



Secondary Legislation Scrutiny Committee

Delegated Powers and Regulatory Reform Committee

Oral evidence: Government responses to the DPRRC and SLSC's special reports

Wednesday 20 July 2022

10 am

Watch the meeting

Members present: Secondary Legislation Scrutiny Committee: Lord Hodgson of Astley Abbots (The Chair); Baroness Bakewell of Hardington Mandeville; Lord German; Viscount Hanworth; The Earl of Lindsay; Lord Lisvane; Lord Rowlands; Baroness Watkins of Tavistock.

Delegated Powers and Regulatory Reform Committee: Lord McLoughlin (The Chair); Baroness Browning; Lord Goddard of Stockport; Lord Haselhurst; Lord Janvrin; Baroness Meacher; Lord Rooker; Lord Tope. Also in attendance: Lord Blencathra.

Evidence session

Heard in Public

Questions 1 - 17

Witnesses

[I](#): The Rt Hon Mark Spencer MP, Lord President and Leader of the House of Commons; The Rt Hon Baroness Evans of Bowes Park, Leader of the House of Lords; Dame Elizabeth Gardiner DCB QC (Hon), First Parliamentary Counsel and Permanent Secretary of the Government in Parliament Group in the Cabinet Office.

Examination of witnesses

Mark Spencer, Baroness Evans of Bowes Park and Dame Elizabeth Gardiner.

Q1 **The Chair:** Thank you very much for coming along this morning; we are very grateful to you for giving up your time.

I will begin by reading you the normal caution. The evidence session is public, and it is being webcast live. You will be sent a transcript when it becomes available. If you have any corrections, we would be grateful if you made them as quickly as possible.

Some Members are attending remotely, as you can see from the screens. It is a slightly complicated box and cox arrangement.

I introduce Lord McLoughlin, who chairs the Delegated Powers and Regulatory Reform Committee—one of the two committees here today—and his predecessor, Lord Blencathra, who was rostered off at Christmas. He is attending because he has had more input into the reports that we shall discuss, which are the subject of our inquiry, and the Government's reaction to *Government by Diktat* and *Democracy Denied?*, the two reports we produced last Christmas.

I make two quick points about the background. The DPRRC, Lord McLoughlin's committee, is concerned with input—how a Bill becomes an Act and the way in which statutory instruments are built into it. The SLSC, which I chair, is concerned with output and how statutory instruments work when they become part of the law of the land.

We are not concerned—either of our committees—about policy. The Government of the day will face that at the ballot box. We are concerned about process and the way in which we get the best types of law and informed consent for Parliament and, through Parliament, to the country as a whole.

I will put an opening question to the two Leaders. The government responses to the committees' two reports on the relationship between Parliament and the Executive were almost wholly negative, in places very brief and failed to engage in the fundamental issues raised in the reports.

We would like to hear how you reconcile this with a statement that "the Government is fully committed to a strong Parliament that effectively scrutinises, challenges and improves government policy and its implementation". Who would like to go first?

Mark Spencer: I am happy to go first, Chair. Thank you very much for inviting us here today. We share all the aspirations that you set out at the beginning of the meeting.

I start by saying that I am a little disappointed with your negativity. I think that the Government do respect the work that the two committees do. I think that you do a great deal to improve, enhance and advise government on the way in which we progress legislation.

I am not sure that the evidence supports what you say—that we ignore everything you do. Of the 22 DPRRC's recommendations, I think we have

accepted 14 in full or in part. That does demonstrate that we do listen and take seriously what you say.

Baroness Evans of Bowes Park: Some examples of the sorts of things that we have done are: some important changes to chapter 15 of the guide for legislation, which is particularly on delegated powers, including your statement of principles, on which I think both committees were very keen.

We have links to your guidance. We have strengthened lines on the use of Henry VIII powers. We have updated statutory legislation and Explanatory Memorandums. We have also improved the training offer. I think that the DPRRC is going to be involved in helping with that, so we have made changes across the board in taking on board, as Mark said, many of the recommendations that you proposed.

Lord Blencathra: In that case, I am very grateful, Leader, for those assurances. Could we see copies of the changes you have made and, in particular, of the revised guidance on Henry VIII? It would be very convenient for the committee to see it.

Mark Spencer: I am sure we can supply that.

Baroness Evans of Bowes Park: Yes.

The Chair: It does not appear to us that this guidance has been changed in the way you suggest to follow up the suggestion of the DPRRC.

Lord Blencathra: I will follow up on that. You say that the *Guide to Making Legislation* has been changed. I understand that Cabinet Office guidance has not changed. The Government are still implementing the 2014 Cabinet Office guidance. Is that correct?

Mark Spencer: In the scrutiny of legislation as it comes forward, there is a lot of behind-the-scenes tyre kicking, shall we say, where we really do test some of these extra powers. Those are some of the challenges that this committee has put to government. It is in the forefront of our mind, as well as practically set out. It certainly does have an impact on the way in which we scrutinise our own legislation as it comes forward and goes through the sausage machine, if you like, before it finally pops out into daylight.

Dame Elizabeth Gardiner: Perhaps I may clarify that. The *Guide to Making Legislation*, as it is currently on the internet, is the old version. It is a very large document, and we are currently updating it. We have already updated the chapter on delegated legislation, and that has been circulated to current Bill managers for the third session. That will be published when the whole document is published. We are planning to do that over the Summer Recess.

Lord Blencathra: Will that incorporate the principles of the Delegated Powers Committee?

Dame Elizabeth Gardiner: It does, yes.

The Chair: I am glad that we have got to a situation where we know what is coming, even if it has not arrived quite yet, as was suggested.

Baroness Evans of Bowes Park: It has within departments. They have the updated version. It has not been public but, as we have said, we are happy to share, and it will be made public over the summer.

Mark Spencer: I hope you recognise that that is actual movement in your direction and, as a result of the challenges that you have put towards government, we are moving towards you to try to assist.

Q2 **Lord Lisvane:** I think it is fair to say that at the heart of the disquiet about delegated legislation over recent years there has been the feeling that matters of policy and principle do not always appear on the face of the Bill and, indeed, are very often consigned to the use of delegated powers.

When I read through the government response to the two reports I expected to see a ringing endorsement of the principle that matters of policy and principle should always be on the face of a Bill, but I did not see it. Why was that?

Mark Spencer: I think I would share that ambition, to be honest. I think in most cases you should be able to set it out on the face of a Bill and we should all understand what a Bill is trying to deliver. There will be exceptions to that rule. I suppose that the details of a particular policy could be bottomed down in secondary legislation, but the overarching policy and the intention of a Bill should be on the face of it so that people understand what it is trying to achieve.

Baroness Evans of Bowes Park: That is obviously important for clarity and everything. I think it is fair to say that we do share that intention.

Lord Lisvane: You, Leader of the Commons, used the word "ambition". The Leader of the Lords used the word "intention". I was rather looking for something more akin to a very firm undertaking.

Mark Spencer: There will always be an exception. I cannot sit here and say to you that every Bill will be produced and that it will be directly on the face of the Bill. There is bound to be an example at some point in the future, which I cannot predict, where it is not, or it is not possible to deliver that. That would be very much the exception to the rule rather than a regular occurrence. I think we would share your ambition that it is quite important for the legislative process and for people understanding what we are trying to achieve for the intention of the Bill to be on the face of that Bill.

Lord Lisvane: Can you help us through the difficulty that would arise if something—a contentious issue, perhaps—were to be put in delegated legislation or the exercise of a delegated power, and we have seen a few of those in recent years, where the situation for both Houses is, "Take it

or leave it"? There is no opportunity to amend or suggest changes to a matter of policy that is presented to Parliament in delegated legislation.

