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Legislation – the Whitehall stage

1. The preparation of legislation

The dominant form of law-making is legislation in that legislation is superior to everything other than European Union law (on which see pp. 423–40 below).

In an average session Parliament produces something between 50 and 80 statutes. The number of statutes per session has not changed greatly but the length of statutes has been growing considerably in recent years as may be seen from the table below:

Volume of all Public General Acts, 1901–1991[1]

Year	No. of Acts	Pages	No. of Sections[2] and Schedules
1901	40	247	400
1911	58	584	701
1921	67	569	783
1931	34	375	440
1941	48	448	533
1951	66	675	803
1961	65	1048	1087
1971	81	2107	1963
1981	72	2276	2026
1991	69	2222[3]	1985

In 2003 there were 44 statutes amounting to 2,868 pages.

1 Hansard Society, *Making the Law* (1992), p. 11. The report was the work of a 'Commission' appointed by the Society. Its prestigious membership included a former Permanent Secretary to the Home Office, a former First Parliamentary Counsel, a former Director-General of the Royal Institute of Public Administration, a former Clerk of Committees of the House of Commons, the Director of Legal Affairs of the Consumers' Association, the General Secretary of the Association of First Division Civil Servants and a sitting Law Lord. The chairman was Lord Rippon. For a review of the Report see 14 *Statute Law Review*, 1992, pp. 75–83.

2 The number of sections and schedules do not tell the whole story as they can be of greatly differing importance and length. Also the table takes no account of the extent to which provision is made for delegated legislation.

3 Printed on A4 paper which was larger than the size previously used, so requiring fewer pages.

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Legislation takes the form either of Public or Private Bills. Most Acts are Public General Acts which affect the whole public. Private Acts (see further p. 57 below) are for the particular benefit of some person or body of persons such as an individual or company, or local inhabitants. (They must not be confused with Private Members' Bills – for which see p. 60 below.) Private Acts sometimes deal with the affairs of local authorities and are then called Local Acts. To confuse matters, Local Acts are sometimes the result of Public Bills but any Public Bill which affects a particular private interest in a manner different from that of other similar private interests is technically called a Hybrid Bill (see further p. 60 below). The significance of the difference between Public Bills, Private Bills and Hybrid Bills lies in the parliamentary procedure adopted in each case. This book concerns itself primarily with Public Bills.

In addition to Acts of Parliament there are also very large numbers of statutory instruments (see pp. 108–26 below). In the early years of this century the number of statutory instruments was in the hundreds; since the Second World War it has been in the thousands, and again the number of pages has been increasing greatly. Thus in 1951 there were 2,335 statutory instruments running to 3,523 pages. In 2001 there were 4,150 S.I.s running to 10,756 pages.

(a) The sources of legislation

The belief that most government bills derive from its manifesto commitments is mistaken. Research established, for instance, that only 8 per cent of the Conservative government's bills in the period from 1970 to 1974 came from election commitments and that in the 1974–79 Labour government the proportion was only a little higher at 13 per cent.[4] The great majority of bills originated within government departments, with the remainder being mainly responses to particular and unexpected events such as the Prevention of Terrorism (Temporary Provisions) Act 1974 in response to the Birmingham IRA bombings, or the Drought Act 1976.

A surprising number of bills derive from the recommendations of independent advisory commissions or committees. Some of these are ad hoc – such as Royal Commissions, Departmental and Inter-Departmental Committees. Others are standing bodies. The most important standing law reform body by far is the Law Commission.[5]

Analysis has shown that as many as a quarter to a third of all statutes that could have been preceded by the report of an independent advisory committee or commission were the result of such a report. Dr Helen Beynon studied all the Public Bills which received the Royal Assent between 1951 and 1975 (a total of 1,712 statutes).

4 Richard Rose, *Do Parties Make a Difference?* (2nd edn., 1984), pp. 72–73. Moreover, as will be seen below (p. 6), manifesto commitments are often themselves based on ongoing Whitehall processes. See also R. I. Hofferbert and I. Budge, 'The party mandate and the Westminster model: election programmes and government spending in Britain 1948–85', *British Journal of Political Science*, 1992, pp. 151–82.

