

PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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not by a backbench MP but by a cabinet minister: the Leader of the House. But to make modernisation work the House needed a leader in the Richard Crossman mould,⁴⁰ and neither Anne Taylor nor Margaret Beckett fitted it.

Instead of coming via the Leader of the House and the Modernisation Committee, parliamentary leadership in the Commons came in the 1997–2001 Parliament from the rather unlikely source of the Liaison Committee. This normally quiet and sleepy committee is composed of all the chairs of the departmental and other⁴¹ select committees. In the 1987 and 1992 Parliaments it barely met and reported only cursorily at the end of each Parliament—in general terms and without great effect—on the difficulties encountered by select committees during the Parliament.⁴² However, during the 1997–2001 Parliament the Liaison Committee stirred. Its first and most important step was to publish in March 2000 a report entitled *Shifting the Balance: Select Committees and the Executive*.⁴³ This powerful, and for a select committee well-publicised, report sought to provide the impetus for a revision and strengthening of select committees. When the report was published it had been more than 20 years since the last reorganisation, and the Liaison Committee in 2000 aimed to achieve for parliamentary scrutiny in the first decade of the twenty-first century what the 1978 report of the Procedure Committee had achieved for the 1980s and 1990s.⁴⁴ For the Liaison Committee, the starting point was that:

the 1979 select committee system has been a success. We have no doubt of that. At a bargain price, it has provided independent scrutiny of government ... it has exposed mistaken and short-sighted policies and, from time to time, wrong-doing both in high places and low. It has been a source of unbiased information, rational debate, and constructive ideas. It has made the political process less remote, and more accessible to the citizen who is affected by that process—and who pays the bill. Its very existence has been a constant reminder to Ministers and officials, and many others in positions of power and influence, of the spotlight that may swing their way when least welcome.⁴⁵

However, despite the fact that the committee system had ‘shown the House of Commons at its best’ the committee acknowledged that the performance of select committees had ‘not been consistent’ and that their success had not been ‘unalloyed’.⁴⁶ The purpose of the committee’s report was to find ways of making parliamentary Bills. On these, see 2000–01 HC 906 and 1997–98 HC 543. Other matters on which the committee reported included: sittings on Thursdays; timing of votes; facilities for the media; voting methods; scrutiny of European business; and explanatory material for Bills. The rather more impressive work of the Modernisation Committee since the 2001 election is considered below.

⁴⁰ Crossman was Leader of the House in Harold Wilson’s reforming government of the 1960s. He was the minister responsible for steering the Parliamentary Commissioner Bill through the House in 1966. This was the measure which introduced the ombudsman into British constitutional practice. A gifted and committed constitutionalist, it was the same Richard Crossman who wrote the introduction (first published in 1963) to Bagehot’s *The English Constitution*.

⁴¹ Eg, Public Administration Committee and Public Accounts Committee.

⁴² See, eg, 1996–97 HC 323.

⁴³ 1999–2000 HC 300, 3 March 2000.

⁴⁴ See Select Committee on Procedure, *First Report*, 1977–78 HC 588.

⁴⁵ Liaison Committee, *Shifting the Balance*, above n 43, at para 4.

⁴⁶ *Ibid* at paras 5–6.

mentary scrutiny of the government more effective, by reinforcing the select committees.⁴⁷ The various recommendations contained in the report of the Liaison Committee can be analysed as falling into eight main categories, as follows.

Appointment and Nomination

The committee recommended that nomination should be taken out of the hands of the whips; that at the very beginning of each new Parliament, at the same time as the Chairman and Deputy Chairmen of Ways and Means are appointed, a Chairman and two Deputy Chairmen of Committees should be appointed, all of whom would be senior and respected backbench members of the House, who would invite names for appointment to select committees, the nominated membership of each committee being put before the House within two weeks; the committee further recommended changes to the way in which appointments are made to committees during Parliaments, when members of committees leave—the very high level of turnover, and delays in replacing members, caused considerable concern in the 1997–2001 Parliament.

Payment and Remuneration

The committee recommended that in order to make chairmanship of committees more attractive, and in order to provide for a career structure in the Commons to complement the ministerial career ladder, that such matters as paying chairmen of committees should be urgently considered by the Senior Salaries Review Body.

Debates and Questions on Reports

The committee suggested that the tendency to use the frequency of debate of select committee reports as a criterion of success was somewhat crude, and stated that while more parliamentary time could usefully be deployed in this way, such a reform would not be sufficient of itself:

what is needed is a new way of giving timely and effective exposure to reports. We propose that, once a week after Questions, there should be a period of half an hour devoted to a report—normally one published within the previous fortnight.⁴⁸

Timing and Quality of Government Replies

The committee noted that the rule was clear: namely that government departments should reply to select committee reports within two months; the committee

⁴⁷ A number of the ideas underpinning the committee's recommendations were drawn from the early experience of the Scottish Parliament, which has experimented valuably with committee mandate and structure in a number of ways.

