



HOUSE OF LORDS

Revised transcript of evidence taken before
The Select Committee on Secondary Legislation Scrutiny
Inquiry on
RESPONSE TO THE STRATHCLYDE REVIEW

Evidence Session No. 1

Heard in Public

Questions 1 - 16

TUESDAY 2 FEBRUARY 2016

4.05 pm

Witnesses: Rt Hon Chris Grayling MP

Dr Ruth Fox and Joel Blackwell

Members present

Lord Trefgarne (Chairman)
 Baroness Andrews
 Lord Bowness
 Baroness Fookes
 Lord Goddard of Stockport
 Lord Hodgson of Astley Abbotts
 Baroness Humphreys
 Lord Janvrin
 Baroness O'Loan
 Lord Woolmer of Leeds

Examination of Witness

Rt Hon Chris Grayling MP, Lord President of the Council and Leader of the House of Commons

Q1 The Chairman: Lord President, good afternoon. Thank you very much for accepting our invitation to come and speak to us. You know what we are considering: we are looking at the three Strathclyde options. We shall report on the various options in due course. We might even report to the effect that we do not like any of them, but we shall see. We have not reached any conclusions yet.

You have very kindly agreed to come and talk to us. You have seen the principal questions we would like to put to you. I suggest we make no delay, other than me just reminding you that this is a formal evidence-taking session. There is a record being taken and it is being webcast, both audio and video. A verbatim note is being taken, which will go on to the public record in printed form and on the parliamentary website, and we shall course send a copy of the transcript to you for amendment of any errors, if there are any. I hope that is all right.

I want to start, if I may, by asking the first question. What, in your view, is the current contribution of the House of Commons in ensuring the effective scrutiny of secondary legislation, and how does it compare with that of the House of Lords?

Chris Grayling: It is a question that, in a sense, depends very much on the statutory instrument concerned. There are statutory instruments that get very detailed and exhaustive debate, discussion and scrutiny in the Commons. There are those that are uncontroversial and pass through relatively undebated, although not undebated, because all those that go through on the affirmative resolution and all those that are prayed against will be debated. But where Commons Members believe there is an issue with a statutory instrument, it gets vigorous debate.

Q2 Lord Janvrin: Can I move on to the options and ask your views on option 1? Could removing the Lords entirely from the scrutiny of secondary legislation be justified?

Chris Grayling: I should start by saying that the Government have not yet reached a view on this. We have read Lord Strathclyde's recommendations, as indeed you have. We have noted his recommendation for option 3 rather than option 1. There are undoubtedly those in the Commons who believe that option 1 would be preferable, but we are very open-minded about it. I can understand why the Lords would look at option 1 and see that as a less desirable option, removing you, as it does, from a role you currently perform. Certainly, the Government have not done or said anything to indicate a preference for option 1. It would be a very big step, because it changes very significantly the relationship between the two Houses in respect of secondary legislation, more significantly than either of the two other options.

We have not reached a conclusion ourselves. We have been careful to say that we are neutral. We are not only considering the report itself but want to give sufficient time for the report of this Committee to be studied by our team and by us when you produce it. I clearly understand why you would be concerned about option 1. There are those in the Commons who were very clear, on the day the report was announced, that they liked option 1, but we have not formed any view ourselves, and nor will we do so until we have seen all the representations from different parts of Parliament.

Baroness Andrews: In that context, if I could draw back a little, in his evidence to Public Administration and Constitutional Affairs Committee, Lord Strathclyde declared categorically that he did not think in fact that what had happened had created constitutional crisis. My first question must be whether you agree with that. I would be interested in knowing, though, in the context of what you have said about option 1, the problem that you have been invited to address as the Leader of the House of Commons.

Chris Grayling: Essentially, the issue in our view comes down to the process, in this case for a measure that is of budgetary significance. In addition, it has generated debate about the broader issue of statutory instruments being handled in both Houses of Parliament. We had two fatal Motions tabled, one successful and one narrowly defeated, over a two-day period. Fatal Motions have been used very, very sparingly over the decades by the House of Lords. The particular measure on tax credits had been brought forward by the Chancellor as part of a budgetary package. For technical reasons, although it was clearly a budgetary measure designed to contribute towards the reduction of the deficit, in actual legislative terms it fell under a welfare umbrella and therefore was not covered by issue of privilege in monetary

designations applied to some other measures. It therefore came to the Lords and was defeated on a fatal Motion.

The Government felt that that was not appropriate and that it strayed into territory that had not previously been strayed into. There had previously been no examples of measures that had a significant budgetary impact of that kind being dealt with by the Lords in this way. That is why the Prime Minister invited Lord Strathclyde to consider the implications for it.

As to whether you would ascribe the word “crisis”, I do not choose any particular form of language. Clearly, it created a constitutional matter that needed to be debated, in our view. We have sought to approach that by commissioning a review by a respected Member of this House. We are also seeking not to rush into a decision but to say, “Here are his recommendations. Let us now consider the views of the different Committees in both Houses of Parliament that will have a perspective on this, and consider how best to respond”.

Baroness Andrews: I should perhaps go further into Lord Strathclyde’s evidence in this case. Reading it, it seems to be clear that he now thinks that whether it is a finance Bill or not is less of an issue—and I do not want to open this can of worms, because we have gone over this a lot; rather, he seems to be convinced that the real issue is that the House of Lords came up with what he describes as “a bit of an innovation” in putting forward a Motion that was intended to delay but that, because of the way the Government reacted, was in effect a Motion to reject. I think he is now clearer on this point. If it is a question of the House of Lords finding a third way to ask the Government to think again, is this something the Government would happily do in the light of the balance between the two Houses and the traditional position of our House in holding a veto, which we very, very rarely use indeed?

Chris Grayling: If you look at what took place, first of all it has been custom and practice that the Lords does not seek to use fatal Motions. They have been used only in the most exceptional circumstance. We then had two tabled in two days. There was definitely a sense in the Government that there was a danger that conventions would be set aside. There have been one or two other issues in this Parliament. A manifesto commitment was defeated recently on an environmental matter, for example. Of course, the relationship between the two Houses has depended upon convention.

The Prime Minister felt, as Lord Strathclyde recognised, that in this particular case the conventions appeared to have been weakened and that it was an appropriate moment to take a look again at how this worked and to see whether it should be done in a different way. In terms of the Motion itself, there is of course no third way. A Motion to delay is a fatal Motion, effectively. A Motion to Regret is simply a Motion to Regret. Anything else has the

effect of being a fatal Motion. Lord Strathclyde might well have come forward and said, “We should put forward a third way”. It could be something this chooses to recommend, but he said that his preference was to have in effect a situation where the House of Lords could ask the House of Commons and the Government to think again about a measure by pinging it back. It is “ping without the pong”, as some people have said.

Baroness O'Loan: I do not quite understand. You started off by saying that the Commons does not scrutinise secondary legislation. Option 1 would suggest that the Commons would have complete control of secondary legislation. But in a situation in which you have a Government with a majority that is whipping its Members, is it not the case then that there would be no real opportunity for scrutiny of secondary legislation? Given that a huge amount of what would previously have been included in Bills is now included in secondary legislation, does this not effectively significantly reduce the scrutiny of secondary legislation?

