



Procedure Committee

Oral evidence: [Delegated Legislation](#), HC 1031

Wednesday 9 April 2014

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Members present: Mr Charles Walker (Chair); Jenny Chapman; Nic Dakin; Thomas Docherty; Yvonne Fovarque; Mr James Gray; John Hemming; Mr David Nuttall; Jacob Rees-Mogg; Martin Vickers.

Questions 22-47

Witnesses: **Lord Bichard KCB**, ex-Director, The Institute for Government, **Rt Hon Lord Hunt of Kings Heath OBE**, ex-CEO, NHS Confederation, **Baroness Thomas of Winchester MBE**, Chairman, Delegated Powers and Regulatory Reform Committee, **Christine Salmon-Percival**, Clerk, Delegated Powers and Regulatory Reform Committee and **Peter Milledge**, Counsel to the Lords Committees gave evidence.

Q22 Chair: We are going into public session but we only have a very short amount of time. I want to ask Lord Bichard a question. This Committee produced a report in 2003 recommending that the SLSC be a Joint Committee. The Government rejected this proposal, stating that it wanted to see how effective the sitting Committee at the Lords was. Do you think the Government has had long enough now to ascertain its effectiveness?

Lord Bichard: I would probably refer this to Lord Hunt who has been around longer than I have.

Lord Hunt of Kings Heath: I do. It has been going a number of years. It has had at least three chairmen with experience of operating under two separate Governments. I would have thought that is ample time to look at its effectiveness. Certainly from my point of view, having been in Government and then in Opposition, it has proven to be one of the most effective Select Committees in the Lords. Aside from the technical issues that we have discussed, from the point of view of the House itself, we now have a great mechanism for deciding which statutes should be debated on the Floor of the House.

The most important thing I would put over to you is that any Member can force a debate on any SI on the Chamber of the House. It is used sparingly, but without the kind of work the Select Committee does I think it would be very difficult for us to do the analysis that will be required to determine whether you do need the debate or not.

Lord Bichard: It is also exercising an influence on quality, clarity and issues like consultation. We are very concerned at the moment about the fact that consultation appears not to be taken as seriously as we think it should, because consultation should make for better legislation and secondary legislation, so we are pursuing that with Departments. The fact that Departments know that we are going to be constantly asking them questions about whether there is too much jargon, whether it is too long, and whether they are consulting, does lift standards.

Chair: The problem we have identified—and I know the Leader of the House is keen to work with us—is that rarely do SI Committees, which I also Chair, last more than half an hour. The reason is that we are looking at totally uncontentious SIs when there are far more contentious SIs going through under the negative resolution that should be demanding of our time.

Q23 Jacob Rees-Mogg: Thank you all very much for coming. I know we have no right to ask the Lords to come, so we are very grateful that you have come. To what extent, from what you know of our procedures, do you think we could benefit from what you are doing? Would it help the overall parliamentary scrutiny of statutory instruments if we copied more of what you are doing?

Lord Bichard: The point that has just been made is an important point because what the Secondary Legislation Select Committee does in the Lords is it focuses on those instruments that need to be considered or that Members should be aware of. Obviously it criticises sometimes if it is not achieving the policy intent, but most of all it is stopping every single affirmative instrument, for example, being considered and time being wasted. We only refer or draw out about 7% of the instruments that come before us.

Baroness Thomas of Winchester: Could I come in here, Chairman, as the Chairman of the other committee—Delegated Powers? This Committee is extremely useful for discovering what the pressure points are in timely legislation. I know that when there are Joint Committees looking at a draft Bill, they ask our Committee to look at the Bill. We have looked at, for example, the draft Deregulation Bill extensively. I think you did that one, didn't you, Peter?

Peter Milledge: I did, yes.

Baroness Thomas of Winchester: I think it has proved its worth.

Q24 Chair: The Leader of the House is obviously very keen to work with us on this because, as I said, we have loads of SI Committees that need to be manned and womanned by Members of Parliament. They turn up, they block out an hour and a half in their diary, and they last five minutes, and people say, "Wouldn't it be better to get rid of these things altogether?" We do want something in return from them, which is the opportunity to give a few SIs proper scrutiny, subject to the negative resolution. How do you think we should go about making that argument?