⁴⁸ *Ibid* at para 40.

further noted that this deadline was very frequently missed; the committee further noted that the quality of government replies was 'patchy: some are exemplary but too many are superficial.'⁴⁹

Follow-up on Recommendations

The committee reported that some select committees were already in the habit of regularly following-up on their recommendations—the Agriculture and Defence Committees were cited as examples; the committee recommended that all select committees adopt this procedure; the committee further recommended that all select committees should draw up annual reports which should be submitted to the Liaison Committee so that the Liaison Committee too could follow-up on committees' recommendations.

Improving the Scrutiny of Draft Legislation

The publication of draft bills was an innovation of the 1997–2001 Parliament, with 12 being published in all; draft bills were scrutinised by select committees (not standing committees) and this was felt by the Liaison Committee to be a valuable use of select committee resources, although a number of improvements to the procedure were recommended by the committee, particularly as regards timetabling and notice.

Ensuring Greater Co-operation between Committees

Like the introduction of draft bills, the publication of joint committee reports (following joint inquiries) was a further innovation of the 1997–2001 Parliament. The leading example to date is the quadripartite inquiry into arms exports conducted by the Defence, Foreign Affairs, International Development, and Trade and Industry Committees. The Liaison Committee welcomed this innovation, although it stated that here again certain procedural improvements and clarifications were needed.

Staffing and Resources Issues

The committee noted that 'no-one could accuse select committees of being profligate in their staffing' and noted that the House employs 107 permanent staff who serve some 25 committees and sub-committees. As a way of helping select committees improve the quality of their financial scrutiny of government departments the Liaison Committee recommended that the Committee Office should establish a unit specialising in public expenditure. The committee further recommended that if select committees are to engage in more pre-legislative scrutiny the Committee Office should also establish a unit of staff with specialisation in that.

⁴⁹ *Ibid* at para 47.

This adds up to a comprehensive and intelligent package of reforms. Yet it was comprehensively and quite unintelligently rejected by the government.⁵⁰ The Liaison Committee stated that the government's reply was:

both disappointing and surprising. We found it disappointing because our proposals were modest. We did not suggest line-by-line scrutiny of the Estimates as a condition for their approval; we did not suggest any change in the powers of select committees: for example, to allow them to require papers from government departments or to summon Ministers—for all of which there are strong cases.⁵¹

The government rejected out of hand the committee's recommendations on reforming the way in which members of committees are nominated at the beginning of Parliament. It further rejected the committee's suggestion that prime Commons time (immediately after questions once every week) should be devoted to questions and/or short debates on a recently published committee report, the so-called 'select committee half hour'. On improving conditions for scrutiny of draft legislation the government was non-committal at best. On facilitating co-operation between committees the government was unhelpful, as it was on the committee's suggestions for improving the timing and quality of government replies to select committee reports. None of the government's positions persuaded the Liaison Committee, which subjected the government's reply to a forensic and devastating critique.⁵²

The report of the Liaison Committee was debated twice in the Commons, once on an adjournment debate in November 2000, and once on a substantive motion on an opposition day in February 2001.⁵³ But despite persistent parliamentary pressure the government stood firm. One year on from the publication of its first report the Liaison Committee published a further report, *Shifting the Balance: Unfinished Business*,⁵⁴ in which the committee revisited its core recommendations, and repeated them. Not all of the committee's recommendations required government action or approval, of course. Of the eight sets of recommendations outlined above, those relating to nomination and appointment, to payment and remuneration, to government replies, and to scrutiny of draft legislation would require government action. However, those relating to improving follow-up procedures, to co-operation between committees, and to staffing matters were recommendations for the attention of the House as a whole, and not principally for the government. In its *Unfinished Business* report, while the Liaison Committee remained disappointed by the response of the government, it was able to report substantive progress on many of its non-governmental recommendations. Committees had started to produce annual reports which the Liaison Committee could (and did) use as the basis of further scrutiny. One major advantage of this was that the Liaison Committee could identify 'best practice' and encourage all

⁵⁰ The government's reply to the committee was published on 18 May 2000 as Cm 4737.

⁵¹ Liaison Committee, *Independence or Control?* 1999–2000 HC 748, 25 July 2000, para 3

⁵² *Ibid.*

⁵³ See HC Deb, 9 November 2000, cols 473–540; and 12 February 2001, cols 80–128.