Chris Grayling: In this particular case, you have to remember that the House of Commons had voted on this matter three times.

Baroness O'Loan: Can I clarify that I was not asking specifically about this case? We are looking at the future handling of secondary legislation. My question was a general question. Does this mean that there would be very significantly less scrutiny and that in fact if you had a Government with a majority, there could effectively be no scrutiny?

Chris Grayling: Interestingly, if you were to adopt Lord Strathclyde's recommendation, you could argue that it actually strengthens scrutiny because it provides more of an opportunity for the Lords to ask the Commons to think again. In the way the Commons works, of course there are no restrictions on scrutiny in the Commons. It is really for individual Members to look at statutory instruments as they are tabled and form a view as to which ones there should be a lively debate on and which ones are simply a matter of routine. Of course, in some cases statutory instruments are dealt with on the Floor of the House and in many cases in Committee. Of course, for negative instruments, it is predominantly for the Opposition, or indeed for a bloc of Members, to say, “This is something we wish to see debated properly and then potentially voted on”.

Baroness O'Loan: If I may come back just once more, the reality is that a lot of secondary legislation comes to us without any Commons scrutiny at all, and it is very complex legislation.

Chris Grayling: Are you talking about legislation that comes to you on a negative resolution or an affirmative one?

Baroness O'Loan: I mean an affirmative resolution.

Chris Grayling: Any affirmative measure will have been through a Committee in the Commons and will have been voted on on the Floor of the House. When you made the point about the whipping of Members of Parliament, in the Commons today you cannot always be certain of a majority when you table a Motion, as we know from one or two experiences in recent months. The Commons is not above expressing its view if it disagrees with something simply because the Whips instruct it.

Lord Janvrin: Can I follow this line of questioning? Continuing on option 1, if you wanted the level of scrutiny of secondary legislation to be maintained but did away with the House of Lords scrutiny, would you see that there would need to be changes in the Commons procedure and way of scrutinising Bills? Can you see that, under option 1, there would need to be some kind of change in the other place?

Chris Grayling: I have thought about this. It is difficult to see what change you would bring forward. If you compare affirmative and negative resolutions, affirmative resolutions are already debated in Committee and there is a full vote on the Floor of the House if people disagree with the measure. You might criticise individual MPs for their engagement in a particular measure, but, as I have said, there have been plenty of examples where statutory instruments get very substantial scrutiny. If it is a matter of concern to Members, as opposed to being a routine matter, it tends to get very extensive scrutiny.

The matters that come forward on a negative resolution are often very mundane and very technical. Parliament tends to pass them through without debate unless there is reason for concern. Recently, we saw an issue with student grants. That was tabled on a negative resolution because it is set up that way in the Act. The Commons was very clear about expressing its view. The Opposition brought it to the Floor of the House and it was debated. The mechanisms are there in the Commons to debate any subject extensively. It is a matter of whether individual Members or individual parties, looking at the issue, form the view that this is a major problem or not.

Lord Janvrin: Can I ask one supplementary question? Under option 1, would you see there being the same amount of scrutiny, less scrutiny, or the mechanism being there actually to adjust accordingly?

Chris Grayling: It is something we would have to consider. If this Committee, for example, recommended option 1 but invited us to consider means to strengthen scrutiny in the Commons, we would undoubtedly do that. I do not rule that out; I do not rule it in. If the consensus of all the Committees looking at this is that Lord Strathclyde has got it wrong and that we should go for option 1, but on the condition that the Commons looks at ways of

strengthening the scrutiny of statutory instruments, that is clearly something we could and should consider.

Q3 Lord Bowness: Lord President, good afternoon. Options 2 and 3 propose removing the veto from this House and replacing it with a power of delay. Lord Strathclyde talks in his evidence about option 2 being about convention and the House of Lords building a consensus. Option 3 would be statutory and would limit our powers to the power to invite you to think again. To what extent do you agree with Lord Strathclyde that option 3 would preserve and enhance the role of the House of Lords to scrutinise secondary legislation? Perhaps I can come back to option 2 in a moment.

Chris Grayling: Formally, the Government have no view on this at the moment, because we are in listening mode. Option 3 would give more opportunity to the House of Lords than it has at present to invite the House of Commons to think again about something, because at the moment if you pass a Motion to Regret, nothing actually happens. If you pass a fatal Motion, it dies. In both those cases, the House of Commons does not think again. The Government may go away and think about their policy if a statutory instrument has been killed in the House of Lords, but there will be no reconsideration process in the Commons. Option 3 would provide for such a reconsideration process.

Lord Bowness: Before I go on to option 2, let me ask you this. Do you see the removal of the veto and replacing it with the power of delay to be in respect of all statutory instruments, or would one option be to remove the veto only in respect of financial matters, however you would define that? How would you define it?

Chris Grayling: These are matters to be considered if they are the recommendations of the Committees. At the moment, we rule nothing in and we rule nothing out. If the consensus of the Committees is that there is a fourth way that has not been set out by Lord Strathclyde, when we come to respond to this, we will give it due consideration.

Our plan, I should say, Lord Trefgarne, is that we do not intend to respond until we have had time to consider the reports being prepared in both Houses at the moment, by the relevant Committees in the Commons and in the Lords, so that we can really get a full sense of how those Committees view these proposals and what additional ideas there may be. It is difficult to give you a clear answer to that. I am not here to express a view on behalf of the Government, because the Government are very much in listening mode.

Lord Bowness: Can I ask you, as Leader of the House of Commons, not for a government view on something that is not specifically in this paper? I come back to option 2, which would be by convention. Lord Strathclyde, in his evidence, talks about how the House of Lords

might want to try to rebuild the convention by consensus. I ask this as a genuine question. From your experience in the Commons, if there were agreement on how things should proceed, could that be put into force by way of memoranda of understanding between the two Houses, backed by Standing Orders of both Houses, approved in each case by each House? It would go further. You would not, then, be relying on convention.

Chris Grayling: It could certainly be done that way in theory. The reason we are having this debate in the first place is because, in view of the Government and, indeed, of very many in the Commons, a convention has been broken; in fact, more than one convention has been broken in recent times. From the point of view of the Commons, the overwhelming view of Members of the Commons would be: “We are the elected House. We regard the Lords as an institution that offers wise advice, puts us on the back foot and insists that we consider issues again, but if the Commons reconsiders those matters, if it debates those matters again and still reaches the same view, ultimately the Lords should give way to the elected House”.

Lord Bowness: I understand that.

Chris Grayling: In this particular case, one issue that triggered this was that you had a matter that had been voted on and approved three times in the Commons, where convention was that fatal Motions of this kind would not be used in a matter of this kind, but they were and it was. At that point, the convention stopped being used. I emphasise that it was not the only case; there was a Division in which the Government were defeated on a manifesto commitment related to an environmental matter. When there is doubt about conventions and whether they will be applied, there will of course be those who say, “We should have more than a convention”.