Lord Hunt of Kings Heath: In the end it must lead to better regulation-making in general. I would say that the fact that you have, certainly in the Lords, an ability to challenge Departments, both about the quality of the SIs and about the policy content, would lead to a better process of making regulations. I think that has been proven in the last few years.

The other big difference, coming back to the point I have raised, which I think is different in the Commons, is that Departments know that we have the ability to force a debate and a vote on the Floor of the House. That is used sparingly, but I think it is quite a powerful mechanism in order to get Departments to take these things seriously.

Lord Bichard: It is also very cost-effective. The members of the Committee are able to focus on the things that matter. We have fantastic staff, and I don't say that because they are here. We have only three of them and we get through sometimes 60 instruments a week, but we know that they are generally pretty good at identifying where we should be concerned. We then probably filter it down a bit more. It is a very cost-effective process.

Q25 Jacob Rees-Mogg: If I could clarify one thing. Am I right that you effectively end up treating negative and affirmative resolutions in the same way? They go to the Committee and either can be debated equally so you determine their priority at the point at which the issues are being raised rather than worrying about what was put in when they were first legislated for, which might have been a completely different political argument at that point.

Lord Hunt of Kings Heath: The Joint Committee on Conventions looked at this. The key thing is that, although it can be a technical issue, what the Joint Committee on Conventions said is that the Lords can attempt to defeat an SI where special attention is drawn to the

instrument by the Joint Committee on Statutory Instruments or the Lords Scrutiny Committee. Although only about six or seven SIs have ever been defeated in the Lords, the fact is that this shows that the Lords, within the conventions, can attempt to do it.

But in order to justify that you need the Scrutiny Committee to have said that it merits special attention. You can have a go without that but it has much more power if the Committee has drawn the House's attention to it. We are coming back in May and the first two days we have debates on SIs. They will probably be votes. These are not fatal—they are regret motions—but they could have been fatal and we could have voted on those.

Q26 Jenny Chapman: The political heat, the temperature, is slightly different, I think, in the Lords to the Commons and the Whips—shall we say?—take different methods. Thinking about how this might work for us, how self-disciplined do members of your Committee need to be when considering whether the policy will do what it says on the tin? I can imagine taking quite a strong view on certain things myself and not having the required self-discipline to serve with any good effect on a Committee like that in the Commons. How do you handle that issue?

Lord Bichard: It is clearly not our role to say, "We don't like this policy." In all the time I have been on the Committee, I don't think it has ever got close to saying that. The role is: does it achieve the policy intent? Of course, I know nothing about politics but, frankly, it does not matter whether you are a member of the party that took the policy through or you are a member of the opposition or you are cross-bencher, it either does or does not achieve the policy intent. The debate—

Q27 Jenny Chapman: It is not always clear-cut though, is it?

Lord Bichard: No, it is not but I have to say—I can only speak from the two years or so experience I have had—it has not been a problem. I think maybe once we got quite close to that but otherwise it has not happened.

Baroness Thomas of Winchester: In my Committee, we certainly do not look at policy. We look at the delegation, whether it is an appropriate regulation and whether the level of scrutiny is appropriate. What is interesting is that the Members often police each other. If somebody strays into policy, somebody else will say, "That is straying into policy," so we are pretty strict about that because it might be tempting. Also, having been on the other Committee myself—I was

there for three years—I found that we did not really stray into policy. We were pretty strict about it, however tempting it is. It may be different in your House but we have to be pretty strict.

