications of Convention law for the way its legislation will be

implemented. Parliament remains free to decide what (if any) remedial action should be taken when primary legislation is found to be incompatible with a Convention right, whether by a court in the UK or by the European Court of Human Rights in Strasbourg. But this freedom imposes special responsibilities on Parliament to ensure that each House understands the human rights implications of the course which it contemplates and makes a properly informed decision.

Statement of Compatibility - To help Parliament, the Act requires the Government to examine the compatibility of its legislative proposals with Convention rights. Under section 19(1) of the Act, a Minister who introduces a Bill to either House must make a statement in writing either- that, in his or her opinion, the Bill is compatible with Convention rights, or that he or she cannot state that the Bill is compatible, but that the Government nevertheless wishes Parliament to consider it.

The statement of compatibility, which appears on the face of printed copies of the Bill, serves to focus Parliament's attention on the need to evaluate the Bill in the light of the UK's human rights obligations. Ministers have agreed to explain the reasons for their view in relation to any particular provision if asked for an explanation during the passage of the Bill.

A similar concession has been made in respect of statutory instruments subject to the affirmative resolution procedure, and private Bills.

In addition, since January 2002 the Explanatory Notes to Bills, published by the Government, contain an account of the Convention rights which the Government considers are engaged by particular provisions of Bills, with a brief account of the Government's view as to the compatibility of the provisions. Apart from this, however, each House must form its own view of the Bill in the light of an assessment of its human rights implications.

The Joint Committee on Human Rights: remit and membership. To assist them in monitoring human rights in the UK, the two Houses established a Joint Select Committee, which met for the first time on 31 January 2001.

The Committee's terms of reference, as eventually agreed by the two Houses, are very wide. They include-

(a) reporting on matters relating to human rights in the United Kingdom, excluding individual cases. This means that, although the passage of the Human Rights Act 1998 was the stimulus to the creation of the Committee, the

Continued on next page

From previous page

Committee's remit extends well beyond the Convention rights which have become part of national law under that Act. On the other hand, the exclusions from its remit mean that it has no case-load (unlike a human rights ombudsman or, perhaps, a human rights commission), and no power to consider human rights outside the UK (which fall within the remit of the House of Commons Select Committee on Foreign and Commonwealth Affairs); and

(b) a specific duty to scrutinise remedial orders made under section 10 of, and Schedule 2 to, the Human Rights Act 1998 (a form of subordinate legislation designed as a fast-track method of amending primary or subordinate legislation which has been held, by a UK court or the European Court of Human Rights, to be incompatible with a Convention right).

The Committee has the power to call for persons and papers (allowing it to insist on receiving evidence from Government Departments and Ministers, as well as other people and organisations). Like any Select Committee in Parliament, it is the ultimate arbiter of the meaning of its own terms of reference.

There are six members of the Committee from each House, who bring varied experience and expertise to their task. Some are lawyers, but not all the lawyers are human-rights experts. The non-lawyers include both career politicians and members who have worked in different areas of the public and private sectors. In its present form, at least, there is no Government majority on the Committee: there are six Labour members and six others. The Committee is chaired by Jean Corston MP, a Labour backbencher (who also chairs the PLP).

Mode of operation. The Committee quickly decided that it should make legislative scrutiny a major plank in its platform. After an experimental examination of five Bills in the 2000-01 session of Parliament, the Committee has examined every Bill (including PMBs and Private Bills) introduced to either House in the 2001-02 session.

If a Bill appears to raise a significant issue relating to human rights, the Committee's Chair writes to the Minister in charge of the Bill, asking very specific questions about the Minister's reasons for thinking that particular provisions are compatible with specified rights.

As well as establishing a dialogue between the Committee and the Minister or the Department responsible for a measure, the Committee has encouraged people and organisations outside

Parliament to make submissions to it, and has encouraged Ministers to respond to those concerns it has thought were well founded.

The Committee has interpreted its wide remit as allowing it to inquire about any human rights which people in the UK are entitled to assert against the State under international law, EC/EU law, or national law.

For example, as well as the Convention rights under the ECHR, it has pursued issues relating to rights under the International Covenant on Civil and Political Rights (ICCPR), the International Convention for the Elimination of all forms of Discrimination against Women (ICEDAW), the International Convention for the Elimination of all forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESC), the European Social Charter (ESC), the Convention on the Rights of the Child (CRC), the Convention on the Status of Refugees, and the EC Equal Treatment and Social Security Directives. Whenever it has done so, the Government has given full and reasoned responses to the Committees questions.

Objectives - In its legislative scrutiny work, the Committee has four objectives. First, it tries to increase the transparency of the reasoning supporting the proposed legislation. Secondly, it can stimulate the Department to give further consideration to matters which give rise to concern. Thirdly, involving civil society in its work strengthens the element of participatory (or at least consultative) democracy in the legislative process. Fourthly, the Committee can put pressure on Departments to respond to issues originally identified by other Members of both Houses, NGOs, and other persons and bodies.

