

Unrevised transcript of evidence taken before

The Select Committee on Delegated Powers and Regulatory Reform

THE QUALITY OF DELEGATED POWERS MEMORANDA

Evidence Session No. 1

Heard in Public

Questions 1 - 11

THURSDAY 19 JUNE 2014

10 am

Witness: Richard Heaton

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present

Baroness Thomas of Winchester (Chairman)
Baroness Andrews
Lord Bourne of Aberystwyth
Baroness Drake
Baroness Farrington of Ribbleton
Baroness Fookes
Countess of Mar
Lord Marks of Henley-on-Thames
Baroness O'Loan

Examination of Witness

Richard Heaton, Permanent Secretary for the Cabinet Office and First Parliamentary Counsel

Q1 The Chairman: Thank you very much indeed for coming to see us. I note that your time is limited. Welcome to the Committee. Would you like to introduce yourself first, and then we will crack on with the questions?

Richard Heaton: Certainly. Thank you very much for asking me to come to the Committee today, Baroness Thomas. I am Richard Heaton. I have two jobs, both of which I think are relevant to this. The first is First Parliamentary Counsel; I am in charge of the folk who draft primary legislation. I am also Permanent Secretary at the Cabinet Office, which obviously has co-ordinating functions as well.

The Chairman: Thank you very much. I should have asked for declarations of interest, but I do not think anyone has any for this inquiry, so I take it as read that there are no declarations of interest.

As you know, our inquiry is into the purpose of delegated powers memoranda, so we would be very grateful for your answers. I think you have seen some of the questions, but others will come up as well, as I am sure you understand. Would you start by describing the purpose of delegated powers' memoranda, and tell us whether in your view their value extends beyond

informing this Committee in its deliberations and whether you envisage their having a use when the exercise of powers described in the memoranda is being scrutinised?

Richard Heaton: I was reflecting on this. Let me step back almost to the beginning of my Civil Service career. For most of my career I have been a government lawyer in various departments, mostly helping to get legislation through the House. That was my trade before I took a strange course a few years ago. I started in about 1991, and I think this Committee came into being in about 1992 or 1993 as I recall. I remember this Committee starting and I remember its impact, which is positive, let me say. We have seen quite a lot more rigour, thought and care taken in the choice of delegated powers, which, if I may say so, is a credit to this Committee and your predecessor's. For example—although I do not want to caricature this—22 years ago, more likely than not when you were thinking about how to wrap up the last clauses of the Bill you would ask counsel to put in something that broadly speaking allowed you to do what you liked because it was convenient. No one really gave it a second thought, so I think it is a huge credit to the culture created by this Committee that people think quite carefully now about delegated powers. That is the first thing I want to say.

On the memorandum, the principal customer—if I can use that word—for the memorandum is this Committee, but before it comes to your Committee it serves quite an important internal function. First, it forces the department to think about its delegated powers and to have conversations with the people who are going to draft the delegated powers. The memorandum gets looked at by the law officers and the other members of the Parliamentary Business and Legislation Committee, the Cabinet committee that looks at Bills before introduction. It is among the papers that are circulated to all the members of that committee, so it has quite a good internal-discipline effect. That is the first impact of the memorandum. It is a really good aide memoire and a check.

The principal purpose is, of course, to inform your Committee. We might talk in a moment about how we can help you better in that. You asked an interesting question about whether it serves a purpose beyond that scrutiny function. It is always going to be available to anyone, whether a parliamentarian, a practitioner, or even a judge, subject to rules about admissibility, as evidence of what the Government had in mind when they created those enabling powers. It is not written for any particular subsequent audience beyond this Committee. Your Committee is the principal audience, but if a subsequent Committee debating an affirmative procedure wants to know what government had in mind, there it is in the memorandum. Its use is what people choose to make of it. It is not drafted to speak to a primary audience: it is drafted to speak to the audience that is scrutinising the choice of the power, but it is always going to be useful for subsequent audiences if they choose.

The Chairman: What we wonder is whether the drafters of the SIs look back at what the memorandum said. Do you know whether that happens?

Richard Heaton: I remember drafting SIs, and my principal purpose would have been to put into law what the policy was. Then I would have in mind what my vires—my powers—were. Usually I would be pretty clear about my powers, and I did not think I would need to go to the memorandum. If there is some after-the-event worry, concern or doubt about the powers, what would I do? I might go back to parliamentary counsel and say, “Remind me, what did you mean when you created this?”. I might well go to the memorandum. I am not sure of the extent to which people do, but I can remember it being an instrument that I would turn to. I do not know the degree to which that happens. Possibly Jonathan Jones would know better than I do, because it is his people who draft the SIs. I certainly remember it being an instrument that is useful background.