Mark Spencer: That would be very exceptional. I cannot think of an example where that has happened.

Lord Lisvane: Tax credits.

Mark Spencer: Clearly, in circumstances where you are dealing with the Exchequer and the amount of money that is available, I suppose you do end up in a circumstance where it is, "Take it or leave it". The amount of money that is available to the Exchequer to deliver a policy is finite, and you cannot increase that amount. It would be wrong for a committee of the Commons or the Lords to increase that amount of money.

Lord Lisvane: I think the issue is slightly different. The "Take it or leave it" applies to the statement of any broader policy, does it not?

Mark Spencer: Ultimately, you end up in that place, I suppose. Eventually, you have to make a decision whether you are going to support or not support a government policy or a piece of legislation. That is where you end up with all pieces of legislation. It is a binary question. You either end up in the Aye lobby or the No lobby. That is a binary question: take it or leave it. That is how we make decisions in Parliament.

Lord Lisvane: I do not need to tell either of you that the legislative timetable is extraordinarily crowded—it is this Session, and it has been for several Sessions past. How tough is the PBL Committee on wanting to see a fully worked-out policy before it will approve a Bill for introduction? Is there a temptation to say, "Well, we haven't quite got there yet in terms of a departmental write-round, or whatever it happens to be, so we'll use a delegated power to do that"?

Mark Spencer: I think it is very robust and very tough. There are some Ministers who have literally been munched up and spat out in PBL. I think that is the right place to do it, in private and without public scrutiny, where you really do get under the skin of the legislation, and you test Ministers' knowledge of the policy. You test how well thought out that policy is, and you properly take them to task in private before it meets the sunlight of public scrutiny. I think that is the right place for it to happen.

Baroness Evans of Bowes Park: During my time as Leader, I can say that the process has definitely got more rigorous. It is not just the PBL. We now have a series of meetings leading up to it. It is not that it suddenly appears and that is it. There is a lot of iterative work. The four business managers meet every week. We often get Cabinet Ministers in to talk through what is coming up and test it.

I would also say that it is a process. At various stages we will go back and say, "No, this is not good enough. Come back", in various sets of meetings. Ministers are in no doubt about how prepared we think they are, and whether we are satisfied with what they are presenting to us. It

is an iterative process. As I say, I can certainly say over my time as Leader that it has got more and more rigorous as time has gone on, which is how it should be.

Baroness Meacher: To get to an example, which I think might be helpful, as some of you know, the Schools Bill is the latest and most extreme example yet, although we have an even worse one coming along, of the delegation of powers and major Henry VIII powers to Ministers. As our Leader knows, half the Bill—and that was your Minister's term—had to be withdrawn and rewritten.

I wonder whether Mr Spencer would feel able to demonstrate everything that you have said in your commitment to the effective operation of our democracy and parliamentary democracy by doing everything you can to make sure that that half-Bill does actually have a proper Committee stage and Report stage in both Houses rather than being shunted through to a quick Third Reading, which is very little better than the complete delegation of all those powers to Ministers, which was the original plan.

Mark Spencer: Clearly, that is going through the House of Lords as we speak. I think that demonstrates that this end of the Houses of Parliament is scrutinising that Bill and seeking to improve it. Obviously, it comes into my domain once it reaches my end of the building.

Baroness Meacher: Which it is going to do. We will not have seen this half-Bill, which has been completely rewritten after our scrutiny. What I am asking is whether you, in your situation, could do everything in your power to make sure that the House of Lords, as well as the House of Commons, has an opportunity to have a Committee stage and a Report stage on his half-Bill. The initial draft was completely removed by your Ministers, rightly, partly because three former Conservative Education Secretaries of State objected to that whole chunk of the Bill. We need that opportunity to look at what they now come back with.

Mark Spencer: That will be drafted, and that Bill will then take the form, given the advice and scrutiny that it has had at this end of the building. I hope that it will receive quite a lot of scrutiny at our end of the building. There will be the opportunity, presumably in ping-pong, for you to go over that again if you have those concerns.

There are also lots of other opportunities for scrutiny. I am presuming that the Education Committee could look at that. The vehicles for scrutiny are not just within the two Chambers. There are huge other opportunities for scrutiny as well as the two Chambers.

Baroness Meacher: What we are hoping is that the process of the passage of Bills through Parliament should be a proper process. What I am really putting to you is: can you make sure that the process is proper in relation to that half-Bill? I do not think we should pursue this further, but I would be really grateful if you did that.

Lord Janvrin: In your original answer, you said there could be

exceptions to the principle that key aspects of policy should be on the face of the Bill. Will you spell out what sort of exceptions you see?

Mark Spencer: I think that Covid is a very good example. It is not possible to put everything on the face of a Bill because you need a fairly dynamic response to a very rapidly changing situation. You get into this difference between what is regulatory law and what would be guidance, for example.

Let me give you a tangible example. It would have been very silly to have regulated and put into law that you could not hug people in the street. You may say we should not put that on the face of the Bill, but giving the power for local authorities to give guidance that people should keep two metres apart was probably the right thing to do.

Baroness Evans of Bowes Park: In terms of sectors that move fast, if we are too prescriptive at certain points, you could end up having to change primary legislation time and time again. There is also having to adapt to the dynamics of things like digital, et cetera, where you need to think about the overarching policy in as much content as you can but understand the flexibility and fleet of footness that you might need to adapt to changing circumstances. For instance, with the Medical Devices Bill, because things innovate and move, we had to balance the way we look at legislation.

As we have said, we agree with the principle, but I think you also need to look at sectors and areas as well at certain points, and make sure that you are not logjamming everything in and putting yourself in a straitjacket.

Lord Lisvane: Forgive me, my Lord Chairman, but does that not exactly make the case? If you are talking about a matter of principle, that is what is to be achieved. That is where you need to seek the approval of Parliament for the achieving of that aim. But the way in which you achieve it is classically for delegated legislation, because, by then, you have the authority of achieving the aim. But how you do it is, and has been for decades, a matter for delegated legislation.

Mark Spencer: I think we agree, do we not?

Lord Lisvane: I am delighted.

Q3 **Lord McLoughlin:** Can I go back to the Schools Bill? Will there be a bit of an inquiry into how the Government got into such a mess? On the first Bill it put in the Queen's Speech, into the House of Lords, it basically had to withdraw half of it. It is rewriting it—not has rewritten it—and it will go down to the Commons in a rewritten form that has never been discussed in the House of Lords.

Are you not really quite horrified, Lord President, that this has happened on a principal, key Bill? There has been all this scrutiny before it has ever got there. You have the Select Committee. You have what they have been talking about in the past. You have presented a Bill in Parliament

that you are basically happy to rewrite.

Mark Spencer: I think that question is for the Department for Education and the Secretary of State for Education. As we set out at the beginning, we are interested in procedure. I am not here to talk about policy.

Lord McLoughlin: You are the Lord President. You are the Leader of the Commons, and you are the Leader of the Lords. You are bringing the Bills on behalf of the Government to Parliament. This should have come out at the legislative Committee, should it not? Should somebody not have said, "Gosh, there is a lot of extended powers here that are going to be rewritten and we will never get this through Parliament", because you have not and you are rewriting it?

Mark Spencer: Those challenges were made, but you have to take what Secretaries of State and different departments tell you at face value. I cannot speak for others, but I am not across all those policy details of every department. You have to accept at face value what those departments tell you. They are responsible for their own legislation. It is my role to get it through both Houses and to make sure that they have thought through, as much as I can be assured, the challenges that are ahead of it. It has to be for individual departments to be in control of their own legislation.