⁵⁴ 2000–01 HC 321, 15 March 2001.

the committees to adopt it. Another was that the committee could obtain a fuller picture of the contribution which select committees were making. From the annual reports which the Liaison Committee reviewed in March 2001 it could conclude, for example, that in two respects in which Parliament (and in particular the House of Commons) is usually regarded as being particularly weak in terms of scrutiny, considerable improvements had been made: first as regards scrutiny of treaties,⁵⁵ and secondly as regards scrutiny of EU matters.⁵⁶ Further, staffing in the Committee Office had improved, and in particular the Comptroller and Auditor General had authorised the secondment of staff from the National Audit Office (NAO) to the Committee Office to help select committees in matters of financial scrutiny. Finally, the Committee could report that in another development which was contributing to the growing reach and range of select committees' activity, a number of committees had conducted hearings into public appointments: this was true of the Treasury Committee (which took evidence from all the members of the Monetary Policy Committee); the Health Committee (who interviewed the chairman-designate of the National Institute for Clinical Excellence); the Transport Committee (who took evidence from the newly appointed chairman of the Strategic Rail Authority); and of the Health and Agriculture Committees (who jointly interviewed the chairman of the new Food Standards Agency); as well as others.⁵⁷

Hansard Society

In its endeavour to raise the profile of the Commons scrutiny function, and to persuade both Parliament and the government to take scrutiny seriously, the Liaison Committee played a leadership role, but it was not alone. The Hansard Society, the think-tank and pressure group which seeks to 'promote effective parliamentary democracy' appointed in the autumn of 1999 a working party to conduct an

⁵⁵ The Procedure Committee conducted a review of parliamentary scrutiny of treaties (see 1999–2000 HC 210) and had found that while select committees have frequently performed expertly in scrutinising treaties, there was one improvement which could be made. The Liaison Committee reported that the Government had accepted the recommendation of the Procedure Committee to the effect that if a select committee requests a debate before ratification of a treaty raising major political, military or diplomatic issues, the request would be acceded to.

⁵⁶ The Liaison Committee reported that 'there is increasing emphasis on European Union subjects: not only broad policy, but also specific proposals and documents. The Home Affairs Committee has stepped up its work on Justice and Home Affairs business in the EU; the International Development Committee has produced three reports on EU development policy; the Welsh Affairs Committee has examined European Structural Funds as they affect Wales; the Environmental Audit Committee reported on a greening agenda for the Helsinki summit; and the Health Committee looked at the proposed EC Directive on Tobacco Advertising. These are only a few examples; and for some committees, such as Foreign Affairs and Trade and Industry, the EU dimension is present in much of their work. We particularly welcome the co-operation between the European Scrutiny Committee and other committees in the examination of issues on the EU agenda. This relationship has been underlined by the new provision in Standing Order 143(11) under which the European Scrutiny Committee may seek an opinion on a European document from another committee before deciding whether to clear a document or to recommend a debate.' See 2000–01 HC 321, at paras 87–88.

⁵⁷ See *ibid* at para 93.

inquiry into and to report on ways in which Parliament's scrutiny functions could be improved. In the early 1990s the Hansard Society had commissioned a report on improving Parliament's legislative procedures. That report was widely read, respected and influential.⁵⁸ Now the Hansard Society sought a similarly weighty and authoritative report on scrutiny. In July 2001 it got one: the report was called *The Challenge for Parliament: Making Government Accountable*.⁵⁹ Building on the foundations laid by the Liaison Committee in 2000, this was a formidable report, well researched, thoughtful and well argued.

Unlike the Liaison Committee, the Hansard Society report did not focus exclusively on select committees. Rather, it sought to evaluate Parliament's strengths and limitations as regards scrutiny in the round. It considered both Houses—not only the Commons—and it discussed the chamber of the Commons as much as it considered committees. The report set out its many detailed recommendations as if based on seven overarching principles. Some of these principles are rather banal, but we should briefly set them out. They are: Parliament should be at the apex; Parliament must develop a culture of scrutiny; committees should play a more influential role within Parliament; the chamber should remain central to accountability; financial scrutiny should be central to accountability; the House of Lords should complement the Commons; and Parliament should communicate more effectively with the public.