5 On law reform bodies, and the Law Commission in particular, see further Chapter 8 below.

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She excluded from the study various categories of legislation: (1) legislation which did not change the law, such as consolidation or statute law revision legislation, or re-enactment legislation; (2) emergency legislation rushed through to deal with some unexpected crisis; (3) certain financial legislation such as the Appropriation Acts which authorise the bulk of annual expenditure and Consolidated Fund Acts authorising interim and supplementary expenditure; (4) legislation concerning the Civil List which pays for the monarchy; and (5) statutes to give effect to treaties and other international commitments. When all of these were eliminated, there remained 1,335. In no less than 380 cases (28 per cent) the statute was preceded by a report of an independent advisory committee or commission.[6]

Very little has been written about the process of preparing legislation from Whitehall's perspective. One rare instance, however, was a paper by a senior Home Office official speaking at a Cambridge conference on penal policy-making in December 1976. (In those days, unlike the present era, penal policy was not a hot party political issue.)

Michael Moriarty, 'The Policy-Making Process: How It Is Seen from the Home Office', in *Penal Policy-Making in England* Nigel Walker (ed.), Cropwood Conference, Institute of Criminology, Cambridge (1977), pp. 132–39.

> In general it is unusual for an incoming government to bring with it anything approaching a detailed blueprint of penal policy. . . .
>
> The absence, usually, of a strong and detailed Party programme on penal matters does not mean that an incoming Home Secretary (or other Home Office Minister) may not have its own well-formed objectives and priorities. A recent example is the Ministerial commitment, since March 1974, to improving bail procedures and developing the parole system. But time and again the Ministerial contribution to penal policy-making, at least as it appears to the observer and participant within the Home Office, lies not in the Minister's bringing in his own fresh policy ideas, but in his operating creatively and with political drive upon ideas, proposals, reports etc, that are, so to speak, already to hand, often within the department but sometimes in the surrounding world of penal thought.

Sources of the Criminal Justice Act 1972

The year 1970 was notable for a sharp rise in the prison population to what was then a peak of 40,000,[7] which gave rise to intensified policy discussions within the Department of ways of developing alternative measures. The Report of the Advisory Council on the Penal System (ACPS) on Non-Custodial Measures (the 'Wootton Report')[8] contained a number of relevant proposals, notably a proposal that offenders should carry out community service. The Department instituted an urgent study of the practicalities by a working group with substantial probation service representation. Two other working

6 H. Beynon, *Independent Advice on Legislation*, unpublished PhD thesis, Oxford University (1982), Table 11, p. 21.

7 In April 2004 it was 75,200! (ed.).

8 *Non-custodial and Semi-custodial Penalties* (1970).

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groups were set up at the same time: one on use of probation resources, the other on residential accommodation for offenders. The main production of the first of these was a proposal to establish experimentally some day training centres, on a model originating in the United States, interest in which had been stimulated by the Howard League for Penal Reform among others. The other group developed ideas for running probation hostels: a substantial adult hostel building programme was established in 1971, following a small-scale experiment promoted by the Department in extending this method of treatment to those over 21. Detailed work on the proposals in the ACPS report on Reparation – the 'Widgery Report'[9] – was also going on.

Thus the Criminal Justice Bill of 1971/2 could be said to be born from a fusion of a Ministerial desire to be active in the criminal justice field, along lines which were identified but not too rigidly pre-determined by them, with a supply of departmental and other raw material that was lying ready or in process of being worked up. Much of the Widgery Report was in tune with a political objective that offenders should recompense their victims. From the Wootton Report, the community service proposal appealed partly for its reparatory element, partly because it was a non-custodial penal measure (Ministers were already well aware of the need to try to bring down the prison population) that would appeal to those who were suspicious of 'softness'. The form in which the community service proposals appeared in the Bill owed something to the specific intention of Ministers that the new measure should be seen as a credible alternative to custodial sentences.