Lord Blencathra: The PBL did a lot of kicking of the tyres, and Ministers were chewed up, spat out and sent back to rewrite things. It does not seem that PBL did its job very well here on this occasion, Lord President.

Mark Spencer: I am not sure that is true. Again, it is down to individual Secretaries of State to reassure the committee that they have thought these things through and that they have a plan.

Baroness Evans of Bowes Park: I am sure that a new Secretary of State coming in will be having some quite robust conversations with them about what has happened, because it has not been particularly pleasant for any of us involved, particularly for the Minister who has had to do her best in difficult circumstances.

Baroness Meacher: Forgive me, because we need to move on, but I failed to ask our own Leader whether you can ensure that this half-Bill, which has been completely rewritten, does not jump to a Third Reading? It was published last night, but we have not had time to absorb it. The point is that that half-Bill, at the moment, might be expected to jump to a Third Reading, which it should not. I am sure you will agree.

Baroness Evans of Bowes Park: I am very happy, if I remain in post when a new Secretary of State is in post, to have a conversation with them. I cannot make promises on behalf of somebody else but, as I say, I am very happy to have conversations because I think we have all learned from this experience. We do not want to see it repeated.

The Chair: We ought to move on. May I just say, Mr Spencer, that we are very concerned about your using—and the Government having used—

the pandemic as an excuse for acceleration? Of course, the committee understands that. We understand that those were exceptional circumstances. We quite support what the Government had to do, but not to use that as an excuse in the future. We need to go back to the much more deliberate and organised approach, in which both Houses of Parliament have a chance to scrutinise better. Examples of what happened under the pandemic do not cut the mustard, as far as we are concerned, for either of our committees.

Q4 Lord Goddard of Stockport: I have served on Secondary Legislation for four years and two years on this. Consistently, Bills containing bad, broad powers can be an indication of poor policy development. What steps have the Government taken to prevent or, at the very least, mitigate misalignment between the process of policy development and Bill drafting? That is the failure. That is where the stumbling block is.

Mark Spencer: Clearly, Bills have to be taken on a case-by-case basis. We do challenge the way in which these policies are developed. They are put through the process that we described earlier and are held to account. We share the ambitions of the two committees to bring forward legislation that is as polished as it can be.

Lord Goddard of Stockport: I understand that, but you have heard about the Schools Bill. The health and care Bill contains delegated powers about procurement. The policy side should deal with that. If you want the ultimate example, of course, there is the Northern Ireland Protocol Bill, which our committee described as “a series of exorbitant delegated powers that are mere triggers for future ministerial action”. This is not the way to develop policy or law.

Mark Spencer: I would defend the use of some delegated powers. There have to be delegated powers in lots of pieces of legislation. I do not think you can start from a position where we should not have any delegated powers. They are quite an important tool to government and Ministers. All we can do in terms of the committees that we run is to challenge them wherever we can and to make sure that Ministers are only asking for these powers when they absolutely need them. We certainly would not accept them on an “I’d quite like to have that power” basis. There has to be a justified reason for having that power.

The Chair: Lord McLoughlin is going to take the skeleton legislation issue.

Q5 Lord McLoughlin: Lord President, may I just start by saying what a pleasure it is to see Mr Bone sitting directly behind you—a gamekeeper turning poacher and, perhaps in my case, a poacher turning gamekeeper? That is a great reversal of roles.

I want to ask about skeleton legislation. I must admit that I had not really heard very much about skeleton legislation before joining this committee. I think there is a concern about the growth of skeleton legislation.

I well understand that the whole way in which we govern our country has changed very dramatically. In the past, we have had legislation imposed on us by the European Union and we have been able to say, "That is nothing to do with us. That is Europe". Of course, that is now removed. All legislation is now going to be passed by Parliament. What we have to make sure is that Parliament has the chance to have that.

While I have every confidence that no Conservative Minister would ever overstep the mark in what he or she may do, I am not so sure that future Governments would be as cautious as I would expect a Conservative Government to be.

What is your feeling about skeleton legislation? What is your feeling about the rights of Parliament to be able to hold back and challenge skeleton legislation in the future?

Mark Spencer: I am not sure I even recognise the term, to be honest. I do not really know what you mean by "skeleton". Bills are produced on an individual basis. Clearly, some Bills will have more delegated powers than others. I do not really know what more to add to that.

There are lots of examples—and I will try to avoid Covid, as you indicated, Chair—where the flexibility and a dynamic response from Ministers is absolutely essential. You just have to give those powers to Ministers to be able to respond in a very dynamic situation.

For example, with the sanctioning of Russian oligarchs—a very dynamic situation—we had to give powers to the Secretary of State basically to impose fairly draconian measures on foreign nationals who were using the UK to clean their money up. It was impossible to be able to put all of that on the face of a Bill. You just had to give the power to do that to those Ministers, to be able to do it as quickly as possible.

Lord McLoughlin: Does the First Parliamentary Counsel have a definition of "skeleton bills"?

The Chair: Or "framework Bills".

Dame Elizabeth Gardiner: I prefer "framework". I am sympathetic to the committee's wish and every parliamentary counsel's wish to ensure that there is sufficient policy on the face of any Bill so that Parliament can scrutinise what we are proposing. I think that is really important.

There is not a clear dividing line between something that is a framework Bill and something that is not. It is a graduated scale. In any Bill you might have an individual provision that is in the nature of a framework, or you might have a whole Bill that is in the nature of a framework. We would be hoping to bring to Parliament a framework that we think demonstrates in enough detail what the Government are proposing to do and that Parliament will accept that they understand the nature of those powers, and what will be done under them, and will grant those powers to Parliament.

We are always testing those powers. In fact, just very recently I asked a department to go away and think again, where I felt that there was not enough of a framework that we could put before Parliament. That is a regular part of the process within a department and within the relationship between parliamentary counsel and the department.

Lord McLoughlin: How big is your department, and how many parliamentary draftspeople do you have?

Dame Elizabeth Gardiner: I have 53.

Lord McLoughlin: I think this year, so far, we are at 38 Bills, and other measures may be laid before you if my memory is correct on the wording.

Dame Elizabeth Gardiner: I think that is right, yes.

Lord McLoughlin: That presumably excludes the Finance Bill, which is of course always a little easy job for anybody to run off.

Dame Elizabeth Gardiner: Absolutely!

Lord Blencathra: May I challenge the Lord President? With all due respect, Lord President, we were not critical of the Russian oligarchs thing. That was obviously for delegated powers, and it is a bogus example, if I may say so. But our report did list many Bills that were aspirational only, and what gives the game away is that the Delegated Powers Memorandum often admitted that the Bill was a framework Bill because the policy had not been thought through. That is what we are critical of: a Bill for a list of aspirations because the policy had not yet been figured out.

Mark Spencer: I think that was a statement rather than a question, Chair.

The Chair: Okay.

Q6 **Lord Rooker:** Good morning. I have a question for the First Parliamentary Counsel. I accept the skeleton Bills. I am new to this committee and have discovered things I had never heard of in my 40 years here, such as public notices. I fully accept the need for framework Bills, but if they are to be legitimate through Parliament, the scrutiny that takes place of the delegated part of them has to be better than it is now. Super-affirmative legislation has to be built in so that Parliament can genuinely feel as though it has scrutinised the Bill. That was in one of the reports that we are discussing, yet the Government did not seem to acknowledge any difficulties with it. We accept skeleton Bills—or framework Bills; it does not really matter what we call them as we know what we are talking about—but the scrutiny of the legislation that flows from them must be improved. The Government do not seem to accept that.