It may be that what you have described, Lord Bowness, is an alternative way of doing that. If that comes forward in your Committee’s report, I will read and study it very carefully, and we will consider it carefully as a Government.

Lord Bowness: I am asking whether you agree with that suggestion, whether in your view it is possible.

Chris Grayling: As far as I am aware, there is no reason why it would not be possible.

Lord Bowness: Presumably it would, then, be enforceable.

Chris Grayling: Standing Orders are only ever as enforceable as the two Houses make them, as it is of course possible to suspend Standing Orders. That is where Lord Strathclyde came to option 3, saying, “This is something that has to be fixed”. I am not saying that anybody would suspend the Standing Orders, but there is a clear difference between something that has statutory force and something that is set out in Standing Orders.

Baroness O'Loan: I just wanted to draw your attention to something Lord Strathclyde said in the Commons, Lord President. He said, “Everybody behaved with constitutional propriety”. It is profoundly important to have that in the record, because it seemed to me that you were suggesting otherwise. If we behave with constitutional propriety when we send things back for reconsideration by the Commons, then what you are saying is slightly inaccurate. Maybe I misunderstood you.

Chris Grayling: I am not suggesting that we are in the midst of a constitutional crisis. I am saying that what took place certainly prompted constitutional discussions and raised constitutional issues. It raised issues about the relationship between the two Houses. I would never ascribe impropriety to the House of Lords, because these things are always a matter of judgment for the Houses as to how to operate and behave. I would never suggest that we are talking about constitutional impropriety. Nonetheless, what took place appeared to us to be at variance with the conventions that had previously been followed. If it was not, it has still generated an issue for discussion, because it has been the convention for a century that in budgetary matters the House of Commons has the decisive say. We were in a position where a major budgetary issue was being caught up in the way it was caught up. Inevitably, that would prompt the kind of discussion that we have had and are having, and the kind of report that Lord Strathclyde has produced.

Baroness O'Loan: Lord Chairman, we are very clear that it was not a financial measure. There was a right to scrutiny under the Welfare Reform Act. The House of Lords did what it was entitled to do, and it was not a fatal Motion because it provided for a delay and the opportunity for the Commons to think again.

The Chairman: Forgive me, Lady O'Loan. That is your view, not necessarily the view of us all.

Chris Grayling: I have to say that, of course, there is no current third way. Perhaps there could be a third way; it may be something this Committee wants to bring forward. Fundamentally, if a Motion is not a Motion to Regret, if it goes further than that, it is, by definition, a fatal Motion. There is no variation. I appreciate that this might have generated the thought of a possible third way, but in the arrangements that existed at the time of the vote there was no such thing.

Q4 Lord Woolmer of Leeds: Lord President, you have said twice that the Government were defeated on two statutory instruments in succession.

Chris Grayling: No, I said that two were tabled. The first one was defeated. The second one passed narrowly, but the issue arose. Given how infrequently fatal Motions are used and come

close to being used—if I remember rightly, the second fatal Motion was defeated by about 10 votes—there was at that point a clear concern that this tool was suddenly going to be used to much greater degree than had been the case previously.

Lord Woolmer of Leeds: Before I continue to outline the question, it is right, is it not, that, as Lord President, the Leader of the House in the Commons is not the same as the Leader of the House in the Lords?

Chris Grayling: That is true.

Lord Woolmer of Leeds: Your job is to get government business through, among other things. I think that is fair. You do not represent the House of Commons in the way the Leader of the House of Lords may or should represent the House of Lords.

Chris Grayling: I do not think that is right, actually. In many ways, our two roles are similar in that my task is to be a voice for the Commons in government and to take a lead in matters affecting the Commons in Government, in the way the Leader of the House of Lords is as well. Both result in the responsibility of trying to ensure that Government business passes.

Lord Woolmer of Leeds: The point I was going on to raise was that very rarely—six times since the Second World War—does the House of Lords defeat a statutory instrument. I do not mean tabling a Motion that is defeated but actually defeating a statutory instrument. What has happened is that the Government, not the House of Commons, have been defeated. The Government, as the Executive, are putting forward statutory instruments. Anything that weakens the House of Lords in its scrutiny of statutory instruments is, by definition, weakening parliamentary scrutiny, unless something changes within the House of Commons. Is that a fair assessment?

Chris Grayling: I would say that in this particular case it was a matter that had, prior to the House of Lords vote, been voted on and approved twice by the Commons and once subsequent to that. The issue that arose here was that the Commons systematically said that it wanted to do this, and the Lords said, in contravention of custom and practice, “No, we will not let you”. That has been done very, very exceptionally. It was not something that had not been considered by the Commons. It had actually been considered again and again by the Commons.

That is one of the reasons why this came to pass, but the interesting thing about Lord Strathclyde’s option 3 is that, of course, it would give the Lords more opportunity, rather than less, to say, “We are not sure you have got this right. Can you think again?”

Lord Woolmer of Leeds: In your oral evidence so far, you have repeatedly emphasised—three times now—that it was a financial matter, and latterly you brought in an additional

point: that if the House of Commons has already considered and approved it two or three times, it in some way provides for a super-strengthening of the House of Lords not breaking the convention. Of the issues that sparked off the Strathclyde review, which is the important one? Was it that an apparent financial measure was defeated, or was it that the House of Commons had already considered and voted for it? If it was the latter, that would put the House of Lords in an impossible position. Typically, the House of Commons has approved a statutory instrument before it comes to the Lords. There should be a part of the convention, in your view, that says, “If the Commons has already approved it, the House of Lords must never, even exceptionally, veto”. Is that your position?

Chris Grayling: That is not correct. What made this particularly different is that this had not simply been through the House of Commons in a conventional debate about a statutory instrument, been delivered to the Floor for a vote in the remaining Orders of the Day and then been passed to the House of Lords. This was a subject that had been debated extensively in the Commons. It had been voted on twice, I believe, prior to this debate taking place and was subsequently voted on again. Of course, it has also been debated in the various financial discussions that surround the Chancellor’s summer budget.

This is not something that had simply arrived in the House of Lords for a nod through in the remaining Orders of the Day. For the House of Lords, in a matter that is very clearly a central part of the Government’s budgeting strategy, to use something that has been used desperately sparingly over the years and pass a fatal Motion against what was clearly, at that point, the settled will of the House of Commons is quite a big step to take. That is what prompted the Strathclyde review.

In a different week—perhaps, after the fatal Motion, some wisdom was applied in the House of Lords—the House of Lords came quite close to having two fatal Motions on two significant government matters in two days. The effect of that was to have people in the Commons saying, “Hang on a moment. Let us take a look at this again”.

Lord Woolmer of Leeds: If the preferred option of Lord Strathclyde, option 3, had been in force and the House of Lords had voted, on that fatal evening, to ask the Government to think again, would the House of Commons and the Government have been as cross, given the background you have just described?