This may all sound obvious enough. But the core idea of the report is rather more far-reaching than these principles might suggest. This core idea is that while Parliament cannot itself scrutinise everything that central government does, Parliament ought to do a great deal more than it does at present to consolidate and to review the variety of regulation and scrutiny to which the government is subjected. To some limited extent this happens already: both the parliamentary ombudsman and the National Audit Office are already relatively well 'plugged-in' to the parliamentary process. But most other external regulators are much more divorced from Parliament: this is true not only of the utility regulators (Ofel, Ofwat, and so on)⁶⁰ but also of such bodies as the Law Commission, the Civil Aviation Authority, the Electoral Commission, the Health and Safety Executive, the Office for Standards in Education (Ofsted), the Office of the Rail Regulator, the Financial Services Authority, the Food Standards Agency, the Press Complaints Commission, the Securities and Investment Board, and a whole host of ombudsmen covering such fields as banking, insurance services, pensions, legal services, and so on. The Hansard Society found that while the House of Commons currently keeps no central list of bodies which lay reports before the House, 'it is estimated that over 500 bodies present reports to Parliament, some on an annual basis, others less frequently. During the 1999–2000 session of Parliament 247 reports were

⁵⁸ See Hansard Society, *Making the Law: Report of the Hansard Society Commission on the Legislative Process* (London, Hansard Society, 1993).

⁵⁹ Hansard Society, *The Challenge for Parliament: Making Government Accountable* (London, Vacher Dod, 2001). For commentary, see D Oliver, 'The Challenge for Parliament' [2001] *Public Law* 666.

⁶⁰ See Peter Leyland, ch 7 below.

officially laid before MPs.⁶¹ Yet less than 14 per cent of select committee reports deal with any of this wealth of material.⁶²

The core recommendation of the report was that Parliament should place itself at the apex of this pyramid of accountability: it should systematically and rigorously draw on the investigations of outside regulators and commissions, thereby on the one hand providing a framework for their activities, so they feel less ad hoc than at present, and on the other hand also drawing on their expertise and resources to enable Parliament more effectively to perform its function of holding ministers to constitutional account.⁶³ This recommendation is pushing in exactly the right direction. Stronger parliamentary links with external regulators would be welcomed not only by select committees⁶⁴ but also by the regulators.⁶⁵ It would transform the culture of regulation in the United Kingdom: the external commissions and regulators would no longer be seen as alternatives to Parliament, but as complementary to it, or even as part of it. One of the strengths of this idea is that it builds on preexisting good practice. At its best the House of Commons already behaves in this way. This can be seen by examining the way in which the parliamentary ombudsman and the National Audit Office work with the Commons committees—not only their own committees (the Public Administration Committee and the Public Accounts Committee) but also with the departmental committees. A good recent example of this matrix working well together is the case of the Child Support Agency. Consider the following pattern:⁶⁶

- 1993 Child Support Agency established
- 1994 Social Security Select Committee publishes two reports (March and October) highlighting deficiencies of the CSA
- 1995 January: ombudsman lays first report on the CSA before Parliament
- 1995 January: Government publishes White Paper *Improving Child Support* and amending legislation which becomes Child Support Act 1995
- 1995 March: Select Committee on the PCA publishes report responding to ombudsman's concerns
- 1995 November: Public Accounts Committee publishes report on financing the CSA
- 1996 January: Social Security Select Committee publishes its third report on the CSA

⁶¹ Hansard Society report, above n 59, at para 3.14.

⁶² *Ibid.*

⁶³ To this end the Hansard Society report recommended that both Houses should maintain a central list of all those organisations obliged to report to Parliament. This list should be distributed to every committee, so that every departmental select committee is aware of the organisations which come under their jurisdiction. See *ibid* at para 3.24.

⁶⁴ See, eg, the efforts of the Education Committee to include the work of Ofsted in its oversight: see 1998–99 HC 52; and see *ibid* at para 1.27.

⁶⁵ See evidence of Sir Ian Byatt, Director General of Ofwat, and of Elizabeth France, Information Commissioner, cited *ibid* at paras 1.28–1.29.

⁶⁶ This table is drawn from the Hansard Society report, above n 59, at para 8.25.

- 1996 March: ombudsman lays second report before Parliament
- 1996 June: Social Security Select Committee publishes its fourth report on the CSA
- 1997 March: Public Accounts Committee publishes its second report on the finances of the CSA
- 1997 March: Social Security Select Committee publishes its fifth report on the CSA
- 1997 April: the CSA Independent Case Examiner is introduced to assess cases of maladministration
- 1997 July: Labour Government publishes Green Paper on CSA reform
- 1999 July: Government publishes White Paper on CSA reform which leads to new legislation introducing major changes

Here we see the departmental select committee producing five reports in three years, buttressed by two special reports from the ombudsman, one report from the ombudsman's committee, and two reports from the Public Accounts Committee (both of which were based on reports compiled by the NAO). The Social Security Select Committee took evidence from ministers, senior civil servants, CSA chief executives, pressure groups, and members of the public personally affected by the CSA. Both the Conservative and Labour governments responded—the amendatory legislation of 1995 was introduced in principal part because of parliamentary pressure and was shaped both by the evidence amassed by the committees and the ombudsman and by their recommendations.⁶⁷ The aim behind the Hansard Society report is to make this sort of experience the ordinary routine of Parliament, rather than the unusual exception. The other point which should be made here is that no one else could have done this. From no other source could such persistence of pressure have been forthcoming. No other institution (the courts included) could have achieved the extent of the changes which the Conservative and Labour governments were, in effect, forced to make.