In fact recommendations from the two ACPS reports made up much of the 'core' of the Bill – Part I entitled 'Powers for Dealing with Offenders'. In the form in which it received Royal Assent, Part I comprised 24 sections (and one linked Schedule) which related to the main sources of the Bill roughly as follows:

Section	Subject	Origin
1–6	Compensation	Widgery Report
7–10	Criminal Bankruptcy	– do –
11–14	Suspended prison sentences etc.	Ministerial/ Departmental (s. 12 from Wootton Report)
15–19	Community Service	Wootton Report
20	Day Training Centres	Departmental
21	Breach of Probation	Departmental
22	Deferment of Sentence	Wootton Report
23	Forfeiture of Property	– do –
24	'Criminal' driving disqualification	– do –

Not all the sections listed above were in the original 'core': the origin of some of the later starters is illustrative of how penal policy is formed. What became section 14,

9 *Reparation by the Offender* (1971).

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extending the principle of the First Offenders Act to a wider range of adult offenders, was devised during the preparatory stage as a counter-weight to the ending of mandatory suspension of sentence. Other provisions owed their origin, or final form, to the Parliamentary proceedings on the Bill.

However, the bulk of the Bill was devoted to provisions aptly described as Miscellaneous and Administrative Provisions (sections 28 to 62). Some of these supported Part 1 provisions (e.g. administrative aspects of community service) or were otherwise related to its main themes (e.g. probation hostel provision; legal aid before first prison sentence). Others covered a wide range of topics of varying importance. In source they were hardly less diverse. At least one – increase in penalties for firearms offences – was a 'core provision'; some came from organisations close to the Home Office such as the Justices' Clerks. The provision giving 'cover' for the police to take drunks to a detoxification centre (section 34) had its origin in the report of the Working Party on Habitual Drunken Offenders.[10] Others came from the famous pigeon holes of Whitehall – and these in turn can be sub-divided into, on the one hand, tidying up and, on the other, more substantial though minor changes – for example simplification of parole procedure (section 35).

. . . In 1970–1 much detailed work was done on community service and criminal bankruptcy in particular, but to a lesser degree on the other major Bill proposals in working parties by the Home Office which brought into consultation others whose advice and co-operation were needed. The community service working group included representatives of the probation service, magistracy and voluntary service movement; the criminal bankruptcy group included lawyers of both the Home Office and Lord Chancellor's Office and officials from the Bankruptcy Inspectorate of the (then) Board of Trade.

Beyond this area of activity there was (to move on to a second point) a wider and continuing process of consultation, on particular proposals and on ways of giving effect to them, with many official and non-official interests. A number of Bill proposals affected other Government departments – for instance, Transport and Health and Social Security – in addition to those already mentioned. On any penal policy it is necessary to keep the Scottish and Northern Ireland Offices in close touch. The Director of Public Prosecutions was closely involved in the criminal bankruptcy scheme and other Bill matters, at least one of which owed much to his suggestion. Consultation also went on with the police and probation services (the prison service was not greatly affected by the Bill, except as a hopeful beneficiary), the judiciary, magistrates and justices' clerks. The various representative organisations of course play an active part in the consultation process; and the burden on them can be a heavy one, especially as the pace quickens. The task of keeping the consultation process on the move while doing all the other preparatory work also makes considerable demands on the small team of officials working on a Bill.

In a recent study, Professor Edward Page of the London School of Economics, examined the role of civil servants in the legislative process, a subject on which

10 HMSO, 1971.

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there has hitherto been a signal dearth of knowledge and writing.[11] The study was an investigation, through interviews with civil servants, of four bills that became Acts in 2002: The Employment Bill ('Employment'), the Adoption and Children Bill ('Adoption'); the Proceeds of Crime Bill ('Crime'); and the Land Registration Bill ('Land').