Chris Grayling: It would have been a much more difficult case to make for anyone who was upset about what had happened. If you had had a ping rather than a pong, and the House of Lords was saying, “Please consider this again, because we are not sure you have got it right”, the Commons would have undoubtedly considered it again. As we saw, given the Chancellor

changed his policy subsequently anyway, it might have had the effect at that point of the Commons saying, “Actually, we have had second thoughts”.

It is important that the elected House, having set out its views quite clearly, should be confident that it can get its measure through. If the House of Lords disagrees, an option to say “think again” is quite a sensible one. That is why Lord Strathclyde recommended it. As I said, I have no view. We could take any one of the three options, but we have a clear recommendation from Lord Strathclyde, which I think would provide the House of Lords with greater ability to scrutinise and express concerns than it has at the moment.

Q5 Baroness O’Loan: To take you forward on that issue of thinking again, the current process is that the Commons does not always consider an instrument before it is considered by the Lords. If the Commons is to have a genuine opportunity to think again, will the Commons have to change its procedures in that context?

Chris Grayling: We will have to think very carefully about that. If the recommendation from all the Committees is option 3 and that is what we accept, it would not be realistic to say to the Lords, “Thank you very much. We will take it back, stick it on the table in the room and we will just nod it through”. There would have to be a process in place, and we will consider that as part of our response.

Baroness O’Loan: There would need to be a change in procedure, which would have to be defined, really.

Chris Grayling: If you were to return measures to us from your House, there would have to be a change of procedure, because that does not exist at the moment. It is inconceivable, to my mind, that we could say, “Well, just nod that through and ignore what the Lords says. It just goes through on the nod”. There would have to be some form of process to give it further consideration.

Baroness O’Loan: Can I take you just a little further down that path? In the debate in this House on the Strathclyde report, a number of Members of the House expressed concern about the absence of a fixed period of delay, meaning that the Government could override the decisions of the Lords almost immediately. Might a power of delay, to give you time to think again, be effective if there was no provision for a substantive delay?

Chris Grayling: That is something that we can certainly consider. If it is the recommendation of this Committee that a certain amount of time should pass before the measure can continue, that is something we will of course consider carefully.

Baroness O’Loan: Can I ask a final question in my series of questions?

The Chairman: This is the very last one.

Baroness O'Loan: In this context, you must have thought very seriously before coming to this Committee. I wonder if you have had the scope to think about whether there should be another possible option and if you would like the opportunity to think about another possible option that might meet the needs of the common good rather more than these measures do.

Chris Grayling: If any of the Committees come forward with an alternative to the three we have been presented with, we absolutely will give it careful consideration.

Baroness Andrews: Lord President, it is clear that when you read Lord Strathclyde's report and his evidence to the famous Public Administration and Constitutional Affairs Committee, which I keep coming back to, that he did not see as an option the Commons doing nothing. It is clear from what you said, which was gratifying, that you think something will have to change in the way the Commons does scrutiny. Lord Strathclyde said something to the effect that what he thought he had done was to create an opportunity for further debate and vote in the House of Commons. I was going to quote chapter and verse, but it does not matter. Is that how you would see it done: by further vote?

My second question is this. There is an issue of legislation in relation to option 3, which I imagine would be rather complex. I would quite like to hear your early views on that. Thirdly, Lord Bowness identified one way of getting our views, as it were, into the Commons, via a memorandum of understanding, a protocol or something. How would you see, in that new situation, the views of the House of Lords being transmitted to the House of Commons and therefore the guarantee that the Commons had listened?

Chris Grayling: On the question of legislation, first of all, if one sought to adopt the required legislation, there would be two obvious ways in which one could do it. One could simply amend the 1946 Act or one could replace the 1946 Act.

Baroness Andrews: You mean the Statutory Instruments Act.

Chris Grayling: That is right. Which of those options we would take and whether we would take the legislative route would depend very much on our conclusions after studying all this, together with the Committee reports, when the time comes. With regards to Commons process, that is something we will have to consider when we see the overall responses and the views being brought forward to us.

I am sorry, what was your other point?

Baroness Andrews: How does the House of Lords know in these situations that the House of Commons has seriously considered something? It is such an exceptional thing for us to do. On your point about it being done two days running, that has never happened in history before. It was quite extraordinary that we had two pieces of legislation that struck a chord in different

parts of the House for different reasons. That has never happened before. Hard cases make bad laws, so we had to be very careful.

Chris Grayling: That, indeed, is why we are not rushing out our response. We are taking our time to listen to the Committees and to ask for all your views. Four different Committees will be looking at this.

Baroness Andrews: Yes, precisely.

Chris Grayling: We need to study this carefully. Yes, of course, one has to be careful not to make bad laws, but, equally, Lord Strathclyde is a pretty sensible man. What he has offered are possibly some well-crafted options to address the issue that arose.

Baroness Andrews: You would not feel confined by those options if you thought there was a fourth way.

Chris Grayling: No, if somebody comes forward with another great option, of course we will consider that.

Baroness Andrews: Could you come forward with a better one? Do you consider it within your responsibility to find another, better route?

Chris Grayling: We will also be giving careful consideration as to how to handle this. We have some pretty eminent people in both Houses considering it too, so I would rather wait to see their views and give that some thought myself. Of course, we will consider how to handle all this—we will think it through very carefully—but it seems to make sense to wait until we have the conclusions from the Committees.

In terms of how the Lords passes on its views, it could be a memorandum; it could simply be a Motion that expresses a little more detail than might currently be the case. There are a number of options.

Baroness Andrews: One of the issues raised by the 1946 Act is, of course, the issue of retrospection, which has already been raised. Would you agree that this is not going to be easy?

Chris Grayling: These things are never straightforward, but it feels like a good moment to update it. The Act itself is celebrating its 70th birthday this year, so it may be an appropriate time to improve the system anyway.

Q6 Baroness Stern: Lord President, I would like to move you on to a slightly different aspect of this. An issue that you will notice has been raised in the debates and by Lord Strathclyde is what should be in secondary legislation and what should be in primary legislation. There is a lot of discussion about how appropriate or inappropriate it is to have certain things in secondary legislation. Could I ask you how effectively you think the

Parliamentary Business and Legislation Committee polices the boundary between primary and secondary legislation?

Chris Grayling: Increasingly so, in my view. Clearly, we have to look at the nature of draft legislation or proposed legislation. We have to look at its workability and viability. Particularly in a House where the political balances are delicate, delivering endless Henry VIII clauses is probably not the ideal way to get your legislation through. It is something we have a careful eye on and we are very mindful of. Obviously, there are areas where secondary legislation is a natural flow-through from a piece of primary legislation, where none of us would wish to try to write into primary legislation all the detail. If you write into primary legislation each year the up-rating of a particular level of government benefit payment contribution, or whatever it may be, you stifle yourself in an impossible way. But I am acutely aware that the legislation delivered to both Houses of Parliament needs to be measured, thoughtful, and, perhaps, not overdone.

The Chairman: Lord President, we have Lady Fookes with us, who, as you know, chairs our delegated legislation Committee. She would like to follow up on that.