Lord Hunt of Kings Heath: Could I give an example, Chairman? One of the most controversial SIs in the last two years has been the section 75 regulations in relation to the health service, in terms of the competition requirements on the NHS. The Select Committee produced a very good report—a long report—on the issues raised by the regulations and drew it to special attention of the House. The debate in the Chamber—and it was a big debate with a big vote—was very much around the issue, the policy and the politics, but it was based on the work that had been done by the Committee, which did not look at the politics. It looked at whether the SI was what the Government had promised in the first place. I think you can draw that distinction, certainly in the Lords

Q28 Mr Nuttall: Am I right in thinking that the crux of what both Committees do is to essentially sort the wheat from the chaff? That is really what it boils down to, isn't it? You are skimming through 1,000, 2,000 different instruments a year, of which a very small percentage are ultimately considered worthy of further consideration. Someone mentioned a few moments ago that only six or seven statutory instruments had been defeated. Was it Lord Hunt?

Lord Hunt of Kings Heath: That is right.

Q29 Mr Nuttall: Is that ever or in the last year?

Lord Hunt of Kings Heath: No, that is ever.

Q30 Mr Nuttall: The House of Lords has been around for some time, so it is not a great record, is it?

Lord Hunt of Kings Heath: I think you have to reflect that there was a great debate in the Lords about what powers the Lords should have on this. In a sense, the 1911 Parliament Act that got rid of Lords veto on primary legislation was silent about secondary legislation, mainly because 100 or so years ago there was very little secondary legislation. If there had been, I suspect they would have built a delaying power into secondary legislation as well.

Frankly, I think this is unfinished business because—and this is my personal viewpoint—it is unsatisfactory at the moment. People are very nervous about vetoing secondary legislation, feeling that in an unelected Chamber it would be going too far, but because it does not

have any power to amend a statutory instrument or to delay it, the Lords holds back from that action.

Lord Bichard: It is wrong to suggest that is the primary or the only outcome of the work of the Committee. It is sorting the wheat from the chaff, but how is it doing that? We would get statutory instruments every week. A number of those when we first get them we would say, "This explanatory memorandum is just not good enough," or, "There is something wrong with drafting here," or, "There has not been enough consultation," and we would send it back to the Department and the Department would explain. As I said earlier, that is a way of raising standards.

Some instruments we then merely report to the House on the basis that we think there is interest. It may be a topical issue; it may be some other reason why we think the House would be interested. We do that in an e-bulletin every week and I think many Members find it very useful. There will be debates on some of the instruments that do not involve motions to regret or annul and we might—I have done that recently—go along to the Grand Committee and speak in that debate based upon our consideration. Then there are a small number where you are talking about annul and regret. It is more than just sifting.

Q31 Mr Nuttall: What might loosely be called a quality control function?

Lord Bichard: Yes, it is.

Baroness Thomas of Winchester: If I could just add one thing, I have known that if a Member puts down an adverse motion, perhaps to decline to approve, the Government has removed it. I have known that on at least two occasions. They have suddenly said, "We can't risk this," and taken the SI away.

Q32 Chair: The Leader of the House suggested that we might piggyback off your work, and that somehow your Committee could help us out at our end of the House. Would that be a symbiotic relationship or a parasitical relationship? I do not know, but do you think there is any mileage in that? How could we benefit from your hard work? Could we read across your papers or would that be complex?

Lord Bichard: I do not think there is any reason why you should not have access to the bulletin that we put out every week, if that was helpful. We could do that. If you were talking about going further and

having, say, a Joint Committee—maybe you want to comment on that. I think that might be more difficult.

Lord Hunt of Kings Heath: Yes, I am sure that making information available would be fine. I am not sure about a Joint Committee. Statutory instruments are dealt with in a different way in both Houses and we are probably helped by having a single Select Committee that adjusts its work to the rules in the Lords.

Q33 John Hemming: I see a lot of this because I sit on a lot of these things, DL Committees and obviously the vires Committee. The vires Joint Committee works because it is very narrow in its terms of reference. It is interesting when you mention the question of what are contentious statutory instruments. In my experience, the most contentious statutory instrument was 2013/756, which is the one about school holidays. There has been a big row about that outside Parliament but not between the parties. Interestingly, the Merits Committee, as I understand it, decided not to refer that for debate.

Listening to this, I am becoming convinced that the thesis is this: the House of Commons is perhaps too red in tooth and claw to cope with looking at the merits of statutory instruments from the perspective of whether or not they suit the policy rather than whether the policy itself is right. Would you agree with me that essentially the House of Lords, because it is revising, is quite happy with looking at whether it suits the policy and separating from that whether the policy is right? I am getting nods.

