HOUSE OF COMMONS

ORAL EVIDENCE

TAKEN BEFORE THE

PROCEDURE COMMITTEE

DELEGATED LEGISLATION

WEDNESDAY 29 JANUARY 2014

DR RUTH FOX and JOEL BLACKWELL

Evidence heard in Public Questions 1 - 21

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Oral Evidence

Taken before the Procedure Committee

on Wednesday 29 January 2014

Members present:

Mr Charles Walker (Chair)
Jenny Chapman
Nic Dakin
Thomas Docherty
Yvonne Fovargue
John Hemming
Mr David Nuttall
Jacob Rees-Mogg
Martin Vickers

Examination of Witnesses

Witnesses: **Dr Ruth Fox**, Director and Head of Research, Hansard Society, and **Joel Blackwell**, formerly Lead Researcher on Delegated Legislation, Hansard Society, gave evidence.

Q1 Chair: Ruth, you are becoming a veteran of this Committee.
Dr Fox: It feels like it.
Chair: Joel, have you been before us before?
Joel Blackwell: This is the first time, Chair.

Q2 Chair: I am sure it will not be your last. Thank you for coming here. We are looking at statutory instruments, and we have an excellent set of questions prepared by the Clerks of the Committee. I am not going to waste any time, because we do not have a lot of time. What prompted the Hansard Society to look into delegated legislation? What is it you were expecting to find?

Dr Fox: What prompted it were two previous studies that we had done looking at legislative process. In the interests of transparency, I should say that that research and this research was funded by the Nuffield Foundation. From those two studies of the legislative process, it became clear that delegated legislation was an issue that had not been looked at to any great extent in recent years. It was also an area of growing concern because of the volume, the complexity and the expansion of the number of scrutiny methods and mechanisms that were, at present, concerned about Henry VIII powers.

With Joel as our lead researcher on the project, what we have done over a two-year period is look at six case studies: three Bills in this Parliament and three Bills in the previous Parliament. We have deliberately looked at controversial elements: at where there were concerns about Henry VIII, about the conferring of powers and about the scrutiny mechanisms. We have looked at those Bills through the life cycle, beginning in Whitehall. Our concern is not just what happens here in terms of scrutiny, but what happens upstream in Whitehall in terms of the decision to make the separation between primary and secondary, and then also the drafting and handling process upstream in Whitehall, and the impact that has, as well as what happens then when it arrives in the Commons and the Lords.

Our concern throughout has been to think about how you deal with the most controversial and the most difficult elements of the system, and what that then tells us about how we might reform the process to address those difficulties and separate out the less controversial, day-to-day statutory instruments and delegated legislation from the controversial, and make sure that Parliament is looking at what Parliament wants and needs to look at, given the deluge of delegation.

Q3 Jenny Chapman: Everything you are saying is ringing lots of bells with me, having sat through too many of these and having to deal with them from the Front Bench as well. It is very rare in my area that we will find anything that is controversial. Most of it we have either done to death as the Bill went through Committee, or it is something that is perfectly sensible and we are happy, but you feel obliged to turn up and make a speech. You have to whip a Committee together and you are taking up Clerks' time, and you do wonder whether that is the most sensible way to proceed. I wonder what mechanism you might use, if you want to sift out some of these Committee meetings, and how you might go about doing that.

Dr Fox: I will take us back to first principles, and then I will ask Joel to comment on the sifting mechanisms. Our approach is that jumping to the mechanisms first is problematic because of the volume and the complexity now. There is also the difficulty that other Procedure Committee inquiries and other Committees have looked at this previously over the years and come up with, "We need a sifting mechanism; we need an amendable motion" and so on. I think there is a sense that, to some extent, that could be a bit of a sticking plaster and dealing with the problem after the horse has bolted. What needs to happen is to take a step back, look at the whole process in the round and ask, from first principles: what is being delegated, and why? What should the balance be, in terms of detail? What does Parliament collectively want to look at? What does this House care to look at, and what is it happy to leave to the House of Lords? What does this House want to look at additionally, and, more broadly, given the volume, what might it consider leaving to expert bodies?

Joel can comment on some of the specifics of that, but our approach would be not to jump to that immediately and try to solve bits of the process, but to take a step backwards and look at it in a more collective way.