Q2 The Chairman: We have the Government’s response. They say that they are, “committed to ensuring an acceptable standard of memoranda”. That is a very nice form of

words, but we wonder how that commitment is demonstrated and what deficiency in the current quality assurance arrangements account for the variable quality of memoranda—and there is a very variable quality about them; some are very good, some are really not very good.

Richard Heaton: Departments and departmental teams—and, I dare say, Ministers—perform variably. That could be down to all sorts of things. It could be down to Bills being done within a different timescale, a Bill team being inexperienced, or, for whatever reason, the quality of a department's work being variable. I am sure parliamentarians will see that in all sorts of fields.

I think the key to trying to achieve greater consistency in standards is having a really clear idea of what is acceptable and good and where things fall short. It is really good to know from the Committee that something falls short. It is even more useful to know why it fell short, what it would be good to have seen that was not there, whether it was too long or too short, whether the reasoning was incorrect or whether you did not like the nature of the power that was being taken. Equally, it is really good to know when something absolutely hits the nail on the head. I sense that there is, as you said, a variable quality. You see these memoranda; you probably look at them more regularly than I do. The Committee probably has a better idea—and you are the primary audience—of what really works and what does not.

I am really pleased to be able to say that we will do almost anything to encourage memoranda to meet the standard that you want. We really need to know what standard you are looking for, so I would encourage the Committee, your excellent clerks and your counsel literally to pick up the phone and tell us when something works. When you get a memorandum that is rubbish, just do not accept it; do not put it before the Committee. Call the Bill manager and say that it does not meet the point. That sort of feedback is invaluable.

The Chairman: I am interested to note that you are putting the onus on to our Committee. That is fine to a certain extent, but do you ever make spot checks or do audits yourself?

Richard Heaton: I really did not mean to put the onus on the Committee. All I am trying to say is that dialogue at the official level is invaluable. When the Joint Committee on Human Rights started up, it really got into its swing when there was a rich seam of communication. Because they had had so many conversations, people knew exactly what the Committee was looking for, and we could anticipate what the Committee wanted. On our side, what can we do to help you? First, give us those steers and we would be delighted to propagate them. We are about to republish this book here, which is the Bible for anyone who works on Bills. It is our *Guide to Making Legislation*. I would be delighted to put something in it that refers explicitly to this: that is, if the timing for the findings of this inquiry works. We will put in a reference to your guide, which I think you have. It would be interesting to know whether there have been any updates to the procedural guide, which I think is a few years old now. We will put our updates into this guide and then use it as a benchmark and a tool to train people. I would also love it if those advising the Committee would help us run some training days. There are all sorts of ways in which we can propagate best practice if we know what the market is.

Baroness Fookes: Mr Heaton, you referred to the possibility that we might send back a wholly unsatisfactory memorandum, but given the normal course of events, we are working to an exceedingly tight timetable. That is not always going to be practicable.

Richard Heaton: I accept that.

Baroness Fookes: It is not of our making.

Richard Heaton: No. Indeed, sometimes politics and legislation work very quickly. If there is an opportunity for the clerk or counsel to see something and say that it is not right, I would

just encourage you to pick up the phone. That is all. However, I acknowledge the timeframe that you are working to.

Baroness Andrews: I should like to pursue something that you have said, Mr Heaton. Obviously the quality of Bill teams varies a lot depending on the exposure they have had to making legislation in the first place. Sometimes they come fresh to a Bill and the implications of delegation. Are there any recommendations we could be thinking of making on training for your Bill teams?

Richard Heaton: Well, we have an excellent team in the Cabinet Secretariat, some of whom are sitting behind me. They spend a lot of time training Bill teams. However, I think this is probably an area where we could do some more. I think the leader said in his reply that we are more than happy to take on a bit more of an active co-ordinating and training role, and indeed this inquiry has proved to be a good stimulus. We would not put on any sort of training without consulting you, your clerks and your counsel on what you are looking for. Perhaps we could extract some examples of the best memoranda you have ever seen and the worst you have ever seen, or you could make some up if that is too embarrassing. Yes, absolutely; more training is something for us to do, not you, but we would like to draw upon your expertise.