In addition to this core idea, the Hansard Society report made a series of detailed recommendations covering a wide variety of parliamentary practices. We do not have space to consider them all here, but the key recommendations as regards committees, and as regards the Commons chamber, can briefly be listed. First, on committees, the report proposed that: every backbench MP should be expected to serve on a select committee; all but the largest government departments should have only one PPS (thereby increasing the number of non-governmental MPs); key posts on select committees should be paid; MPs who chair committees should receive a salary equivalent to that of a minister; select committees should be given a set of core duties, and 'to improve the coverage of issues, to utilise the work of the regulators and to give the committees a continuity to their work they should meet pre-agreed objectives over the course of a Parliament'⁶⁸ to be agreed with and

⁶⁷ See *ibid* at paras 8.22–8.33. See also C Harlow, 'Accountability, New Public Management, and the Problems of the Child Support Agency' (1999) 26 *Journal of Law and Society* 150.

⁶⁸ Hansard Society report, above n 59, at para 3.25.

monitored by the Liaison Committee; committees should use rapporteurs to gather evidence and produce background papers; committees should publish follow-up reports two or three years after reporting on an issue to assess the extent to which their recommendations have been implemented. On the Commons chamber, the report recommended that Parliament should have a non-ministerial steering committee responsible for the management of the parliamentary timetable, the effect of which would be to take this issue out of the government's hands. On the chamber the report stated that:

the chamber's role in contributing to the scrutiny and calling to account of government has three main components, namely authorising government action, debating issues of political significance and calling ministers to account for their actions through questions and debates. The chamber's role is distinct in that it provides a broader oversight role than that of the committees which can engage in more detailed investigation.⁶⁹

Modernisation

The story we have been telling is one of growing parliamentary dissatisfaction with the way in which the government is held to political account. We have seen how in the 1997–2001 Parliament the Liaison Committee took the lead in seeking to rejuvenate Parliament's committee structure. We have seen also how the government comprehensively and depressingly rejected the committee's suggestions for reform. We have seen how Parliament bit back in July 2001 when it defeated the government—the first defeat the Blair government had suffered on the floor of the House since coming to power in 1997—on the question of select committee membership. And finally, we have seen how in this endeavour Parliament has received a considerable boost from the authoritative and thoughtful report of the Hansard Society. So where are we now?

If all this left the ball in the government's court, the government have responded surprisingly positively since the summer of 2001. In the post-election reshuffle the Prime Minister handed the critical position of Leader of the House to Robin Cook, the former foreign secretary. Unlike his immediate predecessors, Mr Cook was, potentially, a Leader with both the political gravitas and the vision to become a reformer as influential as Richard Crossman.⁷⁰ After having been appointed, the new Leader of the House surrounded himself with advisers who seemed to share his commitment to parliamentary reform (including Meg Russell, formerly of the Constitution Unit, and Greg Power, who acted as secretary to the Hansard Society Commission which drew up the report discussed above, and who indeed drafted that report). Under Mr Cook, the first work undertaken by the Modernisation

⁶⁹ *Ibid* at para 4.4.

⁷⁰ In opposition Robin Cook was one of the Labour Party's most effective and proficient parliamentary performers. He established his credentials as a committed parliamentarian in leading the opposition on the parliamentary reception of the Scott Report on 'arms to Iraq' in early 1996. Mr Cook resigned from the government in March 2003 and was replaced as Leader of the House first by John Reid and subsequently by Peter Hain. Whether Mr Hain will continue in the Cook vein remains to be seen.

Committee concerned the future of select committees. The Committee reported on this issue in February 2002.⁷¹ The nature and tenor of its report and of the recommendations contained within it were much more closely in tune with the work of the Liaison Committee and the Hansard Society than might have been expected given the government's response to the Liaison Committee in 2000. The Modernisation Committee is a committee of the House of Commons, of course, and not of the government. But it is chaired by a cabinet minister and while its recommendations are not officially representative of government policy, it does seem implausible that the Leader of the House would allow the committee to veer too far away from that which would be acceptable to the government. The committee's key recommendations were as follows:

- on nomination and appointment, the committee recommended that at the start of each Parliament a Committee of Nomination should be set up under the Chairman of Ways and Means; the membership of this committee should be a matter for the Speaker and not subject to any party interest of lobbying and should be prescribed in the Standing Orders;⁷²
- on payment and remuneration, the Committee recommended that the chairs of the principal investigative select committee should be paid an additional salary;
- on select committees following-up on their recommendations, the Committee agreed with the Liaison Committee that committees should produce annual reports which should form the basis of further inquiry by the Liaison Committee;
- on staffing, the Committee made recommendations very similar to those from the Liaison Committee and from the Hansard Society.