Q4 Jenny Chapman: My sense is that Governments will always want to have a fair chunk of what they want to do as delegated, and we have this debate on every Bill I have ever done. We want it on the face of the Bill and they want to have the ability to do it this way. Assuming that they are going to carry on doing it that way, and they are probably not going to be persuaded to change that aspect of the decision-making process, what could you do to filter out perhaps the less controversial SIs? Would you look at it in terms of how controversial they are, or would you look at it in some other way?

Joel Blackwell: To add to what Ruth was saying, when we interviewed parliamentarians and particular public officials on the drafting process, there was very much a sense that assigning an SI to a procedure was very much a gut feeling. In 1996, the Procedure Committee pointed it out and took evidence, and I think it was one of the parliamentary Clerks who said that sometimes it can lead to chance, and that is where mistakes can be made. Reiterating what Ruth was saying, a sifting committee of some type may just be putting a plaster on the situation. First, we need to sit down and think carefully about the set criteria for what Parliament wants to be see, and then we can move on from there. I think the sifting committee would benefit from that open and honest discussion about set criteria for an affirmative procedure, something controversial, or something that Parliament wants to actually see and talk about.

Dr Fox: We have not finished our project, and we have not concluded our recommendations. I imagine we will have done so by the time your inquiry is finished, so you will have a view in advance. One of the issues we are looking at is this: if you were to try to establish criteria, can that be done across Government as a whole, or are there ways in which you might break it down in terms of types of legislation, different circumstances and different departments? For example, tax, welfare or formal legislation might be very different in terms of the criteria and the balance for another department and whether that is feasible. At the moment we don't know the answer, because are still working through the mechanics of it. But that is the sort of thing we are looking at. Then the Committee model could follow from that.

Q5 Jenny Chapman: I think that MPs are going to want to be able to call things in, should they want to. Or something might come up that this criteria would not apply to but, for whatever reason, the Opposition feels that it wants a bit of an airing, and that is the only opportunity to do so, and that it is important to keep that in the system, so—

Dr Fox: You could have a sifting committee. The question is then, is it duplicative of what the House of Lords is doing? One of the questions is: given the volume, does this House look at mechanisms it puts in place and do it unilaterally—put a measure in to address its concerns—or does it look at it in conjunction with the Lords and come up with a streamlined process? This House specifically decides, as the elected House, what it particularly wants to do and what it is content to leave to the Lords.

Chair: The point is that, potentially, there could be a way of doing things so that there are fewer SIs going to Committee—so that the ones that do go in are the ones of greatest interest to the House. I think that has attractions because, as you know, a lot of SIs go in to Committee and are dealt with in a matter of minutes, but there is a lot of time spent getting to that point. Who was going to raise concerns about Henry VIII and all of that?

Q6 Mr Nuttall: Yes. Before we turn to Henry VIII clauses, while you have been conducting the research so far, have you come across any specific examples of where the procedure that is being followed for SIs has been inappropriate?

Joel Blackwell: There was one case with the Legislative and Regulatory Reform Act 2006 and the orders that came about from those. Do you know about the process? The Government decides and lets the Committee know what procedure it prefers and what it thinks it should be scrutinised at. One of the particular orders was a negative procedure in the Government's eyes, but the Lords Delegated Powers and Regulatory Reform Committee decided to upgrade that to a super-affirmative procedure, which is quite a giant leap in terms of Committee procedures.

I think it goes back to the point that we were making at the beginning in terms of leaving it to gut feeling when assigning a procedure, and the switch between the affirmative and the negative can lead to mistakes.

Q7 Mr Nuttall: Turning to the Henry VIII powers, have you come across any examples where they have been used inappropriately while you have been doing this?

Dr Fox: In terms of the Bills we have looked at, there was the Legislative and Regulatory Reform Act; the initial powers on the Bill were very, very wide. You then have the inclusion of public bodies. I gave evidence just before Christmas on the draft Deregulation Bill, where there were very, very wide Henry VIII powers that I would regard as inappropriate in the context of what the Government was doing. The concern we have about Henry VIII powers—they are not always a bad thing, and I think there is an assumption now too much that perhaps every Henry VIII is wrong and we should not have any of them—is that the first instinct of the Government is to go to the Henry VIII and to do it through the delegation,

whereas it ought to be the last stage if they have considered things like repeal consolidation, Law Commission and so on, as options for revising the statute book. Too often it is a first resort and there are too many of them.