Dame Elizabeth Gardiner: At the end of the day, Parliament decides what procedure applies to these instruments. The Government will bring forward the procedure that they think appropriate, and their justification in the memorandum to the DPRRC, and then it is for Parliament to test the Government on that and to table amendments if it does not agree. The level of scrutiny to which those instruments are then subject is a matter for Parliament.

The Chair: If the two Houses were to suggest that some improvement might be needed, how would the two Leaders envisage that being brought about?

Mark Spencer: In what way? Clearly, if both Houses decided a Bill needed improvement—

The Chair: No, it is Lord Rooker's point: if the two Houses were to decide that framework Bills—or framework clauses in Bills, because it would not be a whole Bill—were aspirational and not principle-driven, which was Lord Lisvane's point, and there were suggestions for some change, how would you two Leaders see that being brought about?

Mark Spencer: It would probably be down to the Procedure Committee to look at that and to make proposals to both Houses.

Baroness Evans of Bowes Park: It would be the same in our House; it would be the Procedure and Privileges Committee.

Lord Rooker: But it would require a change in the legislation. The Statutory Instruments Act 1946 would need to be changed to allow the super-affirmative procedure to occur on what are classed as framework Bills. It cannot just be decided by a committee; it requires some legislation to give the powers—

Mark Spencer: Yes, there would have to be a specific recommendation from the Procedure Committee, which would be considered by the Government, and the law would have to be changed on that basis.

Dame Elizabeth Gardiner: I am not sure that a change to the law would be required. We have examples of the super-affirmative procedure in some legislation now, so the 1946 Act is permissive of it. It sets out the possible procedures but does not require them.

Mark Spencer: There are other ways of challenging these things. Parliamentarians are very adept at challenging these things through the SI process.

Lord McLoughlin: Do the Government worry that by having this kind of procedure they are more likely to get judicial review and be overruled in the courts, and that rather than seeing good governance it is leading to bad governance, because it is giving an interpretation to the court that hitherto we would complain about? I see a bigger problem coming down the road if the Government do not tighten up their parliamentary scrutiny, because the courts will be able to say, "This hasn't been

properly tested by the courts". I am no legal expert, but I would imagine that that is what they would say.

Mark Spencer: I cannot think of any examples where that has been the case, to date, but clearly we would want to avoid judicial reviews wherever possible. We would rather win judicial reviews; stopping them happening is an unrealistic ambition.

Lord McLoughlin: Avoid and stop them, yes.

Mark Spencer: Yes.

Q7 **Lord Blencathra:** In our two reports, the multiplicity of legislative devices to get round having to lay statutory instruments was cited as one of "the most striking and disturbing of recent developments" that have resulted in the Executive bypassing Parliament. These devices, fully referenced in our reports, were things called directions, determinations, codes of practice, guidance that one must have regard to and even one extraordinary one: making law by public notice, the modern equivalent of a Henry VIII proclamation. Lords Ministers feel humiliated having to justify them. The Government's response to our reports did not seek to justify these ruses to avoid parliamentary scrutiny, so I simply ask you all: can you justify them now, why are they necessary, and do you think they accord with the principles of good law that law should be clear and accessible? The First Parliamentary Counsel could possibly answer first.

Dame Elizabeth Gardiner: I do not think any of those things are new. Acts have commonly empowered Ministers or regulatory bodies to issue directions to specified authorities about how new functions are to be exercised, and you will find those in statutes going way back. Similarly, you will find public notices in tax legislation going back many years. I think we have had guidance in the *Guide to Making Legislation* about codes of practice for the whole 30 years that I have been in the Office of the Parliamentary Counsel. Again, codes of practice and the way they are used in legislation are very well established.

I take issue that these things are new or novel, and I really do not see them being used as ways to avoid statutory instruments and the scrutiny that comes with statutory instruments.

I absolutely share the view that they must not be hidden or disguised. It is very important that they are publicly available and that people know where to find them and, if they are updated, the updated versions. But it is a case of horses for courses and the right instrument or device being used in particular situations. A direction is often used in relation to something that is given to an individual person or a very small group of people, which might not be appropriate for a statutory instrument. Quite a lot of these things are not truly legislation, and the drafter will be looking for the appropriate device and how the legislation in that area has been framed previously. That is what drives the use of these things, rather than some attempt to avoid a statutory instrument.

Lord Blencathra: I accept that they are not new, but do you accept that

there has been a huge increase in them over the last 30 years?

Dame Elizabeth Gardiner: I have not done the research, so I do not know. I do not have that perception.

Baroness Watkins of Tavistock: Under the Health and Care Act, there are at least 10 different scenarios that would allow further legislation to follow, with instruments including schemes, rules, directions and a published document. Will all this uncertainty about detail to follow be a trend in future Bills?

Mark Spencer: It is difficult to predict the future, but I hope that we would all acknowledge that the world is a different place today than it was many years ago. We live in a more dynamic society where things change rapidly and Governments need to respond in a timely way. The pandemic and Russia's invasion of Ukraine are good examples of where the Government need to be fleet of foot and respond to things very quickly. Sometimes, Ministers and departments need delegated powers to be able to respond very quickly to a dynamic situation. It is not always possible to go to primary legislation in those circumstances.

Baroness Watkins of Tavistock: I completely accept that, but the Health and Social Care Act, for example, talks about potential changes to professional regulation that could give quite a lot of power to the Secretary of State. I think it was watered down as a result of discussion in the Lords, but it is important to take time to get that right to serve our population, rather than doing it in a hurry. I would really like to hear how you balance them, because I could not agree with you more about some of the Covid things that we had to do quickly.

Mark Spencer: You have just cited a very good example of where the House of Lords did its job, and was able to influence that Bill and improve it. That is a celebration of our democracy and how the two Houses work together to polish legislation as it passes through both Houses.

The Chair: Lord Blencathra, do you want to pick up the scrutiny reserve idea?

Lord Blencathra: Not at the moment.

The Chair: Okay. Lord Janvrin?

Lord Janvrin: I have a very quick question for the First Parliamentary Counsel. Could you explain what you understand by mandatory guidance?

Dame Elizabeth Gardiner: We should not have mandatory guidance. There is a clear distinction between law and guidance. It is one thing to say that somebody has to have regard to guidance; that is not making it mandatory. If we had somebody come to us and say, "We want to impose a duty on somebody to follow this guidance", we would say, "That's not guidance. That's"—

Lord Janvrin: So we may not see that expression again.

Dame Elizabeth Gardiner: I am disappointed that you have seen it at all.

Lord Blencathra: I am sorry, but the guidance that one must have regard to is generally interpreted by the courts as a legal obligation.

Dame Elizabeth Gardiner: It is a legal obligation to have regard to it, which is not the same as a legal obligation to follow it.

Lord Blencathra: That is a very fine distinction.

Q8 **Lord Rowlands:** Given the relatively short time between the introduction and Second Reading of a Bill, it is often difficult, if not impossible, for the Delegated Powers Committee to have the opportunity to take evidence from the Minister in advance of reporting. I understand that the Government have responded by saying that they will take the needs of the committee into consideration. Under what arrangements would the Government allow this to happen? For example, if the committee felt it necessary to take evidence from the Minister, can it generally be assumed that consideration of the Bill would be deferred until such evidence was taken?

Baroness Evans of Bowes Park: Minimum intervals in their current form have been around since 1976, so we certainly have not changed things. We make every effort to ensure that we follow our minimum intervals. I do not think we have breached any this Session; we did so on three out of 34 in the last Session, but that was largely towards the end of Bills.