In all these respects, it is clear that the Modernisation Committee moved substantially towards the position of the Liaison Committee. In some respects, indeed, the Modernisation Committee went further than the Liaison Committee. The Modernisation Committee recommended, for example, that a statement of core tasks should be adopted for each committee; that committees should experiment with rapporteurs; that there should be a two-term limit imposed on those who may chair committees; that the standard size of committees should be increased from 11 to 15; that those with poor attendance records should be swiftly replaced; and that the departmental select committees should be renamed 'scrutiny committees'.

⁷¹ Modernisation Committee, *Select Committees, 2001–02* HC 224.

⁷² It will be recalled that the Liaison Committee had recommended a committee of three to perform this task. This was criticised as being too small and the recommendation did not find support when the House debated the report. The Modernisation Committee recommended that the Committee of Nomination should consist of the Chairman of Ways and Means (who should not have a vote) and nine others: these nine should be the most senior backbencher on the government side; the most senior backbencher on the opposition benches; and seven members of the Chairman's Panel, chosen with broad regard to party balance, reflecting gender balance and based on length of service. Four of the seven would be from the government side (including at least one woman) and three from the opposition parties (also including at least one woman).

In March 2002 the Liaison Committee published a report responding to, and broadly welcoming, the recommendations of the Modernisation Committee.⁷³ It supported the Modernisation Committee's proposals with regard to nomination and membership of committees. It supported the thrust of the committee's proposals with regard to remuneration, although the Liaison Committee could not see the justification for limiting the additional salary only to those who chaired the 'principal' committees, as the Modernisation Committee had suggested. The recommendations of the Modernisation Committee as regards the drawing up of a statement of core tasks for committees; on the use of rapporteurs; and on swiftly replacing members of committees with poor attendance records were also approved. The Liaison Committee did not, however, approve of the recommended two-term limit for chairs of committees; nor of the increase of the standard size to 15; and nor of the renaming of select committees as scrutiny committees.

The Modernisation Committee's proposals were debated and voted on in the House of Commons on 14 May 2002. Unhappily, not all of the proposals met with support. Most notably, plans for the new Committee of Nomination were rejected (albeit narrowly: the vote was 209 to 195), with the result that membership of select committees will continue to be a matter for the whips. The House supported the bulk of the remainder of the Committee's proposals, however, and voted (by 197 to 175) in support of the proposal to pay the chairs of select committees a higher salary—this matter has now been referred to the Senior Salaries Review Body. The House also agreed that no member would be able to serve as chair of the same committee for more than two Parliaments (or eight years).

There has been one further reform. On 26 April 2002 the Prime Minister announced that he would appear every six months before the Liaison Committee to answer questions concerning the government's policies and performance. This will be the first time any Prime Minister has appeared before and given evidence to a select committee, and represents another modest step in the direction of buttressing Parliament's ability to hold the executive to account.

FUTURE DEVELOPMENTS: A PROPOSAL

What are we to make of this range of reform measures, both proposed and adopted? On the positive side, it is clear that there is considerable political and parliamentary realisation that Parliament could do better. While in the past quarter-century there has been significant improvement in the way Parliament holds the executive to account (most notably, but not only, due to the establishment in 1979 of the system of departmental select committees), there appears to be both room for, and more importantly the political will to find, ways of making further improvements. There has in recent years been a healthy and widespread political conversation about taking parliamentary scrutiny forward, and

⁷³ Liaison Committee, *Select Committees: Modernisation Proposals*, 2001–2002 HC 692.

this is hugely to be welcomed. On the more cautious side, however, it is equally clear that there remain powerful forces for conservatism (to use one of the Prime Minister's favourite phrases). Nowhere is this more apparent than in the government itself. For all its reformist and modernising zeal, this is a government that has very little appetite to subject itself to greater parliamentary accountability, the Prime Minister's appearances before the Liaison Committee notwithstanding. It can hardly be blamed for this: only the spectacularly naïve would expect it to be different.

The combined efforts of the Liaison Committee, the Hansard Society and (belatedly) of the Modernisation Committee have produced a promising range of reform measures, a good number of which will translate relatively easily and swiftly into rejuvenated parliamentary practice. Even if the question of membership of committees is to remain in the hands of the whips—which is a shame—the profile, importance and political influence of the select committees of the House of Commons has been heightened by the events and reports described in this chapter. The reforms we have outlined are to be taken seriously, and should be welcomed.