In each case there was a manifesto pledge covering significant portions of the bill but Page says that in each case the manifesto commitment 'resulted to a great or lesser degree from the ongoing Whitehall process' (p. 656). In two of the four cases – the Crime and Land Bills – civil servants who served on the eventual bill team played a pivotal role in placing items on the political agenda and seeking to make sure that the government committed itself to legislation. With land registration, the subject had been under discussion since the 1960s but it had been a particular individual, Charles Harpum, who became a Law Commissioner in 1994 that caused a viable proposal for major reform to emerge through collaboration between the Law Commission and the Land Registry. Two members of the eventual departmental bill team were involved in the Law Commission/Land Registry working party. In the case of the Crime Bill, 'the activism of officials created proposals for change which the government later accepted' (p. 657). Three of the Home Office officials who were on the 1998 Working Group on Confiscation, on whose Third Report the legislation was based, were members of the later bill team, including the head of the team. In 2000 the Performance and Innovation Unit (PIU) in 'Number 10' produced a report 'Recovering the Proceeds of Crime' which helped to get political attention for the issue. Two Home Office officials who had worked on the Home Office Working Group and later on the bill team were also members of the PIU team.

The Employment Bill, dealing with a variety of topics, Page says, originated above all in units within the relevant departments. The Adoption Bill arose more closely from a Prime-Ministerial initiative. Tony Blair personally committed himself to reform the adoption system, partly at least, as he later said, as a result of his own experience – his father was fostered. A report in 2000, again, from Number 10's PIU, Page says, 'served the major function of reviving further political interest in adoption reform'.[12]

Summarising, Page states:

> On the basis of the experience of these four bills, civil servants routinely play a major role in the development of the policy behind legislation, *even helping to ensure the legislation reaches the party election manifesto*. (p. 660, emphasis supplied)

11 'The civil servant as legislator: law making in British Administration', 81 *Public Administration*, 2003, pp. 651–79.

12 Later the Prime Minister, responding to a highly publicised case of inter-country adoption, committed the government to 'introduce legislation on it this session' (Commons, *Hansard*, 17 January 2001) – which led to a 'flurry in Whitehall among officials who did not expect adoption legislation until after the election and who were still consulting on proposals in a white paper published in December' (Page, p. 659).

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(b) The role of the civil servants – the bill team

In his study (above), Professor Page distinguished three distinct tasks involved in putting a bill onto the statute book – deciding the policy; producing the clauses of the bill; and handling the parliamentary process. Civil servants are actively involved in all three stages.

The department responsible for the legislation first sets up a 'bill team'. The size of the bill team depends on the nature of the case. In Page's study it varied from four to eleven. The variation in size depended not only on the size and scope of the bill but also on whether it was a *policy* bill team or a *handling* bill team. A policy team is one in which all three tasks involved in producing legislation are carried out by members of the team. A handling team is one that concentrates on stewarding the legislation through its parliamentary stages, with policy being handled by 'policy lead' civil servants who are not formally in the team. Working closely with each bill team, full-time or part-time, is one or more departmental lawyer, acting as legal adviser.

The lead time from the setting up of the bill team to introduction of the bill into parliament varies greatly. In Page's study, in the case of two of the bills it was only three months, in one it was ten months and in the fourth it was eleven months.

The government's legislative programme for the coming parliamentary session is controlled by a Cabinet sub-committee. Previously this was known as the Future Legislation Committee. Currently it is known as the Legislative Programme Committee. (See further p. 11 below.) By the time that this Cabinet sub-committee has approved the project for inclusion in the legislative programme, most of the policy will already have been developed – whether by the bill team, or by policy leads outside the bill team, or by other agencies, for instance, where the bill has been produced by the Law Commission. Sometimes clearance for going ahead with a bill is required not only from the Legislative Programme Committee but from the Cabinet's policy sub-committee on that general topic, if there is one.

The bill will eventually be drafted by Parliamentary Counsel, specialist lawyers who draft all government bills (see p. 14 below). They work from Instructions prepared by the department and generally drafted by departmental lawyers. The job of the bill team therefore, together with the lawyers, is to work out the detail for the Instructions to Parliamentary Counsel.