When we are in PBL one of the many things that I say to Ministers at every given point is about the need for early engagement with the DPRRC as soon as the Bill is cleared. I hope that you see Ministers coming your way to make sure that they engage. That is not just for Bills starting in the Lords but often those coming from the Commons.

I hope that the Government Whips' Office will also be recognised, as we try to give a heads-up of things that are coming down the line as much as we can.

I accept that during some slightly more difficult periods we have not been able to have as clear a timetable as we would want, but we do make every effort. Of course, if a Chair has particular concerns and wants to speak to the Chief Whip, the door is always open.

Generally, however, I think the process works quite well, and I believe that you have managed to produce reports for all the Bills this Session. Obviously, we are keen to work with you, and if there are any particular Ministers or departments that you have concerns about, again, I am very happy to hear from you and have further conversations.

Lord Rowlands: I accept that there will be special circumstances when

there will not be time for it, but, usually, will it be possible to give time between the stages of the Bill to allow the committee to take evidence from a Minister so that the House can be better informed?

Baroness Evans of Bowes Park: As I said, it is up to the Chief Whip to schedule business, and I do not think we would want to see delays. As I said, from the look of your ability to do reports and the conversations that we have, the process seems to work quite well, but, of course, if there are specific issues that you want to discuss, we are very happy to do that.

Lord Rowlands: May I raise one of the really worrying concerns of the committee? I refer back to a former Lord President, Lord Strathclyde, who conducted a review that said that the Delegated Powers Committee's recommendations "are usually accepted by the Government". It was an unequivocal statement by the former Lord President. Yet, in the 2019-21 Session, this Government have accepted only about 30% of the committee's recommendations and rejected the majority. How and why has there been such a significant change in ministerial attitudes and responses to the committee's recommendations?

Baroness Evans of Bowes Park: I was not aware of those figures. As I said, we certainly take—

Lord Rowlands: They were in our original report.

Baroness Evans of Bowes Park: We take the recommendations of the committee seriously, and departments consider them. As I said, there is open dialogue between yourselves and Ministers and we try to accept recommendations where we think we can.

Lord Rowlands: You have not answered my question: why has it gone dramatically the other way, from the assumption that the Government generally accept our recommendations to now rejecting the majority of them? What has happened in the last two years to influence and change that attitude to our recommendations?

Mark Spencer: I am not entirely sure that those figures are accurate. My understanding is that, of the 22 recommendations of the DPRRC, we accepted 14 in full or in part; 10 were accepted partially—

Lord Rowlands: Which ones are you talking about? I am talking about a whole two-year period: the 2019-21 Session. We included those figures in our original report, and the Government's response was meaningless.

Baroness Evans of Bowes Park: I do not think there has been a change in assumption. It is for departments to consider your reports and to decide what recommendations they want to take on board, or not. I think we have a good and open dialogue; your reports are taken seriously, and certainly you as a committee are taken seriously. As I said, Ministers are urged to engage with you at an early stage and to have a conversation with you as their Bills are going through.

Lord Rowlands: May I suggest that another factor has been involved in this change in the last two years? It is not a coincidence that this has happened during a period when the Government have a large majority in the House of Commons and are therefore able to dismiss or reject committee recommendations in a way that they have not been able to before. Are you not willing to admit that that is one of the major factors that has changed the way in which the Government have responded to our recommendations?

Baroness Evans of Bowes Park: As I said, I do not believe that there has been a change in attitude—

Lord Rowlands: Sorry, but there has been a change, from virtual acceptance, as Lord Strathclyde said, to a majority rejection of our recommendations.

Baroness Evans of Bowes Park: Well, we will just have to agree to disagree.

Lord Rowlands: That is not no change; that is a huge change.

The Chair: May I make a suggestion? Baroness Evans, are you prepared to take a letter from us explaining the background to Lord Rowlands's points, which we could then perhaps take away and discuss, rather than take up the time—

Baroness Evans of Bowes Park: Yes, sure. Again, I am happy to share it with my Front-Bench team.

Q9 **Baroness Browning:** Good morning. The title of our report, *Democracy Denied?*, is a very strong allegation. We have heard, particularly from the two Leaders this morning, that responsibility rests with Ministers and Secretaries of State in government departments.

I ask the First Parliamentary Counsel: in general terms, in your experience, how do you rate the understanding and knowledge of delegated powers by the ministerial community?

Lord Blencathra: On a scale of one to 10?

Baroness Browning: Yes, on a scale of one to 10 would do. I mean generally: no names, no pack drill.

Dame Elizabeth Gardiner: As a result of the work of these committees, Ministers' understanding and knowledge of delegated powers is probably greater than it has ever been. Over the last year or so we have been doing an increased number of events for Ministers looking at the legislative process, including the delegated powers process, so their knowledge and understanding is probably higher than you might anticipate.

Baroness Browning: Well, one would hope so, but of course, as we have just heard from Lord Rowlands, there is a concern about the increasing number of recommendations we make when we examine Bills.

When you produce a Delegated Powers Memorandum to accompany the Bill, what involvement do Ministers have in that?

Dame Elizabeth Gardiner: That is not produced by parliamentary counsel but by the officials within the department.

Baroness Browning: Yes.

Dame Elizabeth Gardiner: Those documents will be among the documents that the Minister signs off. I am never involved in that process, so I do not know exactly how it happens, but—

Baroness Browning: Would you not like to know?

Dame Elizabeth Gardiner: Ministers sign off on the policy in their documents and Bills, so I am sure that they also sign off on the Delegated Powers Memorandum. Departmental officials will discuss with them the justifications for their powers, because when they come to the PBL Committee that is one of the things that they have to understand; it is one of the things that they are tested on.

Baroness Browning: I just worry that if Ministers were actively involved right at the beginning as the Bill came forward, our committee would have a lot less work to do and we would not need to spend all this time sending back Bills with comments about the delegated powers that we have identified that we think are unreasonable.

I do not know whether anyone on our panel can answer, but if we anticipate a new Administration in September there will possibly be many people who are new to ministerial office or who have not had a lot of experience of this area of the way we legislate. What plans are there to make sure that the new Administration coming in in September are fully up to speed with what their powers are and what is involved in the area of delegated powers? I do not mind who answers.

Dame Elizabeth Gardiner: The ministerial information programme that has been put together is aimed at exactly this sort of situation, where new Ministers are coming in, whether individually or in number. I am sure that those programmes will run when a new Administration are in place.

Baroness Browning: Are you able to undertake that each new Minister coming in in September will be given a copy of *Democracy Denied*?

Mark Spencer: I am sure it will be available in the Library, if they want to go and pick it up. I am sure that will be very high on their agenda.

Baroness Browning: That is not quite the same.

The Chair: Do not worry, I will send copies to everyone.

Baroness Browning: Thank you, Chair.

Lord Rooker: Looking around the room, I think I am the only person who has served as a Minister in both Houses. I was specifically told in

2001, when I joined this House and the Home Office, that the Government generally accepted the majority of recommendations from the Delegated Powers Committee. I was specifically told the same at the next department I went to, which was the ODPM. That was the case, and I was doing legislation in both. It did not arise so much in my earlier days, but I was specifically given that advice, both from my policy officials and the department's lawyer. I queried things, because it was new to me—I was in a new House and a new department at the same time—and I was informed that it was the case that the Government generally accepted them. Therefore, as Lord Rowlands said, there has been a change. The figures show that to be the case.

Baroness Evans of Bowes Park: The Chair has kindly offered to provide a letter and further information, which we will happily take and have another look at this.

Q10 **The Earl of Lindsay:** Lord President, you and Baroness Evans referred to the robustness of the processes behind the scenes—such as the PBL Committee, various gateways, et cetera—which filter, as it were, draft proposals coming forward.