That said, however, there is something dispiritingly cautious about even the most progressive of these measures. Welcome as they are, these are modest reforms. Even in the report of the Hansard Society there is little in the way of deep thinking. Revamping committees is all well and good, but it has something about it of the famous image of rearranging the deck-chairs on the *Titanic*. Perhaps the analogy is inapt: Parliament may be unfashionable, but it is not about to sink. Nonetheless, we do have to ask the question of whether reducing the power of the whips, increasing the authority of committee chairs, integrating the plethora of extra-parliamentary scrutiny into a parliamentary framework, and beefing up the resources that committees may employ, is really all that we ought to be doing. Certainly, we can see that these are moves in the right direction, but perhaps they represent nothing more than a holding position. This is not the great leap forward: what we have here is a programme of consolidating measures, designed to keep the parliamentary show afloat while we look elsewhere for a more profound inspiration.

For all their many qualities, the various reports and sets of recommendations considered in this chapter share two major omissions: nowhere is there an analysis of how Parliament's scrutiny functions should be accommodated alongside its legislative functions, and nowhere is there an analysis of how the two Houses of Parliament should operate together. This latter omission is particularly surprising given the recent reforms to the composition of the House of Lords provided for under the terms of the House of Lords Act 1999 and the ongoing debate about the next stage of House of Lords reform. Indeed, all of the reform proposals we have discussed rest on two assumptions: that Parliament will continue to be composed of two Houses, and that Parliament will continue to serve as the national legislature, as well as being a vehicle for executive scrutiny. Both of these assumptions might usefully be challenged. Let us start with the latter issue.

It is largely a myth that Parliament is a legislator. It does not make law. Almost all legislation is made within and by the executive of the day.⁷⁴ This is true of primary legislation just as much as it is for secondary legislation. Of course, Parliament is and remains the organ through which the executive must give its legislative proposals the force of law. But the reality is that Parliament plays an instrumental role only—not a sovereign role at all. Parliament retains the theoretical right not to enact into law the measures which the government of the day place before it, but this is a right which is exceptionally rarely exercised. It was exercised only once during the eleven years of Mrs Thatcher's premiership, and has yet to be exercised at all under Mr Blair. Parliament's legislative role is in practice one of scrutiny. Through a variety of means, ranging from the second reading debate on the principles underpinning the measure to the line by line scrutiny of each clause in standing committee, Parliament scrutinises the government's legislative proposals and policies. Sometimes the government will be forced to accept an amendment, and many times the government will itself suggest amendments (sometimes at Parliament's suggestion, often times not), but on the whole all governments—even John Major's governments⁷⁵—manage relatively easily to get the vast bulk of their proposals safely through Parliament.

This being the case, why do we persist with the nineteenth century perception that the purpose of Parliament is to make the law? The legislative purpose of Parliament is not to make the law, but is rather to scrutinise the government's legislative proposals. The critical word here is scrutinise. The whole of this chapter has been concerned with issues of parliamentary scrutiny of government. For over a century constitutional commentators have seen Parliament's legislative function as being distinct from (and more important than) its scrutiny function. The argument here, however, suggests that this may be a false dichotomy. A better view might be that Parliament's legislative function is not different from its scrutiny function, but should rather be conceived as being an aspect of it.

This is a reconceptualisation that sits surprisingly comfortably with recent developments in legislative parliamentary practice. As is well known, the government has started to publish some of its Bills in draft, to enable greater pre-legislative scrutiny than was previously possible. Such scrutiny is carried out by select committees—not by standing committees. If pre-legislative scrutiny can be so carried

⁷⁴ Occasionally Parliament will pass a Private Member's Bill, that is, a Bill sponsored not by the executive but by a non-ministerial Member of Parliament. However, executive control of the parliamentary timetable is such that it is practically impossible for such a measure to be passed without the government's active support. A number of Private Member's Bills are in fact measures that the government would itself have sponsored but for lack of parliamentary time: in other words, some Private Member's Bill are Private Member's Bills in name only and are really government Bills passed in Private Members' time.

⁷⁵ After the 1992 election the Conservatives had a relatively small majority in the House of Commons. The smaller the government's majority, the more difficult it will be for the government to push its legislation through the Commons. But even John Major's government had few problems on this front except in the context of the European Union. The number of eurosceptic Conservative MPs was greater than the government's Commons majority, thereby giving the eurosceptics a considerable degree of leverage: see R Rawlings, 'Legal Politics: The United Kingdom and Ratification of the Treaty on European Union' [1994] *Public Law* 254 (Part 1) and 367 (Part 2).

out, why not also legislative scrutiny? This is not a theoretical question. Select committees, including departmental select committees, are beginning to play a much more visible role in legislative scrutiny. The Anti-terrorism, Crime and Security Act 2001 provides an excellent example. This measure was the subject of no fewer than five reports from select committees during the course of its accelerated passage through Parliament in November–December 2001.⁷⁶