Usefulness - The Committee's reports appear to be regarded as helpful in both Houses. They are regularly cited during debates on Bills, particularly in the House of Lords. The Second and Fifth Reports of 2001-02, both on the Anti-terrorism, Crime and Security Bill, seemed to be treated as worthwhile contributions to discussion of the Bill.

Peers sometimes ask the Committee to assist the House by examining, or re-examining, particular aspects of Bills: such requests have led the Committee to publish further reports on various measures, including the Employment Bill and the City of London (Ward Elections) Bill. The Committee hopes that in this way both Houses will be able to conduct more fully informed discussion of the human rights issues arising from Bills, without depending entirely on the Government or individual peers to provide it

with information and advice”.

Lord Williams then mentioned:

Reforms in the area of the scrutiny of secondary legislation

Another area where our working practices have changed is in the consideration of secondary legislation. Very little time is spent scrutinising secondary legislation on the floor of either House. This is despite the fact that secondary legislation is often as complex and detailed as any bill.

Evidence to the Royal Commission on House of Lords reform shows that the amount of secondary legislation has grown dramatically in the past couple of decades. Since 1980 the number of statutory instruments laid before Parliament has increased by more than a third”.

He next highlighted **The Delegated Powers and Regulatory Reform Committee** – “To ensure that the Executive did not attempt to delegate too much power away from Parliament a committee now known as the Delegated Power and Regulatory Reform Committee was established in 1992. This committee scrutinises bills as they pass through Parliament and reports whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of delegated power to an in inappropriate degree of parliamentary scrutiny. One particular type of clause that the Committee is very alert to is known as a ‘Henry VIII Clause’ which amends the statute itself by delegated legislation. If the Delegated Powers and Regulatory Reform Committee reports a bill for any inappropriately delegated power the Government will need a very robust reason to not amend the reported clauses as the House takes the Committee very seriously”.

His attention turned to the:

Joint Committee on Statutory Instruments. (JCSI)

All statutory instruments go to the Joint Committee on Statutory Instruments before they are can be considered on the floor of the House of Lords . This committee was set up in 1972 to undertake the technical scrutiny of statutory instruments since it was considered that the separate systems which had developed in each House had produced defects and anomalies in parliamentary control. The JCSI can report an instrument on any ground not impinging on the merits of or policy behind the instrument. They scrutinise the vires of the instruments, make sure it does not make an unusual or unexpected use of the powers conferred by the parent statute, check that it is not defectively drafted and that it has been laid correctly and in a timely manner.

Less than 1% of negative instruments laid before the House of Lords are scrutinised further having been passed by the JCSI. However if a Peer has a particular concern about a statutory instrument they can put down a ‘prayer to annul’ within 40 days of the instrument being laid.

The House of Lords can veto statutory instruments. This is an anomaly of the Parliament Acts which were passed when statutory instruments were much rarer”.

The exercise of veto by the House of Lords was an important issue and Lord Williams said: “Convention has been that the House does not exercise this veto. However as the House has got bolder in recent years this convention has started to slip. On 22 Feb 2000, the House defeated two pieces of secondary legislation: the Greater London Authority (Election Expenses) Order 2000, an affirmative instrument, and the GLA Elections Rules 2000, a negative instrument. The issue was the same in each case: free postage of candidates’ election material. This was the first time the House had ever voted down a negative instrument, and only the second time it had voted down an affirmative instrument, the first being in 1968. The Parliament Acts do not cover secondary legislation; the Lords cannot claim that they are merely asking the Commons to think again. The Government conceded the substantive point; interestingly, they did so not by amending the orders, which did not and could not cover free postage, but by amending the Representation of the People Bill which by lucky chance was before Parliament at the time.

The Wakeham report recommended this power of veto be removed from the House of Lords and this is something the Joint Committee on House of Lords reform will no doubt consider.

The Grand Committee is unique to the Lords. Any members can sit, put forward amendments or speak. Lord Williams hoped to see more use made of the committee; which sits outside the chamber and takes no votes.

Lord Williams outlined the current plans for further reform of the Lords:

- Realise the Lords’ long term ambition to ensure that ALL government bills are subjected to pre legislative scrutiny before they enter either chamber;
- Ensure Bills can be carried forward to another session: Lord Williams felt this was particularly important for “Christmas Tree” bills containing a wide variety of items, which were often confused and ambiguous in drafting;

Continued on next page

From previous page

- Provide more time for scrutiny of Statutory Instruments – these have increased by one third since 1980. Statutory Instruments are often controversial and the Wakeham Royal Commission recommended special machinery and a dedicated committee for sifting secondary legislation to identify those worthy of debate;

- Increase ministerial question times to four per week;

- Curb all night sessions – replace with normal rising between 7 and 8 pm, with no sittings after 10 pm. This should reduce the “London-centricity” of Parliament;

- Abolish the “ridiculous” July to October break. Lord Williams proposed September sittings for committees and special session for Law Commission Bills in September. These bills are not party political and do not currently receive the Parliamentary time they deserve.