Q3 Lord Marks of Henley-on-Thames: One of our problems, which was hinted at by Lady Fookes' question, is that the opportunity that we have to comment in effect officially on memoranda that are not up to scratch is in our report, which in a sense is made after the event. I want to look with you at two ways of giving this Committee more teeth. Two people who have submitted written evidence, one of whom is Daniel Greenberg, a former parliamentary counsel, and the other is the Immigration Law Practitioners' Association, have suggested a delaying mechanism that in effect would give us the power to say, "That memorandum is not up to scratch and we will not consider it further until you improve it". The difficulty with this,

of course, is that we are often working so shortly before the Committee stage that there may not be time to do that.

It seemed to me that another possibility would be that where our advisers regard a memorandum as unsatisfactory or are making adverse suggestions—in other words, they are saying, “It is not good enough”—or we do not agree with the position taken, would actually be to require the lead lawyer from the Bill team that drafted the memorandum to answer questions at this Committee either to defend his position or to listen to what we say. How would you regard that suggestion?

Richard Heaton: If time allowed, it would be an interesting one, but I think there are two possible things in there. One is if the quality of the memorandum is not good enough, in the sense that it does not explain what needs to be explained, it is illogical or there are bits missing. Then there is taking a position which the Committee might not agree with, such as asserting that the negative procedure is the appropriate procedure when the affirmative procedure would be better. They are quite distinct things. I would expect the lawyer, or indeed the drafter—it does not have to take a lawyer to draft a good memorandum; it really does not—to be accountable to the Committee either in correspondence or by appearing before it if necessary. On the former, it is usually a policy question. I think that the lawyer speaking to the policy of a Bill is a little unusual because you would expect a Minister to do that in a parliamentary forum. However, I am very interested in the idea that if something does not feel right, let us know and we will try to fix it, exactly as you say, before it gets to the next stage. The quality of a memorandum being reported on in a report does not seem to be the right remedy.

The Chairman: We do not like having to say that we do not think that the quality of a memorandum is good enough, but the Committee has been unanimous on the fact that just very occasionally we do have to say that. We feel that we must.

Q4 Baroness O'Loan: Mr Heaton, you have referred to the Committee's guidance and to the guidance for the Cabinet Office and you have told us that you are in the process of revising it. Obviously you are revising it because you think it can be updated. Are you making any significant changes to it? What is the nature of the revision?

Richard Heaton: We update the guide every year, so the last one was produced in July 2013. We do an annual "lessons learnt" exercise on the passage of legislation, which covers this as well as all aspects of procedure changes. We learn lessons from the things that have gone wrong and how to deal with them. We will not update it across the board and it will not be a full revision, but I certainly want to focus on the matter before this Committee, because it is a salient point.

Baroness O'Loan: To take you forward on this, we do get quite frustrated when we are given a memorandum that states that a power is appropriate, full stop. That is because very often we do not think that it is appropriate. We do not have any criteria to serve as the basis for helping us to understand how the draftsman has made his decisions. Sometimes there is an effort to justify the negative procedure on the grounds that the provision is purely procedural or because the regulations are technical, but when you look at the provision, you can see that there is much more to it. I wonder what could be done in the revision of your manual to address that approach.

The third question I want to ask you is on the technical details. Sometimes we are given the suggestion that we should use the negative procedure because there is no time for the affirmative procedure. I would like your observations on those three issues.

Richard Heaton: There is no "law" around any of this, so it is just a question not quite of precedent but of established principles, which are really valuable. If we could extract the principles for when it is right to do the negative and affirmative, I think that would be really valuable. I am not sure that there are really clear principles yet that everyone is agreed on, so I

regard this as something of a joint piece of work. If we could extract some principles or guidelines, that would bear fruit. I think people have got this by feel but perhaps we could just work a bit harder on looking at the areas where it really is not appropriate to do the negative procedure as opposed to the affirmative. Your guidance might help us on that. We can hazard a guess, but at the end of the day you are Parliament and it is for you to be the final arbiter of when you think the negative is right and when the affirmative is right.

Baroness O'Loan: I also asked about the suggestion that we have to be negative because there is no time for the affirmative.

The Chairman: That is common, and it is something we are very aware of. The time factor of the turnaround is becoming more and more of an issue. The time factor is what determines the level of scrutiny.

Richard Heaton: Do you mean for the initial use of the power? Is that the area you are talking about?