Baroness Fookes: Lord President, our Committee looks at things at the beginning. When it comes through the Second Reading in the House of Lords, we then look at it with the aid of very experienced lawyers in the field. We look at the memorandum prepared by the department, which explains what the delegated legislation is, why they have taken the powers and the level of parliamentary scrutiny they advise. I have to tell you that the value of those memoranda varies considerably, to the point that we prepared a report under my predecessor in which we pointed out all the errors and the failure, very often, of departments to follow the guidelines given by the Cabinet Office and by us. So I beg to differ about the level of appropriateness as between primary and delegated legislation.

May I give you one concrete example before us? It comes from the Education and Adoption Bill. A key clause in that Bill was the arrival of a coasting school. If it fell under the purview of the Secretary of State and it was decided that it was a coasting school, then various interventions would come in. Nowhere in the primary legislation is there any definition of “coasting school”. When I bear in mind that this could have considerable results for the school thus described as a coasting school, I think that is an abuse of the use of delegated legislation. I give you that one only. Test me, and I can give you a great many more.

Chris Grayling: Baroness Fookes, you have highlighted the importance of the role your Committee plays. I have no doubt that is something we will have in mind as we consider how best to respond to this, because there are skills that we would not lightly give up. You are

right to talk about the work that your Committee does. Of course, in the Commons, we hope and believe it is for Select Committees to scrutinise these matters. Sometimes they do sometimes, sometimes they do not. We do not have a specialist Committee like yours when it comes to statutory instruments, but we do have the departmental Select Committees, whose job it is to look at these things. But I do not doubt for a moment, having, as a departmental Minister, experienced the rigours of your Committee, the effectiveness of the scrutiny it puts forward. Certainly Lord Strathclyde, in recommending option 3, had not necessarily envisaged that you would disappear.

Baroness Foakes: I certainly hope not. If anything, we should be beefed up.

The Chairman: Lord President, we are getting to the end of our time. We are enormously grateful. I would like to end with a question from Lady Humphreys.

Q7 Baroness Humphreys: Lord President, the Strathclyde report asserted that it would be appropriate to take steps to ensure that Bills contained the appropriate level of detail and did not leave too much to regulations. What steps should be taken to achieve that?

Chris Grayling: It is for us on the PBL Committee to be more rigorous about this. Having now been doing the job for nine months, I have now got my head around the challenge. We are trying to tighten up the legislative process in a number of ways to make sure that what comes before Parliament is as ready as possible, that we have thought through issues that may arise in the Houses and that we have looked at legislation much earlier than has previously been the case. I am working to tighten up the process.

Of course, there will still be a need for secondary legislation. There will be moments when clauses need to give the Secretary of State reasonably broad-ranging powers, but we have to make sure that these things are used wisely and carefully.

Baroness Andrews: Your department produces extremely good guidance on what is appropriate for technical legislation. It seems to be rarely followed. Lord Strathclyde himself wondered aloud whether the Government had been wise to put tax credits into secondary legislation instead of primary legislation. It is gratifying to hear what you say, but if you could enforce your own guidance and persuade Ministers not to use secondary legislation as a political instrument, it would be extremely helpful.

The Chairman: He will do his best.

Chris Grayling: The challenge that we have with tax credits is of course that when you are setting tax-credit rates, which this in effect did, albeit that it changed them quite significantly, to have the annual amount set in primary legislation creates a whole additional burden on the House. We would in effect have an annual tax credits Bill or an annual benefits Bill, as well

as the annual Finance Bill. It is easier said than done to ensure that all those things are set in primary legislation, simply because you need to be able to make changes sooner rather than later. There is no easy answer to that one, but I take the point you are making.

The Chairman: Lord President, thank you very much indeed. We are enormously grateful to you. There will be a text of what you have been saying. We will send it to you for your consideration in case there are any errors. Thank you again. We are most grateful.

Examination of Witnesses

Dr Ruth Fox, Director and Head of Research, Hansard Society, and **Joel Blackwell**, Senior Researcher, Hansard Society

Q8 The Chairman: Good afternoon. Welcome to you both, and thank you both very much for coming. We are most grateful to you both, Dr Fox and Mr Blackwell. You know what we are about.

Joel Blackwell: We do, yes.

The Chairman: Lord Strathclyde has published his report. The House of Lords has debated it. A number of views have been expressed, and we have just been listening to the Lord President, the Leader of the House of Commons, give his views on the matter. The Government have not yet reached any conclusions, they tell us, but I gather they are anxious to do so reasonably quickly. We hope and expect to report before Easter. We are going to examine the three options that Lord Strathclyde has suggested, but we may conclude that none of them is any good and we do not support any of them. We have reached no conclusions yet, and we shall be very grateful for your help and advice. You published something called *The Devil is in the Detail*. I have seen quite a bit of it. It is available at all good bookshops, no doubt.

There are, of course, a range of factors that lead to the publishing of statutory instruments. As a junior Minister myself once, long ago, I remember rejoicing in the availability of secondary legislation, with which I could do all sorts of things that were probably not what Parliament had originally intended, but that was long ago. The first question we would like to put to you comes from Lady Humphreys.

Q9 Baroness Humphreys: In a speech on the debate on the Strathclyde report, Lord Strathclyde himself said that, in embarking on his inquiry, he asked himself: “Is there a problem that now needs to be solved?” He concluded that there was. What is your view?

Dr Ruth Fox: We think there is a problem, but not the same problem that he thinks there is, in short.

Baroness Humphreys: Please tell us what that problem is.

Dr Ruth Fox: We think the problem is what was referenced earlier in Baroness Stern's question: the current balance between primary and secondary, how complex the process has become, the lack of consistency, and the inadequate scrutiny procedures in the Commons. As a consequence of that, you end up in the kind of situation that we have ended up in with tax credits. Fundamentally, our concern is that the entire process, from the primary through to the scrutiny of the instruments that emerge, is now fundamentally flawed. Ameliorative patchwork reforms are simply adding to the problem and we need to take a step back. We recognise how complicated it is. It is probably the most difficult thing that we have ever written, trying to explain it. Nonetheless, I do not think that because it is complicated one should avoid it now, given the volume that we are talking about and the difficulties we face. The problem that Lord Strathclyde was set was how more certainty and clarity could be brought to the passage of SIs through Parliament and the primacy of the Commons assured. There may be issues relating to that as part of that process and as part of the review that needs to take place, and issues of clarity about whether conventions exist or not and about financial privilege. As the debate in the Lords last month showed, there is perhaps no clarity in some of that. Advancing that clarity would be helpful, but I do not think that this review gets us there.

Baroness Andrews: What did you make of Lord Strathclyde's statement about the quality of scrutiny in the House of Commons? When asked what the scrutiny in the House of Commons of statutory instruments was like, he seemed to be extremely satisfied with it.

Dr Ruth Fox: I would say that that would be somebody who has not particularly looked at it. Having spent two years looking at scrutiny at the Commons end, we think it is inadequate.

Baroness Andrews: Could you say that again?

Dr Ruth Fox: We think that the scrutiny in the Commons is inadequate.

Baroness Andrews: In every respect?

Dr Ruth Fox: Most respects, yes. Joel is more of an expert in the intricacies and procedures and could go through some of the detail.