May I suggest that in one respect it needs to be more effective and rigorous? The departments are subject to guidance that tells them to integrate the preparation of an impact assessment into their process of policy development and to publish the final version of the impact assessment alongside the relevant statutory instrument being laid ahead of parliamentary scrutiny. On too many occasions, the SLSC finds that that guidance is not being complied with and that IAs are being laid either late or after the parliamentary scrutiny process has been completed. How is that guidance enforced, and what internal sanctions are applied in the event of the guidance not being followed?

Mark Spencer: I share your desire to have impact assessments ideally at the same time as legislation is introduced. That is the right way to proceed. Certainly, during the scrutiny process we would encourage departments to make sure that they are working on their impact assessment as well as the legislation, with the ambition of producing them at the same moment.

The Earl of Lindsay: With the powers that you exercise behind the scenes, can you not insist, rather than merely encourage? To my mind, the frequency with which IAs are either late or substandard is not declining; if anything, it is increasing.

Mark Spencer: There will be examples of where it is not possible to deliver an impact assessment, so I do not want to say that we will insist that there will be one for every piece of legislation. Sometimes, the Government have to respond rapidly to something and it is more important to focus on the legislation than the accompanying documents. However, in principle, wherever possible, the impact assessment should be produced at the same point as the legislation. We are fairly robust in PBL in making sure that departments understand that.

Baroness Evans of Bowes Park: We certainly agree that, where it does not happen, it is not good enough, and we go back and talk to departments. We have sometimes halted things and said that things needed to be done—I accept not in every case, but we certainly agree with your sentiment. We often go back expressing unhappiness at the way in which some departments have been running the process. We will continue to do that forcefully as and when these things occur.

The Earl of Lindsay: I wonder whether you could express that unhappiness more painfully to the departments. There are some serial offenders here—

Baroness Evans of Bowes Park: Yes.

The Earl of Lindsay: Clearly, the expressions of unhappiness are not encouraging or persuading them to change their ways.

Lord President, the levelling-up Bill is currently in the House of Commons, and I understand that the IA is completed but the DLUHC has decided not to publish it to assist the House of Commons' scrutiny of that Bill.

Mark Spencer: I shall draw that to the attention of the Secretary of State after this meeting.

The Earl of Lindsay: Sorry, I mixed up two questions there. How can the messaging back to departments that do not get the IAs right and on time be more painful so that we can change behaviours?

Baroness Evans of Bowes Park: With the new Ministers coming in, as we discussed with Baroness Browning, we could certainly reiterate this at the very beginning, and ensure that we are talking to all our colleagues—I can do it with my Front Bench, obviously, but I am sure that Mark or we can also write to all Cabinet colleagues—to reinforce this and make sure that we try to encourage departments to up their game.

Mark Spencer: I am more than happy to commit to that now, Chair. I will write to all departments following this committee to encourage that.

The Chair: May I just ask about the role of the statutory instrument Minister? There is a Minister in each department responsible for compliance with the processes for SIs. We took evidence from Lord Callanan, who is the Minister responsible for SI Ministers, and we gained the distinct impression that here was a bloke trying to do something, but had no powers or ability to enforce anything other than just nice words. We underline the point that Earl Lindsay made, that there does not seem to be any penalty or means for enforcing bad performance. It is just, "What a pity. We didn't mean to do it. It won't happen again", and on we go.

Mark Spencer: I am not sure that is true. Certainly, in the Whips' Office, and in my office, we would recognise who are good Ministers and who are poor, and if you have a track record of not delivering in your department, or if your SIs are poorly drafted and not scrutinised, that starts to drip

into your reputation as a Minister and, come the next reshuffle, puts you in a tricky position.

The Chair: I just think that, as Earl Lindsay said, there are serial departmental offenders and, with great respect, there is a role that you could have to back Lord Callanan, making his writ run more firmly.

Mark Spencer: I accept that, and I do not want to give you the impression that we are not doing that. We recognise that there are serial offenders. It is entirely likely that the departments we may share concerns about receive more scrutiny from my office and the Leader of the House of Lords because they have a reputation for not doing things right or on time.

Q11 **Baroness Bakewell of Hardington Mandeville:** Lord President, what conclusions have the Government drawn about extending the use of statutory review clauses in secondary legislation?

Mark Spencer: Each Bill has to be taken on a case-by-case basis. In recent years we have moved away from requiring sunset provisions, and I think that is probably the right thing to do. You have to recognise that, if you sunset everything, you end up having to revisit lots of these things and you bung up the primary legislation process because you are revisiting the same things on a regular basis. There are moments when you have to include sunset provisions, and that could be very healthy for democracy.

Covid was a very good example of that, where you gave reassurance to parliamentarians that the regulations and the powers that would be taken by government were only for a finite period and would naturally wither and die after that. They can be quite helpful, but you have to use them at the right time.

Baroness Bakewell of Hardington Mandeville: In some of those cases, when the time came up, the regulation was made permanent without any debate.

Mark Spencer: I cannot think of an example where it was done without debate. There would have been a debate in our House.

Baroness Bakewell of Hardington Mandeville: Not in our House. You are talking about the sunset clause and moving away from that to provide flexibility. What does that actually mean in terms of proportionality?

Mark Spencer: Again, each individual case would have to be taken individually. I suppose it depends which piece of legislation you were talking about.

Lord Blencathra: A Bill recently handled by Lord Callanan was the equivalent of the DARPA Bill in the States; I cannot remember the exact name of it. That allowed a Minister, by a statutory instrument, to abolish the whole Bill if the Minister concluded that the Bill was no longer suitable

or necessary. How can it be right that an Act of Parliament can be completely abolished by a ministerial instrument?

Mark Spencer: That sunset provision would have been put in primary legislation. Both Houses would have had the opportunity to debate it at that moment. Building in sunset provisions can be a helpful tool.

Lord Blencathra: Just because Parliament has voted through with a Commons majority an inappropriate delegation does not necessarily make it democratically correct.

Mark Spencer: You would be able to change that at the moment the SI was passed. At that moment, you could pray against that SI and Parliament would have the opportunity to change direction.

The Chair: Please do not go down that road. We all know that the unamendability of secondary legislation means that neither House—particularly this House—is going to press the button, and therefore it will go through. The last time the button was pressed we had a full-scale constitutional crisis. This House does not wish to get into that sort of fight. With the greatest respect, that is a false argument, to be honest.

On the question of sunset clauses, we would be more relaxed if you undertook the post-implementation reviews of the SIs, but in fact 44% have no such reviews undertaken at all. We are falling down in all sorts of places. We understand that you do not want to clog up the machinery, but we need to know that what you put through, or what has been put through, is working effectively, and the mechanisms for doing that at the moment are not being followed.

We must continue.

Q12 **Lord German:** My question is to Mr Spencer and is about the functions of the PBL Committee as a gatekeeper of all the Bills and pieces of legislation that come to Parliament. In response to our report, you said that it would be inappropriate to tell us the volume or flow of secondary legislation that was coming our way. Will you explain why it is inappropriate, or does it really mean that the PBL Committee itself does not know how much business is going to come its way?

Mark Spencer: It is a very dynamic situation, is it not? The flows of legislation change. I am not sure how helpful it would be to put that into the public domain. The PBL Committee basically is very robust in its scrutiny of that legislation as it comes forward. Occasionally it will push back quite hard and will send people away to think again or to review something.

I would not want to put a department or piece of legislation in a negative light because it had been pushed back or challenged and had been requested to be rethought. If you put that into the public domain, you end up giving a negative impression of a piece of legislation that might be unfair.