The Chairman: Yes. It is negative because the affirmative would take too long.

Richard Heaton: I would guess that it depends on the circumstances of the case. Someone advancing that argument would either be saying, "I have a specific exercise of the power in mind in response to a particular event and I need to get it done quickly", that you would need to test on its merits, or there is the broader argument that says, "Parliament has only a certain amount of time to do statutory instruments, and therefore if everything is affirmative, there will be no time to do anything else". The Committee is in a position to take a global look at whether that argument is well founded. If it is made in every case, clearly that would be wrong, but there has to be something in it because Parliament cannot spend all its time doing affirmatives. I think the Committee is in a good position to judge whether the argument is being overused.

Baroness O'Loan: Perhaps I may put one final question to you. In the manual which you held up for us to see, are there actual criteria that have been laid down to indicate to the parliamentary draftsman when it is appropriate to use the negative, the affirmative or the super-affirmative, whichever it is? Perhaps you can help us with what those criteria might be. If you want to write to us, that is fine.

Richard Heaton: I will write to you because there may be some internal purpose that I can point you to.

Baroness O'Loan: That would be helpful. Thank you very much.

Q5 Baroness Andrews: I, too, want to pursue this line. You have been very flattering about the way the Committee itself has prompted better scrutiny of secondary legislation, but it is clear that the number of skeleton Bills has increased and thus the volume of secondary legislation has increased hugely. When we talk about consistency and what is acceptable, we are keen to ensure that the Committee gets a clear and persuasive argument about why a certain choice of instrument has been made. One of the suggestions that has been put to us is that it might make things easier if we were to have some sort of pro forma that we could offer to departments that would set out a bit more structure and give some detail on how we expect clarifications and elucidations to be expressed. Would that prompt a more forensic description of why a particular type of instrument is important or why, for example, a particular precedent was going to be cited? We see the citation of precedents all over the place.

Richard Heaton: Okay, perhaps I may say that that is a great suggestion. I am sceptical about pro formas as such because they drive tick-box writing. Explanatory Notes have long been produced to a pro forma format and we have all seen some terrible notes fitting the pro forma. If the Committee takes the view that it is never acceptable for a department to say, "The negative speaks for itself", which I would guess the Home Office does all the time, then the Committee would say so and that would not happen. I am particularly interested in

developing that. The more you can say about an issue, the more that would encourage a degree of granularity: “A one-liner will never do. We expect you to point out at least the practical or the urgency reasons for doing such and such”. That would enable us to enforce it.

Baroness Andrews: To pick up on that point, we are often told that things are urgent, but we are not told exactly why they are urgent. Sometimes the nature of that urgency is obvious in the Bill, but at other times it is not clear at all. A degree of explanation would be really helpful sometimes.

Richard Heaton: This is really valuable stuff. When you write your report of this inquiry, the more of this level of detail that you can include in it, the better. We will be able to refer to it.

The Chairman: For example, if something is really urgent, the made affirmative procedure can be used. However, it is not used very often.

Baroness Andrews: I think we are aware that because people are working to tight timescales and, as has been said, there is a degree of inexperience in departments, there is already a sort of formalistic instinct to try to provide what the Committee wants. This is a question not only of taking the process a bit more seriously but of giving you whatever help you think would be effective in helping to improve judgment.

Richard Heaton: I would just take issue with not taking it seriously. Even the drafter of an inadequate memorandum takes it seriously. I take the point that there may be insufficient guidance, but everyone who works on a Bill takes the role of Parliament really seriously. An inexperienced Bill manager or an inexperienced Bill team will always benefit from guidance as to what will best serve parliamentary scrutiny.

Q6 Lord Bourne of Aberystwyth: First, thank you very much for the evidence. I come to this as a new boy, but this strikes me as being a question about where the responsibility for these memoranda ultimately lies. As Lord Marks has rightly said, if it comes to us, it is ex post facto. We can police it and say that it is inadequate, but it would be better if it was dealt

with upstream. I am not sure whether the spot audits which the Chair asked about are happening or whether the Cabinet Office is ultimately responsible for the quality of memoranda. If quality assurance is not guaranteed upstream, if you are not looking at the work and saying, “This is adequate”, some of what gets through will be inadequate. So the question is this: where does the responsibility ultimately lie for poor memoranda, and how do we get this right?

Richard Heaton: I think I will give you the orthodox answer, which is that departments are accountable through their Ministers.