Joel Blackwell: It is mainly the procedures that we think are completely weak, and two procedures in particular: the fact that the prayer Motion is coupled with the Early Day Motion system, which does not have the faith of the Members of the Houses of Parliament, and the fact that prayer debates are entirely in the hands of the Government; and the quality of the

affirmative debates in delegated legislation Committees. Those are the two areas of concern that we have about the procedures, and we think they are completely inadequate.

Dr Ruth Fox: To give you an example, in our interviews with MPs when we were doing the research for a case study on Bills and instruments, many MPs did not realise that they could oppose a prayer through an Early Day Motion. Early Day Motions are known in the House of Commons as “parliamentary graffiti”. A lot of them have lost faith in that process and do not realise the link to statutory instruments. The membership of delegated legislation Committees is obviously appointed by the Whips. Members regard it as either Buggins’s turn or a punishment to be on it. We were given numerous instances in interviews of when they were advised by the Whips that they could do their constituency correspondence: “Do not worry, it will be over quickly”. You can have 90-minute delegated legislation Committee debates. The average debate at the moment is 26 minutes.

The Chairman: These sentiments are not unknown in this House.

Dr Ruth Fox: No, but I was asked specifically about the Commons procedures.

The Chairman: One fact that emerged from your evidence, which we have seen, was the number of statutory instruments. We deal with 1,200 or so a year in this Committee. You talked of 3,000 in one of the pieces that I saw. I do not know where all the other 1,800 have gone.

Joel Blackwell: I will briefly talk about the volume of delegated legislation and the three key issues that come up when you talk about the number of SIs that are produced each year. You need to take into consideration the number of local and general UK statutory instruments produced each year. You also need to consider the number of SIs laid before Parliament, which differs from the number of local and general SIs. The particular quote that we put in the book about the number of such arrangements having increased was based on a large increase in the number of UK statutory instruments that we saw from 1992 to about 2003. That is both the local and general instruments produced each year, and the number of instruments laid before Parliament.

From about 2003 onwards, and we made this quite clear in our report, the number has been broadly stable, so you cannot really say that there has been an increase in recent, recent years. From 2010 onwards, while there is constant variation—it has fluctuated, bits and bobs—it has remained broadly stable. That goes for both local and general instruments, and when you put those together that is about 3,000 instruments per year on average. It also goes for the number of SIs that are laid before Parliament.

The number that we focus on in our research and that is focused on in appendix C of the Strathclyde report, and correctly so, is the number of SIs laid before Parliament. As you rightly say, Lord Chairman, that is about 1,200 per Session. It can change. Last Session it was about 1,400. In the mid noughties, it was about 1,800. The key number to focus on, we think, is the number of SIs laid before Parliament, rather than the number of local and general SIs, for the benefit of talking about the scrutiny of delegated legislation in the House and the way it is prepared and drafted in Whitehall.

The Chairman: The number that we deal with has remained pretty stable for the last several years.

Joel Blackwell: Yes.

Q10 Lord Goddard of Stockport: My question was answered in one of the interventions earlier about the weaknesses in the current system. You have outlined that quite clearly. I would just like to ask you: what is the contribution of the Commons scrutiny, compared with that of the Lords? How does that balance and counterbalance?

Dr Ruth Fox: The problem in the Commons is that there is neither the mechanism nor the engagement, or the appetite really, among members. You do not have the Committees in the House of Commons that you have here. One of the problems that we referred to in the book in relation to Commons starter Bills for example is that the scrutiny process in the Commons does not have the kind of benefit that happens here in the Lords, in that here it can benefit from delegated powers reports. Commons starters do not get that and, when considering Bills at the primary stage, MPs are therefore operating in a vacuum when it comes to understanding delegated powers.

In terms of the appetite, there are so many demands on MPs' time, constituency commitments and so on. The Leader of the House talked about scrutiny through Select Committees, but Select Committees are overlaid now with so many commitments. Every time there is a new scrutiny demand it goes on to a Select Committee. The reality is that while Committees may try to get through delegated legislation, in practice they are only really dealing with a very small proportion of it.

One of the issues in the system is a lack of collective knowledge. As a consequence, things slip through, mistakes are made all the time, and there is no learning from past experience. You can see that particularly in the Commons, because you have none of those mechanisms. When you have a similar lack of collective knowledge in Whitehall, it means that the benefits that derive from the work of the Committees here are being lost, frankly, because they are not being picked up anywhere else in the system.

That is not to say that scrutiny here is perfect. We just think that it is better. There are the mechanisms, the appetite and the time, and that combination helps.

Baroness O'Loan: I just wanted to ask you what may be an unfair supplementary, but you talked earlier about a small proportion of measures being looked at by the Commons. Can you put a figure on the proportion the Commons actually looks at, rather than just passing them through?

Dr Ruth Fox: One of the interesting things that emerged from our research was the difficulties of getting a handle on the data and the issues about what Parliament collects, what government collects, what is collected on an annual basis and what is collected on a sessional basis. Under Joel's auspices, we have launched a statutory instrument monitoring system internally, and we will publish some of that data at the end of each Session. Joel has come armed with some statistics about SIs so far this Session, which may help.

Joel Blackwell: At the moment in this Session, the number of SIs laid before the House of Commons has been 766. That is not out of kilter with the average 1,200 that your Committee and both Houses of Parliament will see in a particular Session. As you are no doubt aware, there was a large increase in the number of statutory instruments that were published in March 2015, which was about 300. That is a substantial percentage of the annual number of SIs that are usually published in a Session.

The Chairman: Most of those came on to our desk as soon as we were formed after the election.

Joel Blackwell: Yes, exactly. Part of the problem that we speak about is, as you will doubtless be aware, the peaks and troughs of SIs that are produced.

Baroness O'Loan: Lord Chairman, I think perhaps I did not articulate my question clearly enough. Can I try again?

The Chairman: Of course, yes.

Baroness O'Loan: I think you said, Dr Fox, that a smaller proportion of instruments were scrutinised by the Commons. Is that correct?

Dr Ruth Fox: On current data, of all the SIs that Joel has referenced, in the House of Commons 12 prayer Motions were tabled as Early Day Motions thus far, nine by the official Opposition. Four of those have been debated, all in delegated legislation Committees. If we look at affirmative instruments, 10 have been debated on the Floor of the House of Commons this Session, five on proceeds of crime together as a package.

Joel Blackwell: That is right.

Dr Ruth Fox: An argument was put forward—I think it may have been before the Public Administration and Constitutional Affairs Committee—that if the Official Opposition raise a question about an instrument, it would be automatically debated. Our data does not bear that out.

Baroness O'Loan: Can I just be absolutely clear, then? You are saying that of the 766 statutory instruments this Session, there have been 14 debates on the Floor of the House of Commons.

Joel Blackwell: No. There have been 10 on the Floor of the House of Commons, so that is 10 affirmative instruments debated on the Floor of the House, rather than, as usual, being automatically being put into a delegated legislation Committee. On 10 occasions in this Session, they have been on the Floor of the House, but five of those were grouped together; they were the proceeds of crime orders.