Joel Blackwell: Just to add to that, one of our objectives was to tell the story of delegated legislation throughout the last century, the reform processes and the inquiries that have taken place on delegated legislation. Henry VIII powers were first raised in 1932 by the Donoughmore Committee. They said that they should be used only in exceptional cases and in times of emergency, so we are going over the same issues again and again. As Ruth rightly says, not all Henry VIII powers are bad, but three of the cases that we have seen were framework Bills. Three of them had some very wide powers. On introduction to the House of the Legislative and Regulatory Reform Act in 2006, the first clause was enabling the Minister by order to reform legislation. I think there is a concern with academics and people who are interested in this that we may have reached the bottom line and that the floodgates may have opened, and we are now seeing around 100 Henry VIII clauses appearing per Session.

Dr Fox: One of the concerns is: is the debate shifting in Parliament to focus on the scrutiny procedure to constrain the power, rather than the question of whether the power should be there in the first place? The Government has responded on the draft Deregulation Bill, and the final version of Bill that has been brought forward does not have those clauses in it. They have taken it out and responded to the pre-legislative scrutiny stage. But there is an awful lot of discussion now, in terms of focusing on the Henry VIII powers, around, "How do we constrain it with these enhanced or super-affirmatives?" The consequence of that is that the debate becomes more about the control of it, rather than the principle of whether it should be there in the first place. We have ended up in a situation where, because of the way the Government handles it and grants concessions—particularly in the Lords—around the enhanced and affirmative procedures to constrain the power, you are ending up with a huge number of variations of scrutiny. That is adding layer on layer of complexity and making it even more difficult for people, parliamentarians included, to understand, let alone anybody else outside. It goes back to the question of whether they should be there in the first place as opposed to the constant focus on the constraint.

Q8 Martin Vickers: The Lords have much more comprehensive SI scrutiny. Are there any examples of good and bad practice that you have come across that you can draw to our attention?

Joel Blackwell: The Delegated Powers Committee in particular; there are some examples of good practice there. The reports are very good. I think there is a lot of respect for the recommendations made by the Committee, and the Government tends to accept them, although there are issues. Although the Committee is viewed by other jurisdictions as a benchmark for good practice, throughout our research we have noted things that could be improved, particularly with regard to talking about precedent when it comes to procedures. Also, there is significant variability in the delegated powers memorandum that is submitted by Departments to that Committee. I think the Committee is yet to really push and use the powers that they exercise to improve that in some cases. The other Committees as well—do you want to talk about those, Ruth?

Dr Fox: Yes. One of the things that the Lords have done particularly well is to push the boundaries. I take the point that the Government wants its legislation through as quickly as possible, but the Lords Committees have been quite strong at pushing at the boundaries, first of all by Delegated Powers issuing its detailed guidance, which now is encompassed in the Cabinet Office *Guide to Making Legislation*. Certainly all the Bill teams—when they are working on the Bills and developing them in the Departments—have to make reference to that and use that as a guide to how they develop the Bill. As Joel says, the consequence of that is

that there is often a consultation process with the Committee in advance before they move forward to try to avoid difficulties. Clearly that is not perfect, but it certainly helps. The consequence of that is that a lot of the recommendations of the Committee are adhered to.

The other Committee in the Lords where they pushed at the boundaries a few years ago—I think it was 2006 or 2007—was the super-casino order, where they took evidence for the first time on the reasons why Manchester had been chosen over Blackpool. I think that occasionally pushing at the boundaries of their remit, stepping out a little bit and pushing the Government, has really changed how delegated legislation is dealt with in the Upper House. As Joel says, it is not perfect in the sense that we have found instances where the Delegated Powers Committee has missed things that get either a lot of consideration in this House or, indeed, in the Lords.

One of the interesting questions for the Commons is this: while the Delegated Powers reports are regarded as very useful, they only kick in on Lords starters to benefit this House. On a Commons starter, you do not get that information until it is in the Lords, and then it comes back. I wonder if there is a gap there for the Commons, in terms of the information and pushback provided, and whether some kind of model is needed. But then you do not want to duplicate and replicate what is going on, so is there a way to try to get that information on Commons starters earlier? You get into fairly tortuous issues around the relationship between the two Houses, but I do think there is a gap there in terms of the material available to this House when it begins scrutinising those.