Lord Bourne of Aberystwyth: I thought you would do that.

Richard Heaton: I must, otherwise I am going to have to take on everything and be responsible for everything the Government do. The department is responsible and Ministers are accountable to Parliament, with the department standing behind them. However, we have absolute responsibility for the overall cohesiveness of the Government’s overall legislative programme, while the quality—

Lord Bourne of Aberystwyth: I am sorry to interrupt you, but do you do the spot checks?

Richard Heaton: No. We do not do that methodically. Usually there will be some degree of engagement with parliamentary counsel, usually on the more contentious powers, so there is normally a conversation on those. As I have said, the memoranda will always be looked at by a Cabinet committee, but there is no methodical spot check on quality. However, this is an offer. The secretariat sitting behind me will agree to take on a slightly more active co-ordinating role on quality, especially when it has been armed with the findings of this Committee.

Lord Bourne of Aberystwyth: Why not have spot checks? You say that there are no methodical spot checks, but in a sense spot checks are not methodical.

Richard Heaton: Without knowing precisely what the Committee is looking for, it is a bit difficult to do a spot check. Armed with these examples, I am now better sighted as to the sort of things that the Committee systematically does not like. Certainly we can help to make spot checks when armed with that sort of criteria.

Q7 Countess of Mar: How would you describe the distinction between the delegation of powers that are legislative in character and those that are not? For example, would you expect powers to give directions or to issue a code of practice to be explained in a delegated powers memorandum?

Richard Heaton: Essentially, the memorandum will serve the ambit of the Committee. As I understand it, the ambit of this Committee is delegated legislation as opposed to executive powers of direction or laying a report before Parliament. Secretaries of State are empowered to do all sorts of things: to make or approve an appointment or to take receipt of an annual report from an arm's-length body. As I say, Secretaries of State are empowered to do all sorts of things, but where they are legislative in character—that is, they are rules or regulations that are of general application to citizens—I think that is when they come within the scope of this Committee. Please correct me if I am wrong, but I think that would therefore be the scope of the memorandum. Broadly speaking, it is all the stuff that you put into a statutory instrument. That is how I understand it. Unless the Committee has an appetite for going broader, I do not think we would seek to put into the memorandum a justification of the powers of the Secretary of State to dismiss an officeholder or give a direction in a particular case. I do not think that the Committee operates in that sort of territory.

The Chairman: What is key is that they are legislative in character.

Richard Heaton: Those are two that I would describe as not being legislative in character. Generally if something has the word “rules” or “regulations” attached to it, it is put into a

statutory instrument. That is a practical guide to what is legislative, but as I say, my test would include something about whether it is of general application to citizens.

Countess of Mar: For example, yesterday I picked up the *Special Educational Needs (SEN) Code of Practice*, which has a lot of do's and must's in it. Do you think that we should have a memorandum for such a code?

Richard Heaton: That is a good question. If it is to be brought into force by statutory instrument, that would certainly indicate that someone—

The Chairman: Please do not forget that we only look at Bills, we do not look at statutory instruments. That is the remit of the other Committee.

Richard Heaton: You look at the Bills that create the powers to set up statutory instruments.

The Chairman: Yes, that is right.

Richard Heaton: So, in that particular example, I do not think we would create a memorandum, but I may have got it wrong. I do not think we would put in a memorandum unless the code was presented in such a way that it would turn into a statutory instrument. In your case, I do not think so.

Q8 Baroness Fookes: Mr Heaton, could we return to the issue of a memorandum that in our view is inadequate as a whole, as opposed to disagreeing on a particular recommendation made by the Government in relation to the work we do? If we find that, I am not clear what happens beyond a Minister being informed. If a whole memorandum is considered to be inadequate, is there not a case to be made not simply for it to go back to the department but for it to come back to your office?

Richard Heaton: By “inadequate”, do you mean that the whole thing has just been badly drafted or that it does not make sense? If something is that poor, I hope that whoever opens the e-mail would see immediately that it does not make sense and would say, “This is hopeless”. I would be happy to take that call, but the department that signed it off should

know that it has put something in that is hopeless. I would really encourage that to be pointed out before it reaches this Committee, because it will simply frustrate you and waste your time. That needs to be fed back quickly so that people know about it.

Baroness Fookes: That is fine. I was thinking about how, in the longer term, it could be prevented from happening again, either from the particular department or indeed any department. What is the longer-term measure that should be taken? I am suggesting that it should be referred back to you or to your team.