Lord German: Forgive me, I am not talking about specific pieces of legislation. I am asking whether you, as a PBL Committee, know what is behind you—what is behind the gate. In other words, do you know how many pieces of legislation are coming your way? How much notice do you get? Is there one week when you are 100% full and one week when you have 200%? What Parliament would like to do, of course, is to be able to scrutinise effectively what is coming before it, but, if there are ebbs and flows in the numbers in the timetables that are given, we cannot gear up because we do not know until you open the gate. It is an indication of the volume and flow.

The question I was asking you was: do you know what the flow and numbers likely to come to your PBL Committee are like? Do you have some forewarning of that? If that is the case, why is it inappropriate for us to know not about the individual legislation but about the numbers?

Mark Spencer: Because they are at different stages of development. We are already thinking about the fourth Session now and looking at possible legislation for introduction into a Queen's Speech next year. That process has already begun.

Legislation is at different levels and different stages of its development. Of course we have half an eye on how that is being developed and when it is likely to land in our inbox. That is all part of the process that PBL and the business managers undertake.

Lord German: If you look at the EU legislation that is to be repealed and put into a new Bill—we understand that most of it will come by secondary legislation in the Bill itself—you presumably know that that is coming and therefore you can tell us in advance, "In the next month you are likely to get X number", or even if you give it a traffic light system, "It's going to be a heavy month ahead", or, "It's going to be heavy in the month that follows".

We are likely to get this big chunk of EU legislation being repealed by secondary legislation and you must know when you are going to open the gate. All we are asking is that you tell us some time, "You're going to have a tough couple of months in terms of what you are opening the gate to". It is not about specific legislation; it is about what you are trying to push through. If you are just opening the gate without knowing what is coming through, surely it is not that difficult to tell us in advance roughly what we are likely to expect.

Mark Spencer: It is quite difficult to predict, if I am honest. It is down to individual departments. You made reference to the number of SIs that may come forward if we were to go down the route of changing all that EU law. It is entirely possible that vast numbers of SIs would be required. The difficulty for us is that we do not know the cumulative effect of all those departments.

All we can do is challenge individual departments to assess how much of that legislation would be required to come through the Houses and the

timescales by which they would bring it forward. It is quite difficult to analyse that and work it out. It could be a large number.

Lord German: Chair, we now know that there will be a lot of SIs coming forward in this particular Bill and all we are asking for is some notice that they are going to arrive. It is not a question of which ones and how many. It is giving us an indication that this will be a heavy month.

The Chair: Onward, I think.

Q13 **Lord Haselhurst:** We are very glad to see the Leaders agreeing to this session. Can they tell us what changes have been made to departmental working practices as a result of what we have said in our respective committees and the reports that we have produced? If so, what impact do they judge has been made by these changes?

Mark Spencer: I think we have taken the recommendations of both reports seriously. We have not accepted everything that the two reports say, but that is a healthy part of the process, I suppose. You make recommendations, we consider them and we have acted in some cases but not in all. I pay tribute to the work you have done and thank you for that, and we do listen on a number of occasions.

Baroness Evans of Bowes Park: As we said, the *Guide to Making Legislation* is being updated, which we have already talked about. We have updated the guidance for secondary legislation Explanatory Memoranda. As the OPC was saying, there is improved and enhanced training and we have training programmes that will take into account many of the points that you have made. I believe that the committee or some of the committee are helping in working on the DPRRC side on training as well. We are embedding that within both risks and guidance but also training through departments, and will be encouraging new Ministers, as we have already discussed, and, indeed, the teams within departments who work in this area, to take that up and make sure that they are on top of this very important area.

Lord Haselhurst: We appreciate that assurance, but the evidence as supplied by the Bills that have been forthcoming in the new Session of Parliament does not back it up. There have been some quite astonishing demands for delegated powers. The most notorious, perhaps, is the Northern Ireland Protocol Bill, which has no bounds in terms of what Ministers seek to be allowed to do without further supervision.

There is a battle, is there not, throughout our history where the Executive will be contested by a legislature, these days created in more democratic ways? We are seeking to be more precise about the extent of the powers in particular cases that the Minister seeks. It is not comforting when we are told in some cases that the reason for having an extensive power is that the Bill is not completely ready; that does not give us a great deal of confidence. To be told that it might be too technical for us and those affected by it to understand it is not very comforting either. There is the feeling that the drafters might say, "We'll just throw in the extended

power just in case we might need it". We do not honestly find that a very strong argument.

We would have hoped by now that the drafters of Bills were aware of the things that the Delegated Powers Committee is debating—Henry VIII powers and the creation of new offences with severe levels of punishment. Yet it is still coming forward as though nothing has happened. So we would like further examination and further assurances.

Mark Spencer: I hope I can offer that to you, Lord Haselhurst. I wrote yesterday to all departments and all Cabinet colleagues making sure that they understood that process, that they were doing everything they could to meet the 21-day rule, and that they took seriously their responsibilities when drafting statutory instruments. I hope that they will listen to that plea when they receive that letter and respond to it.

Q14 **Lord Blencathra:** The themes raised in *Government by Diktat* and *Democracy Denied?* have resonated in the House and well beyond. In order to meet the concerns expressed, what further steps will the Government take to bring about the essential cultural shift within government departments to ensure that the inclusion of the principles of parliamentary democracy clearly set out in the *Guide to Making Legislation* have lasting influence?

It is not just a matter of circulating it. It is changing attitudes in the Executive to give Parliament the chance of proper legislative scrutiny of delegated powers.

Lord President, you said that there is a lot of kicking of the tyres when Bills are ready, but I think that all former Ministers in this committee who served in the Commons will admit that when we were pushing Bills through the Commons we fully considered the policy and the politics, but we never considered the detail of delegated powers, and I submit that that has not changed one iota over the last 30 years. The only time delegated legislation is considered in full is when a Bill reaches the House of Lords and then Ministers realise for the first time just how inappropriate the delegated powers are and Lords Ministers have to scurry back to their Commons colleagues and say, "My god, we've got a problem here. We need some changes made".

So, Lord President, will you go down in history like your great predecessor Norman St John-Stevas, who was a great Leader and parliamentarian? He created the Commons Select Committees. Will you set up an equivalent of the Delegated Powers Committee in the Commons so that Commons Ministers can make the corrections before they get here? Will you set up a Delegated Powers Committee, and how will you change this cultural attitude that Parliament can be bypassed?

Mark Spencer: I think we have accepted 18 of the 31 recommendations across both reports. We, of course, continue to challenge Ministers when they come before the PBL Committee. I think that the scrutiny and handling of the House of Lords is a very important part of that PBL Committee. Ministers are challenged very robustly not to think just about

the Commons but to think about how they are going to get legislation through this end of the building. They are put through the wringer and they are challenged on that basis.

Ministers have not always thought about both ends of the building. They have concentrated on the Commons. In the committee that I chair, I see it as our responsibility to make sure that they understand that challenge and that they have properly thought about it.

Q15 **Lord Rooker:** I entirely agree with Lord Blencathra, by the way, about Ministers in the Commons not paying attention to delegated powers.

The question you were specifically asked by Lord Blencathra was whether you would consider setting up a Commons equivalent. Basically, while I have no permission to speak for her—it is all on the public record—Baroness Cavendish of Little Venice wrote a seminal piece in the *Financial Times* on 4 December. She then led a debate in the Lords on 6 January on this very issue. I would welcome a commitment that you would have a look at her speech.