Q9 Martin Vickers: Are there other additional points that you would want to make that could improve the Commons system in order to complement what is happening in the Upper House?

Dr Fox: Changes to the Delegated Legislation Committees.

Joel Blackwell: Yes, I think many of you will understand the difficulty of being on a Delegated Legislation Committee and the frustrations that you can have sometimes on those Committees. I think there are some quick-fix reforms that could really improve the way that statutory instruments are debated on those Committees. We like the idea of having consistency of membership. A lot of the interviews that I held with people who were focal in terms of the Welfare Reform Bill or the Public Bodies Bill really wanted to carry on that process after Royal Assent, and wanted to sit on Delegated Legislation Committees and look at the regulations that were quite a substantial part of that Bill, but they were frustrated by the Whips. We think that perhaps a consistency on the Public Bill Committee and moving that on to a DL Committee would be a good thing.

Also, on the European Scrutiny Committees and when they move paperwork on to the A, B or C Committees, you can have one or two of the Select Committee members on that Committee too, which again provides consistency. I think that would enable and enhance debate. We do not like the time limits. They seem quite arbitrary. A lot of the time limits across the whole delegated legislation process seem quite arbitrary, like the 40 days or 60 days. It feels as if they are picked up from there. For example, there is the question of why Northern Ireland Committees can look at an SI for two and a half hours but DLCs can only have one and a half. There is no explanation for it—things like that.

In the research that we were doing, we were thinking a lot about incentives, in terms of incentivising MPs to want to take part and really be passionate about the work they do on these Committees. Then you move into questions about amendable SIs and amending delegated legislation, but I think that—

Dr Fox: I think we have concerns about the amended ones. I am sure that comes up as one of the usual list of reforms. We would prefer the conditional approach, where you reject, subject to X, Y and Z being done, and then you would be prepared to accept. I think there is

an issue about doing amendables, and there are potential drafting consequences and difficulties that arise from that. Departments should have to do the heavy lifting; not Members, not the Clerks, not the legal advisers. Overall, it would be better. You would still have the incentive. You would still have a bit more capacity in terms of what influence can be exercised, but you would not necessarily lead into the legal difficulties.

Q10 Jacob Rees-Mogg: I want to follow up on your answer on people wanting to carry on, if they have been on a Bill, to be on the Statutory Instrument Committees. They are allowed to turn up and speak. Do they not feel that is sufficient, or do they not know that they are allowed to do that? They are also allowed to go on the European Scrutiny Committees, and I think there is some confusion. I am glad Mr Hemming has just come back in because he will give an example of an MP who had no right to vote at an SI Committee, but turned up, spoke, and the statutory instrument was withdrawn by the Minister. This is obviously very rare, but how important do you think that right is?

Joel Blackwell: I think it is very important. You are right, Mr Rees-Mogg: there is an issue in terms of understanding of the process by parliamentarians. Hopefully the research that we have been doing will lift the lid on that process, and it is important. In the case Mr Hemming's refers to, I think there was a drafting issue, or there was an issue that a constituent had brought up to the MP, and by being at the Committee he raised the issue almost informally, but it sparked interest in the Minister and they could then revoke it and start again and improve the process.

Q11 John Hemming: It was about fjords and rivers, and when you were in the sea and when you were not in the sea. Basically, he demonstrated how, as it was worded, it would not work. Sorry, have you finished?

Jacob Rees-Mogg: Yes, I have.

John Hemming: I can come in on that, because it does raise an interesting question? I have just been at the Joint Committee and the Select Committee on Statutory Instruments, which looks at the vires. Although it was very short, there is an important function there, because it is an opportunity for Officers of the House—the legal advisers there—to look at the vires and whether the instruments are correct, and the Committee has the authority to bounce them back to Whitehall; that is what its function is. The question then is the function of the individual Delegated Legislation Committees or debates on the Floor of the House. We have a good example of that particular question in the renewable fuel obligation.

Do you know of other instances where defective SIs have come into force without that being picked up—where the SIs themselves are defective? You can argue about to what extent you upgrade benefits, and you can have a political argument about that, but some are defective in practice. Do you know of any examples?