In terms of prayer Motions, 12 EDMs were tabled by MPs, nine of which by the Leader of the Opposition. This is slightly different from what happened in the last Session, where we only had one prayer Motion debated on the Floor of the House. So far already in this Session, four prayer Motions have been referred to delegated legislation Committees for debate. Indeed, one of those was even put to a vote on the Floor of the House, via the Opposition moving it during an Opposition day debate, which is quite a rare occurrence.

Baroness O'Loan: Just to be absolutely clear, you can count fewer than 20 instruments that have actually been considered in detail by the Commons. Is that what you are saying? I am sorry, I do not want to be obtuse.

Dr Ruth Fox: All affirmative instruments are considered in a delegated legislation Committee automatically. There is an issue about the quality of that debate, how they express their view and then what happens. If the Leader of the Opposition, however, wants to raise concerns through a prayer Motion for a negative instrument, the number of those is very low, yes, but that is not unusual.

Q11 Lord Janvrin: Can I come on to the options, against the background of what you have just said? You may end up repeating it. What implications do you see for the parliamentary scrutiny of legislation of removing the Lords from the scrutiny process under option 1?

Dr Ruth Fox: I would be completely opposed to it. I think that it would drive a coach and horses through the concept of having a system of parliamentary government, and in effect it would not ensure the primacy of the House of Commons, which is what the review was supposed to be looking at. In my view, it would ensure the primacy of the Government to drive through whatever it wanted. It would essentially be giving a rubber stamp to diktat by

government, unless and until there are significant changes in the way primary and secondary legislation are dealt with upstream in Whitehall at the production stage, and in the procedures in the House of Commons.

I would be completely opposed to it. To be fair to him—and it may be a straw man to make the other options look more respectable—Lord Strathclyde implicitly suggests in his comments that he acts as judge and executioner of option 1.

Lord Janvrin: Against a background of the Lord President saying that there was possibly significant support for option 1 in the Commons, can you envisage any procedural change that the Commons could adopt under that option to compensate for the lack of scrutiny in the Lords? It is similar to the question I put in the previous half of the session.

Dr Ruth Fox: You would have to put a system of Committees in place. You would have to have some kind of sifting Committee; you would have to have a Committee system to scrutinise them properly. You would have to link that to a better system than Early Day Motions for Members to express concern. You would have to have some assurances about how Members were going to dedicate the time necessary to those Committees, in the context of their being already strapped for time. That is already a big problem. You would need to have some linkage in the procedures between the expression of concern about an instrument and how that was then reflected in a vote.

In the end, we are a bicameral Parliament, and to take the Lords out of that process entirely drives a coach and horses through the principle of bicameral parliament. I would be surprised if there were sufficient support for this in the Commons. I would be very surprised, to be honest, and if there is it is political and it is driven through a lack of real understanding about the delegated legislation process and what may happen. I cannot see how they would get it through.

Baroness Andrews: Could you elaborate a little on that? If, from your experience of speaking to lots of House of Commons Members by the sound of it, you are suggesting that there is really no appetite for this in the Commons, is that because each of these options possibly requires more time on the Floor of the House or another sort of Committee, or is it more political insofar as they are actually very relaxed about the House of Lords doing the hard work for them?

Dr Ruth Fox: I have not spoken with many Members specifically about the Strathclyde options, but in the context of delegated legislation per se, most of them begin from a lack of understanding, which inhibits their ability to engage with the system at all. There is a lack of time, which is a problem, and because the procedures in the Commons are so weighted in the

interest of the Government, there is no real incentive for Members to engage with it. The only way you would change that is to incentivise it, and the only way you would get there is if you had some kind of conditional amendment at a minimum, or some kind of amendment option for them.

Baroness Andrews: Some ability to change it?

Dr Ruth Fox: To change it, yes. The inability to change it is a problem, which means that when combined with all those other factors, they put their hands up and ask, “What is the point?”

Baroness Andrews: You are saying that nothing else will change. They will not become more interested or more expert. No more time will be found.

Dr Ruth Fox: No.

Baroness Andrews: Those all apply to each of those options, do they not?

Dr Ruth Fox: Yes.

Q12 Lord Bowness: I turn to option 2, which Lord Strathclyde did not pursue, but in his evidence to the House of Commons Committee, he said, “If the House of Lords wants to go down a consensus road and rebuild a convention, which is my option 2, it would be open for them to do so”. However, do you think it is possible to have, as it were, a non-legislative approach that was nevertheless binding on each House, and where do you think the main points of tension would be in finding what would have to be a consensus between both Houses, and indeed between Government and Opposition, as to the terms of such a resolution?

Dr Ruth Fox: I have two concerns with this, I think. One is how you rebuild a consensus that would address the problem highlighted by this particular tax credits issue and encapsulate that. Clearly there is a lack of clarity about the notion of the convention in relation to the House and statutory instruments, but say you were able to rebuild that and establish a consensus among Members that, as the Lords *Companion* says, the House retains its unfettered right to reject statutory instruments, but to do so in exceptional circumstances. I think you could get that addressed.

You might be able, through discussion with both Chambers, to reach a decision on financial privilege that would go further than what we have at the moment. Financial privilege does not extend to statutory instruments, despite what some people have said, so you might be able to have a discussion there. There would be a huge debate if the Government wanted that to be retrospective. The implication of the Treasury Committee correspondence with Lord

Strathclyde is that the Treasury Committee would like to look at that. That has huge implications and could almost take the House out of consideration of SIs by the backdoor.

It seems to me, though, that fundamentally the breakdown was not constitutional or procedural but political. I am not sure that rebuilding it through a resolution of the House would put that back together if another issue were to arise that were similar. I am not sure that it will address the problem that exists. If the Government want to say, “We have debated a statutory instrument, albeit not actually as part of the formal statutory instrument procedural process in the Commons, but we have debated the issue in principle through our budget discussions and whatever else”, where do you go with that? What is acceptable and what is not? If there has been a Back-Bench business debate, if there has been an e-petition debate, if there has been a substantive Motion somewhere in the process, not through the SI debates but through another avenue, is it acceptable for the House of Lords to then say, “The House has expressed a view”? It is not on the terms of the statutory instrument before it. It is not on the terms of the legislation. As an issue of principle, perhaps it is. I would not say that it cannot be done, but I think it is difficult, because the issue to my mind is still a political one, not a procedural problem.

One of the potential advantages of doing it through the non-legislative route, though, which is interesting in respect of the EVEL debate in the Commons regarding introducing English votes for English laws, is that there was a desire on the part of the Government not to have that in legislation and to put it in Standing Orders. Obviously Article 9 of the Bill of Rights was cited in keeping the courts out of the procedural process. It would be interesting to see, although I know there is the additional element of the Statutory Instruments Act to be revised or replaced, what the implications are for option 3 as opposed to option 2 of doing it through a non-legislative route, and the advantages and disadvantages of that. That is not reflected on in the Strathclyde review.