I will make one point. At the end of her opening speech, she made the point, “I wonder whether it would be possible to establish an equivalent of delegated powers in the House of Commons”. She said she had written about the piece in the *Financial Times*, and then said, “A number of MPs contacted me to say they felt these issues were of real importance which they did not know enough about”. If that is true, this is a big gap in our democracy.

I strongly suggest you have a look at what Baroness Cavendish said in being an opinion former, because she asked a specific question, which Lord Blencathra has just asked, which would considerably help in legislation and inform Commons Members. I know they are busy; do not tell me—I know about it. Thank god I am not there now with social media and everything else, but the fact of the matter is that it should not be left just to this House to take an interest in secondary legislation. We are a joint Parliament. While we are here, we will do what we have to do, but the fact is that the Commons should do more of this on the Bills that are introduced into the Commons.

Mark Spencer: If after the meeting you can point me in the direction of that speech of Baroness Cavendish, I am more than happy to look at it.

The Chair: Your officials will get it from *Hansard*. It was an early January debate.

Lord Rooker: It was 6 January.

The Chair: I am afraid you are going to find most of the people around this table speaking in the debate as well.

Mark Spencer: I shall look forward to being stimulated by reading that debate.

Q16 **Lord McLoughlin:** I presume that you and your staff are very well aware

when you are drawing up a Henry VIII clause, and likewise when you are doing framework legislation. Do you think it would be more helpful to Parliament overall if a statement from parliamentary counsel at the beginning of a Bill explained why Henry VIII clauses and framework legislation were being used, rather than it having to be dragged out by committees that say, "God, the Government are trying to get away with something here"? It would be far more open to tell us that you are going to do it.

Dame Elizabeth Gardiner: Obviously, we have a key role in what the Bill looks like, but we do not decide on its contents, and the inclusion of the powers in the Bill is at the end of the day a political and policy decision. All the information that you mention is included in the DPRRC memorandum, which is published when the Bill is introduced. I do not think it is for parliamentary counsel to justify the structure of the Bill to Parliament. It is the Minister's Bill and it is for the Minister to put the case for the Bill to Parliament.

Lord McLoughlin: Is there any reference to Ministers that this will be what the House of Lords would regard as a Henry VIII clause? Yes, it is for the Minister to decide policy, but you are helping the Minister achieve what his or her policy aims are in the legislation.

Dame Elizabeth Gardiner: Absolutely, and we have that discussion on a daily basis with the teams and with the Ministers about the nature of what they are asking for, what the powers would have to look like and, therefore, the likely reaction in Parliament, including the principled objection to Henry VIII powers—why they would be seen as exceptional and how we might do it in a different way or how we might mitigate some of the objections through introducing safeguards. Those are the discussions that parliamentary counsel have all the time with departments in crafting the legislation.

Lord Rooker: Did you just say that you are having discussions with Ministers? I understood the position was that parliamentary counsel took instructions from the department's lawyers and Ministers never got involved with parliamentary counsel. That was my experience.

Dame Elizabeth Gardiner: I think things have changed a lot. We are not meeting the Minister on a daily basis but we certainly do meet Ministers. If there is a particular issue with powers in Bills, sometimes we will go with the departmental officials to discuss them with Ministers and explain the issues as we see them. Probably we do meet policy officials and Ministers more frequently on Bills than we would have done 30 years ago when the interactions were very much in writing and directly with the lawyers.

Baroness Meacher: It seems to me that we have a real opportunity now with a change—does one say change of government?—of Ministers, or whatever it is, with changed personnel. We feel—I certainly feel—that there has been an extraordinary shift just recently with amazing levels of delegation, Henry VIII and all the rest of it. With these new people

coming in—you seem to be in an absolutely key position—is it possible to get across to these new Ministers, and I have a feeling that probably most of them will be new around that Cabinet table, that things have actually slipped and we really need to get a grip in getting all those major powers on the face of the Bill and to think extremely carefully before we have a Henry VIII power?

Do we really need that power? Of course we accept that occasionally you do, and of course you need delegation, but something has gone terribly wrong. The Schools Bill and the Northern Ireland Protocol Bill are extraordinary examples of things having gone very seriously wrong, and I think that the Leader of our House would possibly agree on the Schools Bill.

There is a real job to do, it seems to me, and this is a wonderful moment to be doing it. What do you think you are going to be able to do?

Mark Spencer: You seem to be predicting my demise and challenging me to influence the future.

Baroness Meacher: Do you know what I mean? You know what I am saying.

Mark Spencer: We will have to see. I cannot predict the future. Of course I will be delighted to serve in the Government should I be invited by the new Prime Minister, whoever he or she may be, but we will have to cross bridges as we move forward. If I am in this role, of course I will continue to influence it in the right direction. If I am not in this role, then at least I am more informed and will be able to do it from the Back Benches.

Baroness Meacher: Pray not. Having had this meeting, we really need you to continue, as well as our own Leader.

Baroness Evans of Bowes Park: Obviously, if I remain in position, yes, of course I will. I will continue to put the voice of the House of Lords and the concerns that I know, as I see these things coming, you will express and ensure that any Front-Bencher in our House is aware of all these things, pointing people to the training and all the things that we have been talking about. We do take our responsibilities seriously, even if sometimes you wonder how successful we are. Both of us will continue to raise the points that you have made.

Lord Lisvane: On a definitional point, can we avoid Henry VIII clauses as being a particular rebarbative provision? What may be just as objectionable may be a huge sweeping power, which is not a Henry VIII power because it does not allow amendment to primary legislation, but may be just as baneful in the discussions we have been having. I think it is quite important that Henry VIII is not blamed for everything.

Lord Blencathra: I suspect that when Lords Ministers go back to the Commons equivalent or to the Leader and say, "We've hit a problem in the Lords. The Delegated Powers Committee has issued a scorching

report critical of some delegated powers”, Commons Ministers may consider us a bit of a pain. “What is the Lords up to?” Will you accept our assurance that this is not a matter of Lords versus Commons? It is a matter of Parliament wanting more scrutiny over the Executive, and it is terribly, terribly important to get that right.

Would you also accept that, since this committee was started in 1992, not a single recommendation has sabotaged government policy of any description or any colour? It has not stopped the Government getting their policy or politics through. Would you accept that, if all our recommendations were accepted, at most all that would happen would be a few more affirmative resolutions, a few more Lords Ministers having to do a 90-minute debate, possibly one or two other Commons Ministers? There would be nothing to stop this Government or any other Government getting their policies through lock, stock and barrel if every recommendation in our report were accepted? Would both Leaders agree to that?

Mark Spencer: I wholly accept that your intentions are honourable and right. I celebrate the work that the committee does, as well as the House of Lords Chamber. I think it is healthy for our democracy. It leads to better legislation and I congratulate you on the work that you do.

Q17 **The Chair:** Having heard our concerns and with your experience, do you think the system for scrutinising secondary legislation can be improved, or have we reached nirvana? Have we reached perfection?

Mark Spencer: I think it would be a stretch for me to sit here and say we have reached nirvana. There are always things we can do to improve it. There are always things we can do to encourage government departments to give more thought to secondary legislation, and there are always opportunities to bring more sunlight to that process so that more people outside this little Westminster bubble understand what secondary legislation is and what it does.

The Chair: That last point is very important. The 700 pieces of legislation that the SLSC looks through will affect every one of our fellow citizens. We need to make sure that they understand that it has been looked at by their representatives, particularly their elected representatives but also by us, and has been properly considered. Echoing what Lord Blencathra said, we are just trying to make things better and make our system more robust, and defend it as it is under attack in this rather disputatious and difficult world.

Mark Spencer: I accept that.

The Chair: Thank you all three for coming along today and for giving us your views.