Baroness Thomas of Winchester: I personally think you are absolutely right. We never have votes in Committees—I do not know, but maybe you wouldn't either—but that could come up. If, as you put it, there was an issue that was red in tooth and claw, it might be tempting for people to take the party line.

John Hemming: The party line would be driving opposition.

Baroness Thomas of Winchester: Whereas there is no party line in either the delegated powers or—

John Hemming: It is a form of vires, isn't it? Policy vires rather than legal powers.

Q34 Martin Vickers: The process of separating the wheat and the chaff, as my colleague refers to, means that a lot goes through without any

consideration. Is there any mechanism that you have for returning to any of the SIs and seeing if they did perform the function, retrospectively?

Lord Hunt of Kings Heath: Not that I am aware of. The Lords has started to do post-legislative scrutiny and we have started with the Mental Capacity Act, but I do not think at the moment there is any mechanism for looking at SIs and seeing how they operated in reality.

Q35 Chair: On that point, do you think the powers delegated to Ministers are becoming wider, that they are getting more powers to almost make it up as they go along? I know that is rather unfair but there is—

Baroness Thomas of Winchester: No, I do not think that is right. One thing that is clear is that we have not seen so many skeleton Bills recently and that is a very good thing. There is much more in Bills. Bill teams know that they have to justify their delegated powers to our Committee. I think it is a bit unfair to say that Ministers are making it up. Sometimes we can tell the policy has not been fully worked out and that does come over, and that is reflected in my Committee's reports. We sometimes say that the House might like to question the Minister on what this particular policy means.

Q36 Chair: Again on that point, we have had evidence from some who are saying there is a proliferation of Henry VIII clauses. Academics are getting concerned about this. In one recent session they identified about 100. Does that cause you concern?

Baroness Thomas of Winchester: No, it is not more than we think there should be necessarily and they are not always a bad thing. There is a view that you see a Henry VIII clause and you must think that is a bad way of making law, but it is absolutely standard. As long as it is done appropriately and it is affirmative then usually we are happy. We will draw the attention of the House to it in our report. We use the term "Henry VIII clause", but we do not think the Government are using it more than they should.

Q37 Chair: You are in favour of better scrutiny—your Committee promotes better scrutiny of secondary legislation. Do you think there should be, in general though, less scrutiny of secondary legislation or more scrutiny of secondary legislation?

Baroness Thomas of Winchester: We just do primary so that is over to you.

Lord Bichard: We are certainly not complacent. I am not known for being complacent. I think we feel it is probably just about right at the moment. We don't spend too much time in Committee. We have a good staff, as I say, so probably the balance is about right and the response of the House is about right too.

In answer to your original question, by the way, I am told there was a study of the post-implementation review of secondary legislation but it was back in 2009. More recently, we have done an annual review of the Public Bodies Bill implementation over the last two years. We do not do it very often but we do on occasions. From my experience, Members have quite long memories as well and if a Department has failed to deliver quality 18 months ago on a particular issue it is probably going to be remembered.

Q38 Jacob Rees-Mogg: Lady Thomas, could I ask you a bit more about your Committee, partly on the difference between Lords Bills originating and Commons Bills originating, and the extent to which the Government is willing to listen to you on the different types of Bills? Would it be fair to assume that, because you are at an earlier stage with Lords Bills, there is a greater opportunity to persuade the Government to be flexible than with Commons Bills? To that extent, do Commons Bills miss out? Obviously, Finance Bills miss out completely because they never get any of this scrutiny at all and yet have very important secondary legislation within them.

Baroness Thomas of Winchester: That is quite true. I don't think we do find a difference between Commons starters and Lords starters. Perhaps I might ask Peter if he thinks that is the case.

Peter Milledge: I have not found that myself. Where there is a noticeable reluctance is where there is a Lords starter that goes to the Commons and comes back to the Lords with Commons amendments. At that stage it can be difficult for the Committee to make an impression, as it were.