The bill team is also responsible for preparing the Explanatory Notes that accompany both the bill and the Act. Technically, Explanatory Notes are published by the House authorities and it is open to them to refuse to publish them. The Cabinet Office *Guide to Legislative Procedure* says that the House authorities 'have made it clear that they will do so if the Notes attempt to "sell" the Bill, that is go beyond a neutral account of the Bill and into promoting it'.[13] The Guide also says that unlike the old 'Notes on Clauses' the point of the Explanatory Notes is to provide

13 www.cabinet-office.gov.uk, September 2003, para. 9.3. For full guidance on Explanatory Notes see Appendix B to the *Guide*.

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additional information not to duplicate the legislation or repeat or paraphrase the words in a clause. The Commentary section in the Notes should provide factual background, cross-references to other relevant legislation, examples of how the bill would work in practice.

The Cabinet Office has prepared a 'Bill Manager's toolkit' – www.cabinet-office.gov.uk.

(c) The consultative process

The government department with responsibility for the legislative project will need to decide how much, if at all, to consult during the gestation process leading to the introduction of the bill in Parliament. Obviously, if the proposed legislation impinges on the responsibilities of other government departments or govermental agencies they will have to be consulted. But there is also the question whether and, if so, to what extent persons or bodies outside the governmental machine should be consulted.

The traditional Whitehall view was that outside persons and bodies should not normally be consulted at this stage – that the time for consultation is later when the bill has been introduced in Parliament. The effect of this is that consultation only starts when it is generally too late to influence the basic shape of the legislation and all that can be achieved is adjustment at the margins. But in recent years earlier consultation has become more common.

In its wide-ranging Report on the Legislative Process (*Making the Law*)[14] issued in 1992 the Hansard Society said that many organisations in their evidence emphasised the fundamental importance of consultation. Some (English Heritage, the Bank of England, the Institute of Directors, the Association of Chief Police Officers) thought that it worked tolerably well. Some (such as the CBI, the Institute of Chartered Accountants and the National Consumer Council) said it worked better than in the past. Others (the Consumers' Association, the BMA, the TUC, local authority associations) were very critical of the lack of consultation. The Independent Television Commission said that the absence of any open inquiry before the introduction of the Broadcasting Bill in 1989 led to many late changes.

Many organisations complained that when there was consultation the time allowed was frequently inadequate. The Consumers' Association said that six weeks was a reasonable time but that of one hundred consultation documents in 1990, 10 per cent had allowed three weeks or less and another 20 per cent allowed only four weeks.

Some organisations regretted that Royal Commissions or committees of inquiry were no longer appointed. (Mrs Thatcher had appointed no Royal Commission during the thirteen years of her premiership.) The local authority associations regretted a decline in the use of Green Papers and White Papers (see below). Also it regretted a change in the style of White Papers which it said had become glossy booklets promoting the government's policy without reference to alternatives and with less

14 See n. 1 above.

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discussion of issues than in former years.[15] The consultation procedures of the Law Commission (pp. 470–74 below) were commended as a model.

The Hansard Society's Report concluded that 'the overwhelming impression from the evidence is that many of those most directly affected are deeply dissatisfied with the extent, nature, timing and conduct of consultation on bills as at present practised' (p. 30). It recommended (pp. 29–40) that government should so far as possible consult those with relevant interests or experience at the policy information stage. Consultative documents should be as precise as possible. Wherever possible, clauses, or even whole bills, should be published in draft for comment before introduction in Parliament. This was invariably the practice of the Law Commission but it is now on occasion, and increasingly, done by government departments.[16]

(d) Green and White Papers

Sometimes a bill is preceded by a Green or a White Paper setting out the government's plans in advance. The difference between those two forms of government statement, and a discussion of their function in the context of tax legislation, appeared in the *British Tax Review* in 1980:

Cedric Sandford, 'Open Government: The Use of Green Papers', *British Tax Review*, 1980, p. 351

WHAT COLOUR OF PAPER?