Lord Williams gave some detail of the reforms:

Current reforms in the scrutiny of primary legislation

The first stage of House of Lords reform was achieved in 1999, and consisted of the removal from the House of all but 92 of the members present on a hereditary basis.

This in itself has affected the behaviour of the House in legislative scrutiny. Freed from the embarrassment of a hereditary majority, the House has, I believe, become more confident and assertive.

For example. On 20 Jan 2000 the House made a wrecking amendment to the Criminal Justice (Mode of Trial) Bill [HL]. The Government reintroduced the bill as a Commons bill, and on 28 Sept 2000 the Lords threw it out on Second Reading. I remember it well, since I was in charge of the bill as Attorney General. The bill did not implement a manifesto commitment, so there was no breach of the Salisbury convention. As you will know, the issues are still unresolved.

It is not unheard of for the Lords to kill a Government bill. There were three previous instances in the 1990s: the War Crimes Bill in 1990 and 1991, the European Parliamentary Elections Bill in 1998 (closed lists), and the Sexual Offences (Amendment) Bill in 1999 and 2000 (homosexual age of consent), all of which were eventually passed under the Parliament Act. So I cannot claim that the Mode of Trial Bill marked a clean break with the past. But it certainly shows that the post-99 House is no Government poodle.

The composition of the House obviously has an impact on how the House works but the less high profile procedural reforms are equally important in developing a professional chamber. I recently chaired a group of senior members of the House which considered ways to improve the working practices of the House. This report has recently been approved by the House and the reforms will begin to be implemented from the start of the next session for a trial period of two sessions.

Grand Committees - We recommend that Grand Committees be used for the kind of bills considered suitable by the Rippon Group; and that after second reading there should be a motion in the House to commit each bill to the appropriate committee, usually a Grand Committee or a Committee of the Whole House.

Although Rippon envisaged a significant increase in the number of bills going to Grand Committee, the Report precluded ‘important government bills’ from going to Grand Committee. We agree that these bills are better taken on the floor of the House where divisions are possible. ‘The most important Government bills’ are hard to define before you see them. We believe they include bills that contain very controversial policy issues or have constitutional implications. The committal at the end of Second Reading to whichever committee forum is deemed appropriate will remove the automatic bias towards committees of the Whole House which is inherent in the current system. Our Group anticipated this motion would be tabled after agreement with the Usual Channels and would therefore not be too controversial or surprising.

If the majority of Government bills do go to Grand Committee this will not only allow the House to rise earlier but will also free up time on the floor of the House for other business. This will free up time for more back-bench debates and more debates on select committee reports and on general topics in prime time on the floor of the House. Having time to debate such issues in prime time will allow more noble Lords to participate. It may also increase the coverage such debates get which is sometimes sadly lacking.

We have also recommended that Grand Committees may sit in September, whether or not the House is sitting. By having Grand Committees sitting in September we might be able to begin to shift the backlog of work on business such as Law Commission bills and Consolidation bills.

Law Commission Bills

One of the serious blemishes on

parliamentary activity is the cavalier treatment often given to Law Commission reports. They are generally of the highest quality and they frequently include draft bills, so a good deal of specialised drafting work has already been done.

Many such Bills are not politically controversial. They deal with pressing questions of technical law reform left unanswered for many years. I well understand the feeling of frustration this engenders.

Second Readings of Law reform Bills could be held before the Summer recess, with the September Grand Committee able to discuss and digest the Bill.

Lord Williams then listed twenty seven Law Commission law reform reports which are awaiting implementation. The Government accepts twelve of them wholly or in part.

Before concluding the Lecture, Lord Williams referred to:

Pre-legislative scrutiny of draft bills

He said: "This will afford new opportunities for scrutiny of actual statutory text (as opposed to White Papers etc) before the ink dries. The Law Society and other professional bodies have already shown themselves keen to take advantage."

Lord Williams in **conclusion** expressed the view that "evolution" was a useful word to

describe the process of change in the role of the House of Lords. Whilst things don't change rapidly, recent years have seen much change in the way the House conducts legislative scrutiny.

Lord Williams also looked ahead. Having outlined in detail the procedural reference he pointed out that the future composing powers and role of the Lords was still unknown. A joint committee had been set up to consider this. Whilst it is uncertain when the full report will be produced an initial report should appear in the near future.

After the formal lecture, there was a lively Question and Answer session. Two points arose. Lord Williams urged that membership of the Lords was now a full-time occupation, meriting proper equipment, resources and offices. Numbers were crucial – at least 350 were necessary for committee work but he agreed that 700 might be too many.

He felt it was essential to de-couple membership of the house from the system on honours – citing two thespian Lords (now deceased) who had never taken their seats.

Our thanks to Lord Williams for a stimulating evening. Our thanks also go to the Benchers of Gray's Inn for the use of the hall and to the staff for a seemingly endless succession of mouth-watering (and doubtless dreadfully fattening) eats with our wine. ■