Dr Fox: Defective in drafting, you mean?

John Hemming: Yes, defective drafting. The scrutiny process has allowed something through that was inherently defective. Do you know any examples of it?

Joel Blackwell: There is an order. I forget the name of the order now, but I can find out for you. I think there is an order that has been amended four times. It has gone out into the field and failed. They have tried to redraft it. It has gone out again, failed, and that has happened three or four times. It does happen.

Q12 John Hemming: That is the important area of it. To me, what is key about the process is for people outside the House to be able to contact their Member of Parliament and feed their concerns about delegated legislation into the process. What I have noticed is people noticing it more and starting to lobby members of Delegated Legislation Committees. I sit on

a lot of them. I have noticed people engaging more with the process, which in itself is important.

Dr Fox: I think that raises a broader question that we are also touching on, linked to parliamentarians' and the public's level of interest. By and large, the public would struggle to understand the process and even to locate the information and the documentation and so on. It is a minefield. Joel knows it far better than me because he has to do this for six Bills and all the various orders and so on. For an ordinary, interested constituent who has a particular concern, to be able to follow and understand what is happening is nigh-on impossible.

In terms of our interviews with parliamentarians, to be very honest, it has been quite difficult because we have found that parliamentarians do not necessarily understand some elements of the system. When we go back through Hansard—talking about Bills with 142 Henry VIII powers in it, when there were five, and other things there—we are finding the sheer complexity of it now means that the ability to access and understand it, no matter where you stand in the process, is incredibly difficult. Upstream in Whitehall, you are dealing with people who, in their career, will have perhaps only ever drafted one Bill or one public body order or one legislative reform order, and that is it. There is a constant lack of knowledge and experience in the system at the Whitehall end. I think that also contributes to some of the problems in terms of things like drafting, precedence, which procedure should be allocated to which power, and whether or not things should be on the face of the Bill.

Q13 Chair: The Procedure Committee has twice recommended a sifting committee, in 1996 and 2000. This was met with deafening silence by the Government. One was a Conservative Government and one was a Labour Government. Both had one thing in common: They did not respond to the Select Committee report recommendations. Do you think that there are flaws with our previous proposals for a sifting committee? If you think a sifting committee would work, why do you think the Government finds the idea so unpalatable?

Dr Fox: We go back to our earlier point. The issue with a sifting committee will be: is it putting a sticking plaster on the problem? This is why I would encourage a wider look, because I think repeating the same reforms will probably get the same result. This issue is now much bigger because of the complexities of the scrutiny procedures and the variations because of the number of Henry VIIIs and so on. So a bigger look, exploding some of the big problems going back to first principles, might have more effect. I do not suggest that the Government is going to respond and do things in the next few years. Our experience of parliamentary reform is you are looking at a 10-year period before sometimes you get the reforms that you want, but it is about building the argument. The problem of going back to some of these—not small-bore reforms, but in the grand scheme of things perhaps they are—is that you are going to get exactly the same answers. If you come away with the same answer, you are going to get the same response, and I think the debate needs to be broadened and widened.

The issues with sifting are: the issue of duplication; the issue of putting on a sticking plaster; the issue of whether the horse has bolted and it is too late; the degree to which the Committee would be very, very reliant on Clerks and outside experts; and whether it is really member involvement, or whether the staffing or the secretariat are really doing it. Our experience in the Lords is that you are very dependent on a very good Chair. That is absolutely crucial to make the Committee effective. There may be other ways of doing sifting. There are a number of expert bodies that are distributed through the delegated legislation process. There is the issue of whether there are ways to link those to a sifting committee as well, possibly, or to have reporting in in a different way to this House on the controversial things.

Q14 John Hemming: I wonder whether there is merit in having a more transparent system whereby, if people look on the website, it is more obvious which statutory instruments are going through. With the Bills, the website is very good. It tells you what stage a Bill has got to. The concern I have is that people outside Parliament do not know what is going on. They cannot then contact parliamentarians about it and take it on from there. Whereas, with the Bill process, everything works—not brilliantly in every way, but there is a process.

Dr Fox: Clarity, yes.

John Hemming: Where people know what is going on and can engage with it.