Richard Heaton: I would want the departments that are responsible for putting in bad work to feel the heat. I am happy to read the riot act to them and to take receipt of a poor memorandum. However, perhaps I may say that what would be even more effective would be if it was sent straight back to the sender with a sharp message from Parliament saying, “This will not do”. Equally, when a department does something really well and sends a good memorandum, that should be praised. I do not sense that we have found the right level of to and fro in the feedback. People do work really hard on these memorandums. I am sure you must have come across memorandums that do the trick, and departments need to be told about those as well. We can then separate the sheep from the goats.

The Chairman: We often put that sort of praise into our reports.

Baroness Fookes: Yes, we would put it into our report, but it might not necessarily come back to you. I am assuming that it simply goes back to the department. Can we say that you or your team would like to know when we think that something has been done well?

Richard Heaton: We would know about it because if your Committee were to send a memorandum back it would send a shockwave through the system. In fact, I am sure that we would know about it. I would be very happy for it to come to me as well, but as I say, the department that puts in a poor piece of work needs to know about it one way or another, either through me or through you.

Baroness Fookes: I am now thinking of following up on what the Lord Chairman has said and talking about the reverse: that is, where something is very good and whether you would like to know about it. We might put something about that in our own report, but would you like to be told about a really good example, even if only informally?

Richard Heaton: I would be delighted on either count to know from the Committee about the stuff that works and the stuff that does not work, because then we can start training departments properly. I agree that at the moment the practice is a bit varied in terms of quality—you can describe this in those terms. Let us take the example I gave earlier. Someone might have what they think is a really simple procedural power. They have done it a million times before and they say, “Negative. Speaks for itself”. If this Committee finds that unacceptable, please say so and it will not happen. At the moment, I do not think that the message about exactly what is acceptable is quite coming through.

Lord Bourne of Aberystwyth: Do you not routinely receive copies of our reports? It seems to me that you should.

Richard Heaton: Yes, we do.

Lord Bourne of Aberystwyth: So it should be in there.

Countess of Mar: I am frankly quite shocked that you are prepared to accept that some departments are below par. When I joined the Civil Service about 50 years ago, we were given a very rigorous training. I would have thought that the training should go through all sorts of processes, including the preparation of Bills and memoranda. Before something comes over to us, the staff who do the work should be checked every time until they get it right. It is sloppy government.

Richard Heaton: No. The way you improve is by feedback and learning from when things go wrong as well as when things go right. People are bound to make mistakes and those mistakes have to feed back in, otherwise they go uncorrected. Of course we will train people, but we

need to do that training with reference to what is good and what is not good. I remember that in my first days in the Civil Service, if you put something in a box meant for a Minister who was on his feet and it did not work, you would really feel it. You would know that you have let your Minister down. Departments need to learn from real-life experience as well.

Countess of Mar: No. It is best to get it right first time.

Q9 Baroness Drake: It appears from the responses to the questionnaire that was sent out as part of the inquiry that commonly the Bill team manager and the Bill lawyer are responsible for the preparation of the delegated powers memorandum. Given the ad hoc character of the Bill teams, how are the lessons that are learnt about the preparation of memoranda carried forward from one Bill team to another? Is there not a structural weakness in that?

Richard Heaton: Bill teams are ad hoc in the sense that it is not usually the same Bill team as it had been for the previous legislation. However, we put quite a bit of stress on continuity. We like to encourage departments to appoint Bill managers who have been in a Bill team before. We think that continuity and learnt experience are important. The other answer is that we spend a lot of time training and talking to departments about how to do legislation. We get out on the road a lot. Bill managers who have done this work get out and talk about it. We use examples of best practice that cover everything from how to service this Committee, how to service the Joint Committee on Human Rights, how to service the Statutory Instruments Committee further downstream, to how to prepare for amendments and do a parliamentary handling strategy. All those things have to be got right and it is a great deal of work. That is why there is a team hard at work at it. I am sorry to repeat the point, but it will help us if we have the best possible evidence of what is acceptable to parliamentarians and what is not. We are only trying to serve the Committee. We are not trying to do something different. To take the point made by the Countess of Mar, maybe we will get it wrong. I hope that it does not

happen often but that when we do get it wrong we will rapidly learn from it. That is what we are trying to do.