This is what is meant by the suggestion (which now looks a little less radical than it might at first sight have seemed, perhaps) that we should abandon the notion that Parliament is a legislator, and conceive of it instead as a scrutineer. There are three aspects to its scrutiny, two of which have been considered here. The first is administrative scrutiny, the traditional function of the departmental select committee. The second is legislative scrutiny. The third, which we have not had time to consider in any detail in this chapter, is financial scrutiny, an exceptionally important yet still under-researched area the lead role in which is played by the Public Accounts Committee, with considerable and expert support being offered by the National Audit Office.⁷⁷

To what extent is this tripartite scrutiny function capable of being carried out by the House of Commons alone? If the functions of Parliament are to be reconceived along the lines suggested above, does the Westminster Parliament need to continue to operate on a bicameral model? It may be that it does: it may be that Commons scrutiny could be organised (much as it now is) along departmental lines, with House of Lords committees organised along more cross-cutting lines. Thus, there is in the House of Lords a committee on science and technology, a committee on the European Union, and a new committee on the constitution, for example. It may be, however, that the House of Lords has now passed its use-by date and that its abolition would force the Commons to take itself more seriously: without the Lords back-up, the Commons would have to take more responsibility for itself. No particular position on these issues is advocated here, save that these are ripe questions, and they should be under more serious consideration both within Parliament and beyond than is currently the case. Despite the recent, modest, reforms to the composition of the House of Lords, and despite the Royal Commission on further reform that reported in 2000,⁷⁸ there has been very little critical analysis within Parliament of the future of the functions and powers of the House of Lords.⁷⁹

⁷⁶ The Joint Committee on Human Rights published two reports on the Bill, and the Select Committee on Home Affairs, the Select Committee on Defence, and the House of Lords Select Committee on Delegated Powers each published one report on the Bill: for details and commentary, see A Tomkins, 'Legislating against Terror: The Anti-terrorism, Crime and Security Act 2001' [2002] *Public Law* 205.

⁷⁷ A number of changes have recently been proposed and adopted affecting the area of parliamentary financial scrutiny: see Procedure Committee, *Resource Accounting and Budgeting*, 1997–98 HC 438 and Procedure Committee, *Procedure for Debate on the Government's Expenditure Plans*, 1998–99 HC 295. For commentary, see K Hollingsworth and F White, 'Public Finance Reform: the Government Resources and Accounts Act 2000' [2001] *Public Law* 50.

⁷⁸ *Royal Commission on the Reform of the House of Lords* (Cm 4534, January 2000).

⁷⁹ It has been the House of Commons that has traditionally taken the lead in matters of scrutiny. This is particularly the case in the context of financial scrutiny. There are signs, however, that the House of Lords has very recently started more seriously to consider questions of its role as a scrutineer of government: see for example the *Report by the Group Appointed to Consider how the Working Practices of the*

Of course, the continuation of Westminster as a bicameral Parliament is not the only institutional issue brought into question. The relationship in each House between committee work and the floor, or chamber, is a critical issue. It may be that Parliament needs to become much more a Parliament of committees, along the lines perhaps of the European Parliament, than it has hitherto been prepared to accept. It may be that it should be rather smaller. In a unicameral Commons of 500 members, 125 could be government ministers, leaving 375 non-governmental members to be divided into (say) 25 scrutiny committees of 15 members each. Commons time could be very differently organised. Currently about half its time is spent on legislation. Perhaps a better balance would be to spend 50 per cent of time on departmental and administrative scrutiny, 25 per cent of time on financial scrutiny, and 25 per cent of time on legislative or policy scrutiny? These are just some of the issues that would be under consideration if we were serious about revitalising Parliament.

As things stand, however, there is a sense that Parliament has become confused about what it really is, and what it is really for. At present it legislates only indirectly, yet neither does it focus sufficient energies on scrutinising the government (although as we have seen its record here is not as miserable as many would have us believe). However, it is clear that improvements are needed. Equally clearly they are attainable. There is the political will, and there are the parliamentary means. By sharpening Parliament's 'mission statement', perhaps it will perform its key tasks better. One reason why it sometimes performs badly now is that it is unsure of itself, caught between the two stools of legislator and scrutineer. By reconceiving of it so that the legislative function becomes part of the scrutiny function, perhaps a way can be found for Parliament to perform its scrutiny functions that much more effectively. Otherwise, what is the point in Parliament? If we are not prepared to take Parliament sincerely, why not simply abandon it? We could simply elect our government every four or five years, subject it to the ad hoc, sporadic and peripheral scrutiny of ombudsman, auditor, regulator and law court, and make do.