Joel Blackwell: My concern is that if you introduce a sifting committee, the next step is fraught with difficulties, too. If you look at prayers in the House of Commons, they have rapidly declined to the point where not many Back Benchers submit a prayer because of the EDM process in particular. If you are going to have a sifting committee and you are raising the alarm and the attention of Members of the House to something that is quite controversial, which should be debated and should be discussed, the existing procedures there are not fit for purpose in some respects. That is an issue.

Going back to the point about the Lords Merits Committee—or the Secondary Legislation Scrutiny Committee as it is called now—it has re-energised the House of Lords and has done some very notable work. It can be very reliant on the Chair and the personality of the Chair in terms of sifting and getting the House energised. But there is that issue there with the House of Lords, its self-denying ordinance, and the fact that it does not normally, by convention, vote down SIs, which only really works if the House of Commons is performing a function as well. At the moment, when you look at prayers, sadly, I do not think the House of Commons—

Q15 Chair: Before I move to Jacob, you mentioned the procedures were not really up to scratch. Can you expand on that slightly?

Joel Blackwell: If you take prayers, for example, the fact that you have to table an Early Day Motion is very difficult. I think it puts a lot of people off. Speaking to members of the Opposition as well, it is usually they who will lead the opposition, or it will be the Shadow Leader of the House tabling a prayer motion. The lack of resource for those two to really research the SI that they want to pray against creates difficulties. That is one very small aspect of the delegated legislative scrutiny process that perhaps is not fit for purpose.

Q16 Jacob Rees-Mogg: Before I come on to the European side of it, Dr Fox, you mentioned the sticking plaster, and I want to try to understand what you think we should be doing, because if changing the procedures to filter things, or whatever, is a sticking plaster and you go back to first principles, what would we then be trying to do? Are we trying to change the whole system of legislation so that Henry VIII clauses are simply not possible or are heavily restricted? Are we trying to change the balance between primary and secondary legislation? These are outside the remit of this Committee, but in a way there is no point in us improving the procedure at the back end if the front end is completely hopeless. I want an idea of what you think ought to be done, or whether you think you can make this system work if you get the back end right, and whether quite wide powers of secondary legislation are necessary to prevent endless primary legislation of an enormously detailed nature.

Dr Fox: I think our starting point is that secondary legislation is not going to go away, and the volume is probably not going to go away either. Quite rightly, across the board and in particular departmental areas, you would not want it all on primary legislation. It would be impossible. Secondary legislation has a purpose and will continue.

I confess I have no answer for the Committee today. We will probably have an answer for you in a couple of months' time, but we are still working through some of this. The fundamental question has to be, what does this House want to see again? Can you define what it is that you want to look at? Are there particular criteria that you could do that by? Are there particular areas of legislation you want to keep a closer eye on, and are there particular areas where, in general, there are few problems and you are content for that to carry on? Are there areas where you would be content for other individuals or bodies with greater expertise in very technical, specific areas to do that, and to report to the House, which would narrow the number? An example we looked at is the Statutory Examiner of Instruments in the Northern Ireland Assembly, who is an Officer of the House who looks at these and, in a sense, performs something of a legal sifting mechanism and draws that to the attention of the Assembly.

I confess that where we are struggling is how you would define the criteria upstream in terms of the relationship with Whitehall. I do not want to get into the detail of that today because, as I say, we are still working through it. Also, as I indicated to the Clerks earlier, I do not want to say too much about our recommendations when we are still going through some of the detail, although we will certainly provide that to the Committee at a later stage. It is that fundamental question: what do you want to look at, and why? If you can narrow that down, then I think you utilise that as the basis for thinking about what the procedures should be, rather than just accepting that there is the volume coming forward, accepting that and trying to fit a procedure around that. I think it is about trying to narrow down within that volume what it is you are most concerned about as parliamentarians and where you think—in terms of what the public would want, in terms of accountability, oversight and scrutiny—that that lies in the array of delegated legislation that you are seeing.

Q17 Jacob Rees-Mogg: From a scrutiny point of view, it needs to be a parliamentary procedure, rather than, as it currently is, a very much Executive-directed procedure?

Dr Fox: Yes.