Baroness Drake: I am new to this Committee. I think that one of its concerns is this: at what stage in the preparation of the Bill is proper attention is given to the delegated powers memorandum? Is it considered during the early stages of policy development or does it come right at the end? Do you have a view on when is the best time during the preparation of a Bill to focus on the memorandum? If so, when would that be?

Richard Heaton: That is a good question. I would always try to encourage a Bill team that is starting out on the preparation of a Bill to know what the, as it were, products are, and to have all of them planned for at an early stage. Perhaps this meets some of the examples of what has not been satisfactory. I think that things go wrong when all those products are produced right at the last minute. You tend to see that where a Bill is being produced to a very tight timescale. The quality of legislation, let alone the quality of its surrounding products, takes a hit if everything has to be done at the last minute. In an ideal case, there is absolutely no doubt that when you are crafting a Bill and working out the policy you will have in mind the products that will be needed for parliamentary scrutiny as well. I am not saying that it always happens, but that would be my counsel of perfection.

Baroness Drake: There is a risk that quality problems in the drafting of legislation are dealt with by actually taking more delegated powers. Because they have not been taken at an early stage in considering the Bill, they become a sort of add-on to address weaknesses in the drafting of the legislation in the first instance.

Richard Heaton: Yes. In that case, does that go to the quality of the memorandum? Probably not; it goes to issues about the choice of powers.

Baroness Drake: But it reveals itself in the quality of the memorandum.

Richard Heaton: If there are issues about the Government or the department's choice of powers and their attitude towards them, that is quite a fundamental issue that goes beyond the drafting of the memorandum. I think that the inquiry is possibly straying into both those areas. They are both important, but they are slightly different.

The Chairman: I do not think we necessarily want drafters saying, "This is our opening bid. Let's see if we can get away with this". Sometimes you get that.

Richard Heaton: That is a comment about departments' attitude to delegated powers rather than the way they draft the memoranda, I think.

Q10 Baroness Andrews: Following on from this—this is a personal reflection—there is the question of where the Minister fits into this process of iteration and information. As I recall, having done quite a lot of legislation in CLG, and a lot of SIs, we very rarely sat down and discussed the delegated powers memorandum, because it came too late in the process. One would not want to think that it was a corrective method for a sweeping up of all things that had not found their way into the Bill for some reason. There is a question here about the training of Ministers and the way they interrogate the process of Bill-making and amendment, language, and the rest of it. What do you feel about this, slightly straying outside the Committee's remit?

Richard Heaton: Several members of the Committee have more experience of the ministerial side than I have.

The Chairman: Lady Andrews is part of that.

Richard Heaton: Indeed. I think there is probably something in what you say. Respectfully, I think there is; I do not want to comment much further. Sometimes I think it is fair to say that a number of Ministers look at memoranda but in the form of the legislation committee, but I think it is also fair to say that the legislation committee is primarily concerned with handling. It will look at the memorandum, but its primary focus, if I am honest, will be a "There seem

to be a lot of powers. How's this going to go through the House of Lords" sort of consideration.

Baroness Foakes: I want to put in a sense a philosophical point to you. I start from the basis that if you are going to change the law, as much as possible it should be in the Bill that any delegated powers should be limited to occasions where they are obviously sensible, such as welfare regulations for animals, in which I am interested. Those occasions may change, so you might want to change those powers, but basically delegated legislation should not be used, as I sometimes think it is—this has been put to you just how—for sloppy legislation where you have to push something in at the last minute, if I may put it bluntly.

Richard Heaton: I think that is a fair observation.

Lord Marks of Henley-on-Thames: I have one more supplementary question, which is relevant to something that Baroness Drake was asking about. One of our respondents suggested that the use of the first-time affirmative procedure could in a sense be Machiavellian, where the code or the set of regulations that had to be brought in by the affirmative procedure would be an innocent stalking horse because the negative procedure could be used for less anodyne regulations thereafter. I do not suggest that the Government are Machiavellian in that way, but given the timescale problems that you alluded to in answer to Baroness Drake, I just wonder whether there is a weakness about the first-time affirmative procedure where you are vulnerable to the Government getting the easy bits right first time when there is an affirmative resolution and perhaps putting in the more difficult regulations on another occasion when the negative procedure is all that there is in place. It is sometimes recommended in the memorandum, and sometimes something that we recommend in the face of the recommendation for the negative procedure, and I wonder whether it is actually a very happy compromise.