Baroness Thomas of Winchester: Yesterday we had the Water Bill, which you had to start with and we had just finished. The Government tabled on Friday at the 11th and a half hour the most enormous Henry VIII clause about retail exits, which was put into the Bill last night. We had to have two emergency meetings about that because it was a very big Henry VIII power and we wanted a super-affirmative procedure. The Minister did not grant that but he gave us most of what is in the

super-affirmative. In fact, he said a lot of consultation, indicative draft before the main draft. That was a Commons starter but we had to look at the amendments as we went along.

We do ask or suggest that the House might like to beef up a negative to an affirmative, or a first time affirmative. That would have to go back to the Commons but then you would not complain about that. It would not be challenged, I am sure.

Q39 Jacob Rees-Mogg: Am I right in thinking that the Government listens to you in part because of its enormous wisdom and willingness to engage, but also because if you put out a report that is unfavourable, that is highly influential in the House of Lords discussion that follows and therefore the Government is at risk of losing an honoured amendment?

Baroness Thomas of Winchester: Yes, you are right, it does. It does not always do what we want but it gives the House a steer as to whether the House would like to question or probe the Minister about the policy behind if it is not very clear. I think Departments are very aware that our reports are pretty influential and the House often refers to it. That is the good thing—it is helpful to the whole House.

Q40 Chair: Just briefly as we begin to run out of time, what criteria do the SLSC use to identify negatives that merit further debate? Do you take evidence from outside bodies, from Members, political parties, or any other third party outfit, or do you just apply your great wisdom to each one before you?

Lord Bichard: We try to apply some wisdom but we are also sometimes subject to helpful comments from outside that will draw our attention to an issue that in the wider world is regarded as a matter of concern or of interest. We will take that into account and, picking all of that up, we will decide which to put forward and which not to put forward.

Q41 Chair: Who would be those voices, just out of interest?

Lord Bichard: They might be professional bodies. We have just been talking about copyright and licensing and we had representations from UK Music and others about proposed changes in the licensing laws. People tend to know when we are going to be considering issues and they will tend to get to us if they think that there is an issue that the House itself should be concerned about.

Q42 Chair: When you meet with organisations do you have protocols around how you engage with external third parties?

Lord Bichard: We do not normally meet with organisations. We normally do it on the basis of paper submissions or e-mail submissions. We will sometimes call Ministers. We have called Ministers, I think, twice now on consultation recently. We agreed this week that we were going to call Ministers to talk about the copyright licensing simply because we think it is such an important and complex issue. So, yes, we will call Ministers, but not normally outside organisations.

Q43 Chair: You mentioned that you can discharge 60 SIs at a time, in a week not at a sitting. How many times do you sit to discharge 60 SIs?

Lord Bichard: We meet once a week.

Q44 Chair: Once a week. So you will do that in what period of time?

Lord Bichard: I do not think we normally meet for more than an hour, usually less. But we can talk to staff before the meeting so we can deal with issues that otherwise might come to the meeting before the meeting.

Q45 Chair: So you have 60 before you and you will have substantive discussion on three or four possibly, more or less?

Lord Bichard: Probably more than three or four if it was 60. 60 is an unusual number; 20 to 30 would not be unusual and is perfectly manageable.

Q46 Chair: So a substantive discussion on 10?

Lord Bichard: Yes.

Q47 Chair: One of the concerns this Committee has is the proliferation of SIs, secondary legislation—thousands of them, as you identified in the very useful presentation. Are you satisfied that the Committee that currently meets for an hour a week will be able to continue in that form or

do you feel that there is pressure growing? You mentioned that you have only three members of staff. Are you comfortable that the current status quo is maintainable?

Lord Bichard: We are comfortable that the current state of affairs is maintainable, yes.

Chair: Can I thank you immensely for coming and sharing your enormous wisdom with us. We are sorry we kept you waiting for a short while. We were discussing e-petitioning, which you do not want to get involved with, I can assure you. Thank you very much for your time. Can we maintain a relationship with you as we continue with this report and perhaps call on your knowledge at a later date?

Lord Bichard: Thank you very much.