Q18 Jacob Rees-Mogg: Thank you very much. I will now move on to Europe. As I am sure you know, a huge number of statutory instruments come under the 1972 European Communities Act, and the Scrutiny Committee has recommended that all such SIs should automatically come under the affirmative process. Do you think that is a good idea?

Dr Fox: This is an area that we have not looked at in terms of our research, so I could not say yes or no from an informed perspective. We avoided broadly two areas in the research because of just adding in a whole new layer of complexity and expanding the remit. One was the European issue and the second was the devolution issue, so there are two areas where we would not want to comment, unless you want to add anything, Joel.

Joel Blackwell: At the moment, they are automatically negative procedures. What we want to start a discussion about is moving away from that gut feeling of the choice between the affirmative and the negative, and trying to think about what makes an affirmative, what is a negative, and working in that way rather than automatically setting an affirmative bar, which will not be necessary. As the 1996 Committee rightly pointed out, it leads to an awful lot of triple affirmatives, so you are stuck in a Committee and the average time you need to be there is 10 minutes, and that is the issue with setting an affirmative bar.

Q19 Jacob Rees-Mogg: The other recommendation that the European Scrutiny Committee made—and you may not want to answer this either, for very good reasons; it is not a criticism—was that every statutory instrument that has a European legal base, even if it is not under the European Communities Act 1972, ought to say so, so that people know its origins. If you are willing to give a view, do you think that is sensible?

Dr Fox: Our view generally on these is that the more information that is provided and the greater transparency about the origins and the decision-making, the better.

Joel Blackwell: But there would have to be consistency. I think that is the problem with a lot of the paperwork that accompanies SIs at the moment: there is no consistency and it is a highly variable performance by Departments. I think that the Merits Committee, when they looked at the management of SIs in 2006-07, rightly raised a lot of concerns about that variability in the quality of paperwork.

Q20 Chair: Somewhere along the road you mentioned some form of expert scrutiny to decide what statutory instruments should go into Committee. What sort of experts were you envisaging?

Dr Fox: You already have a range of bodies now. The Banking Bill created the Expert Liaison Panel that oversees the statutory instruments of the special resolution regime for the tripartite financial management of the Bank of England, Treasury and so on, so you already have that group of financial experts and lawyers who then report on their views on those particular instruments. In a different way, you have the Social Security Advisory Committee looking at DWP instruments. It reports to the Secretary of State, not to Parliament, but that is the kind of model that I am talking about, where it is looking at a vast array. It can deal with the volume. It brings expert and technical knowledge, and it is able to sift some of the issues of defective drafting and likely problems in terms of implementation. As I said, Northern Ireland has—I cannot remember the exact title—effectively, a parliamentary officer who is the—

Q21 Chair: Who would sit there? Would it be parliamentarians sitting on these bodies?

Dr Fox: It depends how many you would have. You would structure it. Generally speaking, these bodies tend to be external people. What happens at the moment is, by and large—certainly in the Westminster examples—they report to Government Departments. I could foresee a situation in which you would have a number of these bodies in some of the particular areas that you were most concerned about that were reporting to Parliament. It is almost like an NAO model supporting the Public Accounts Committee. You might have a series of small expert bodies supporting a Committee or a series of Committees in particular areas, looking at the legislation. There is a problem of understanding in complexity. There is a problem about appetite among Members to do this because of the complexity, and, bluntly, because of the time constraints. Therefore, is it possible in that process of trying to narrow down and get Members focused on the most controversial or biggest areas of concern, to utilise other things that are out there? Are there potential models to help Parliament and this House do the job in a different way, and to think about it differently, rather than assuming that a Committee model is necessarily always the right and best way? External expertise is already being used.

Joel Blackwell: When you look at the original justifications for the use of delegated legislation, the last time it was looked at was in 1921, which is probably the only book that has ever been written exclusively on delegated legislation. It was the elaboration and the involvement of external expertise. We are seeing more and more statutory consultations added to orders, but again, the Secondary Legislation Scrutiny Committee has spoken about the highly variable practice of consultation. They have raised issues particularly in relation to public body orders. I think there is a lot of merit in that involvement.

Chair: The Committee are content. Can I thank you both for giving us some of your time? Thank you for the conciseness of your answers. It is much appreciated, and no doubt we shall see you again at some stage in the future.

Dr Fox: We will send you our reports, once they are done.