Green Papers were invented by the Labour Government in 1967. White Papers are of much earlier vintage. It is generally held that 'White Papers announce firm government policy for implementation. Green Papers announce tentative proposals for discussion.'[17]

Sir Harold Wilson wrote: 'A White Paper is essentially a statement of government policy in such terms that withdrawal or major amendment, following consultation or public debate, tends to be regarded as a humiliating withdrawal. A Green Paper represents the best that the government can propose on the given issue, but, remaining uncommitted, it is able without loss of face to leave its final decision open until it has been able to consider the public reaction to it.'[18]

15 They contrasted the 'Rates' White Paper of 1983 (Cmnd 9008) which gave a great deal of background information and discussed the pros and cons of the options, with the 1991 White Paper on *Education and Training for the 21st Century* (Cm 1536) which they said was made up of assertions without relevant statistics or reasoning.

16 There was extensive consultation on the clauses of the Copyright, Designs and Patents Bill 1987–88. The Child Support Bill 1990–91 was first issued in draft for consultation. The Inland Revenue had consulted key financial and industrial bodies on clauses of tax bills. Twenty-two clauses of the 1992 Finance Bill were for instance circulated in draft for consultation. In the case of the Competition Act 1998 there was a consultation document including a draft bill. While the Bill was going through Parliament the Director General of Fair Trading published draft guidelines as to how the Bill was likely to operate once the Act came into force. All documents were available on its website or in paper form, an email list was set up and responses were encouraged either electronically or by more conventional means. (63 *Modern Law Review*, 2000, p. 551).

17 John E. Pemberton, 'Government Green Papers', LXXI, *Literary World*, 830, August 1969.

18 Harold Wilson, *The Labour Government 1964–70* (1971), p. 380.

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> As applied to taxation these distinctions are at best over-simplifications. Where Green Papers were not issued, the proposals of the White Paper were often subject to change on major issues. Thus, with selective employment tax the treatment of charities, agriculture and mining was all changed within a fortnight of the publication of the White Paper, whilst with capital transfer tax a lower rate of tax for life-time gifts was adopted during the passage of the Finance Act in direct contradiction to the White Paper. On the other hand, important elements in some of the Green Papers have been presented as 'hard'. As Grant Gordon puts it: 'One believes that one knows the difference between White Papers, Green Papers and their kin, but under close examination they often tend to merge to a uniform grey.'[19]

In 1998 the Cabinet Office published *How to Conduct a Written Consultation Exercise.*[20] In November 2000 the Cabinet Office published a *Code of Practice on Written Consultation*. In September 2003 the Regulatory Impact Unit of the Cabinet Office published a consultation document about consultation (*The Code of Practice on Consultation.*) It proposed that the existing code which mixed guidance and principles should be replaced by a shorter principle based code supplemented by guidance. The new code became operative as from April 2004. (It can be accessed on www.cabinet-office.gov.uk/regulation/consultation/index.asp.)

The Code emphasises the value of consultation and lays down basic criteria for consultation exercises. These include that the timing of consultation should be built into the planning process for a policy from the start – 'so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage'. The Prime Minister's introduction begins, 'Effective consultation is a key part of the policy-making process'. The Code starts with six 'consultation criteria', the first of which is, 'Consult widely throughout the process allowing a minimum of twelve weeks for written consultation at least once during the development of the policy'.

(e) Cabinet control

To what extent is the process of the preparation of legislation controlled or supervised by the Cabinet and its sub-committees? Little is known of this. But a glimpse of what goes on behind the scenes was given in a lecture in 1951 by Sir Granville Ram, the then First Parliamentary Counsel in charge of the Office of Parliamentary Draftsmen. Comparison between Sir Granville's description of the system then with that in the Cabinet Office's current *Guide to Legislative Procedure*,[21] shows that little of substance has changed.

Sir Granville Ram, 'The Improvement of the Statute Book', *Journal of the Society of Public Teachers of Law*, NS, 1951, pp. 442, 447–49

19 Grant Gordon, 'Grey Papers', 48 *Political Quarterly*, 1977 1.
20 Drawing on the work of the National Consumer Council's *Government Consultation: not just a paper exercise* (1997).
21 The Guide is a detailed nuts and bolts description of the process for officials. It is accessible on www.cabinet-office.gov.uk. The latest version was published in January 2004.

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