Richard Heaton: You are right: the first-time affirmative is the deal that is done in some cases when Parliament thinks it is appropriate. It is an agreed position very often. If anyone came to me suggesting that sequence of powers, I hope I would blow the whistle because it does not seem to be a proper use of powers to use it as a stalking horse. Thinking about it, you are right: that is a theoretical possibility. What can I say? We could build something into the two powers in question that tries to rule it out. You can always tweak enabling powers, as you know, which would lead us to a different species of primary affirmative—maybe one that could not be followed up by a negative procedure, except in some circumstances. That would introduce another species of power.

Lord Marks of Henley-on-Thames: Not really very happy about changing the scope of the powers.

Richard Heaton: No, quite. So there is that, or there is blowing the whistle when you see that happening. I do not think that has happened, and I certainly do not think any government lawyer would put it forward without expressing some pretty severe misgivings if it is as stark as you suggest. If it is more than a notional or theoretical possibility, there would be a case, I suppose, for trying to legislate it away. But then, as I say, you are up against tweaking the regular powers, which is not much fun. I am not sure whether that is a comprehensive answer because I do not quite know whether it is a real or a theoretical possibility.

Lord Marks of Henley-on-Thames: It does suggest that we should be more cautious about first-time affirmatives, particularly in the case of rushed legislation.

Richard Heaton: It might be wise to seek ministerial assurances that the power will not be used in the way that you have described. That might be a way through.

The Chairman: I wonder whether I could go back a step or two, because I am not sure that we have quite got this straight. Is there a mechanism in government for reviewing our reports

to inform those who are preparing delegated powers memos? You were saying that you do not know what the Committee wants, so I am not quite sure whether this review ever happens.

Richard Heaton: It does happen. Please do not take this as criticism of the Committee, but where you criticise a memorandum I would encourage, not only in the reports but informally, to say why it fell short. If you simply say that the memorandum did not meet the right standards, that leaves a lot to the imagination. I would simply encourage counsel or your assistants to explain the bits that you did not find right, and we will try to sort it. It is an invitation.

The Chairman: Does anyone have any other questions?

Lord Bourne of Aberystwyth: Just on that last point, if the reasons why we do not like it are in the report and the report comes to you, is not the onus on you to pick up the phone and ask us if something is not clear? They are in the report, as I understand it.

Richard Heaton: Forgive me, maybe there is more than what I have in mind. I just have in mind the sentence, “The Committee found the memorandum unsatisfactory”, or, “it did not reach the required standards”. We can take a guess. If there is ambiguity I hope that we would pick up the phone, but usually we take a guess. We might get it right; we might not get it right. I would just ask for greater particularity, I think.

The Chairman: Our reports are pretty detailed about what we found wrong. In our report on the memo for the Mesothelioma Bill we say, “Paragraph 55 of the memorandum is entirely silent on the nature or extent of any envisaged amplification of the TC’s jurisdiction, beyond the explanation that it might deal with insurance disputes about ‘other work-related conditions or injuries’”. In other words, we have examples of where we say exactly what the problem is.

Richard Heaton: Let me go back and review exactly how we take receipt of your reports. Certainly if there is anything concrete that we can action and disseminate, we undertake to do that.

The Chairman: Thank you very much indeed for your time. That was extremely valuable.

Richard Heaton: I hope I did not sound defensive. We genuinely want to help the Committee to do its scrutiny job.

The Chairman: Lovely. I am so sorry: Lady Mar, do ask the last question.

Q11 Countess of Mar: Mr Heaton, a number of departments have indicated in their answers to the questionnaire that parliamentary counsel is consulted about the memorandum. In one instance, we are told that counsel often clears the draft memorandum if time allows. In a perfect world, would you favour a sign-off by parliamentary counsel in all cases?

Richard Heaton: No. In a perfect world, I would favour it being exactly as you put it: being got right by the people who are accountable, with parliamentary counsel giving advice and challenging where necessary on the choice of powers but not doing the drafting, because then we just have people marking each other, and it is an excuse for poor drafting where that is happening. So I do not think I would volunteer for parliamentary counsel to be the final author, because then quality just slips. I would rather that counsel concentrated on trying—and it is quite hard work when stuff is being done in a hurry—to get the legislation right and challenging and advising on other bits of procedure. I really want the authorship to be right, so I think I would be reluctant to offer sign-off.

Baroness Fookes: There is the rub: do not legislate too much.

The Chairman: —in too much of a hurry. Thank you very much indeed. We must let you and your staff go now. Thank you for your time.