Lord Bowness: Dr Fox said that there was not necessarily agreement about financial matters. It seems to me that we have what is supposed to be a quote from the House of Commons standard background paper on statutory instruments, which talked about affirmative procedures and the passing of Motions, in which it says, “To do this, a Motion approving it has to be passed by both Houses (or by the Commons alone if it deals with financial matters)”. Do you dispute that? I only ask for clarification of what you said in answer to my question.

Dr Ruth Fox: My understanding of it—Joel will correct me if I am wrong—is that whether it is financial or otherwise is defined by the power in the primary legislation. A huge number of

statutory instruments go through both Houses that have a financial element to them. They do not necessarily deal with supply, and it is supply that financial privilege in the Commons has always applied to. Currently, 11% of SIs in this Session are Commons-only. That is because it was set out in the primary power. That defines it.

In respect of the tax credits, yes, it becomes part of the whole budget discussion for the Government, but essentially it was a tax credit power under the Tax Credits Act, which was defined as a welfare measure, not a supply measure. Having realised, upstream in the Cabinet Committee, that it possibly had supply implications, the question is why the radar did not go off in their minds and they asked, “Should this be going through this route?” The power allows it. We then go back to our original point about what the problem is: it is the balance between primary and secondary legislation. We should be asking why it is and whether it is appropriate that the power at the beginning allowed for uprating, which I think most people would accept was an appropriate use of delegated legislation, in line with prices or whatever it may be annually—Parliament does not need to look at that—but that that same power also enabled the Government to reduce or abolish that credit?

There is a matter of administrative, technical change, and there is a matter that gets into policy and principle. If the power is broad enough that it permits both, the question is whether that is what Parliament wants. At the moment, that power allows that, which is why the Government could use it.

Baroness Andrews: That was, of course, part of the case that Mr Grayling made. He referred to it as a variable-rate measure, which it was not; it was far more than that, and that is what the argument turns on.

Q13 Lord Woolmer of Leeds: I rather think you are right that it is a political argument rather than a technical one, but nevertheless some proposals are going to go forward. If, and I pressed the Lord President on this a couple of times, the argument is overwhelmingly about this being a financial matter—it may not be the truth, but if that is the political element that is in it—then the question is whether that is an issue that could be addressed. Could this Committee, or this House, suggest a way forward to deal with that, or does it, as I think you will say, all come down to the original legislation: if it is in there that this is a money matter, then fine; if it is not then, hard luck?

What could this House constructively say, if anything, about dealing with the Commons feeling—because it is certainly a way of getting the House of Commons to argue that it is supreme over the House of Lords—that this was a financial matter? Given that almost

everything we ever look at has some financial issue in it, it may not be possible, but can you think of any way other than addressing this in the original legislation?

Dr Ruth Fox: I do not think there is anything stopping this Committee, on its own or working with the Procedure Committee in the House of Commons for example, from reaching an agreement about financial privilege in relation to statutory instruments and how the scope of that should be drawn. The point of contention would be whether you make that something forward-looking in respect only of instruments drawing on powers in new legislation, or whether it is retrospective. Retrospective, I think, is fraught with difficulty.

That could be done. The danger would be whether the Government would utilise that to get things through the Commons only. There was a comment—I am fairly sure it was by Lord Strathclyde; I cannot remember whether it was in the debates in the House of Lords or in his appearance before the Public Administration and Constitutional Affairs Committee—in which he suggested that, in government, some departments were not really aware of the fact that they could have a Commons-only instrument, and that that might be part of the problem. Things that ought to have been financial and dealt with only through Commons powers were not being put in in that way. That may be true, but it raises some quite serious questions about the preparation of Bills upstream that need to be dealt with and that go to our broader point about the balance between primary and secondary and how these things are prepared.

Baroness Andrews: That was what he described as one of the weaknesses of option 3. I think that was in the Public Administration and Constitutional Affairs Committee. I interpreted that to mean that option 3 was possibly going to open the door to Governments doing far more drastic things through statutory instruments, which they would have done anyway. Maybe we have a slightly different interpretation of that, but that is a question for when Lord Strathclyde comes back to us, I suspect.

Q14 Lord Hodgson of Astley Abbotts: Inevitably some of this is going to criss-cross over ground we have already covered. Lord Strathclyde is suggesting that we should get option 3 ready for take-off, where we replace the power of veto with a power of delay. Could I invite you to blue sky a bit about this? First of all, when you say a power of delay, how long and in what sense is it? If I asked you to sell me option 3, how would you do it? In particular, how would you do it against the background of your previous comment that our scrutiny process would be significantly diluted, not completely nullified? Then, how would I and my colleagues here, who now have a nice and easy gun to shoot, be restrained from shooting it every day, just to see what happened, and overuse it?

Joel Blackwell: First, to clarify, what we said about it being completely nullified was in relation to when, in December, before the report had been published, we responded to media speculation that Lord Strathclyde would recommend that the veto be removed. That quote referred to the veto being removed, not to option 3.

In terms of trying to sell you option 3, it is in keeping with the culture of the relationship between both Houses in that it is asking the House of Commons to think again. As we said at the beginning, we do not think that the House of Commons at the moment is willing or able, due to weak procedures, to do that. To bring the House of Commons and MPs within this scrutiny process could be quite positive in that respect.

However, the detail in the report fails to address the process for the House of Commons to think again. It does not say how MPs are supposed to be engaged with the decision of the Peers, and it does not speak about the procedures that would apply to enable them to reach that view or an alternative view. It does not say how the decision of the House of Lords would be conveyed to MPs, for a starter. It does not say whether the resolution in the new procedure would be preceded by a debate, or even a debate on the Floor of the House. Also, it does not say whether the matter would be subject to deferred Division. We know that most affirmative votes are on deferred Divisions on the Floor of the House, after the DLC has met. They are the issues that need to be addressed. We can understand why Lord Strathclyde perhaps did not go into that much detail, but we can only push the positives once those three questions have been answered.

In terms of the implications, yes, there is the possibility that it could lead to a more robust stance in the use of this delaying power, asking the Commons more and more often to think again. The problem is that if it is overused there is the fear that MPs might just stop listening to what the Peers are saying, and then the positives of the scrutiny process and improving that are all but finished. It would be a shame.

Lord Hodgson of Astley Abbotts: Following up on that, I did not hear you say the length of delay that you think would be appropriate in the circumstances. As part of that, we have had a lot of talk about a ping without a pong. Would it be any better if you had ping, pong, ping: i.e. there were two chances to make it doubly clear? Following up Lord Woolmer's point, and I am a complete novice at this, is there any mileage in primary legislation, where it refers to secondary legislation, indicating into which of the categories it might fall? That is to say that you might have some that were clearly financial and some that were clearly not financial. There is obviously a middle bit, and, as Lord Woolmer will know, everything is financial in

the end, so it may not be possible, but is that a way you could deal with it right at the beginning of the situation?

Dr Ruth Fox: We would need to sit down and think about the length of the delay carefully. I would not want to put an exact time on it. But there is an issue about instruments that are already in a sense enacted and operational, and what happens to those. In the Strathclyde review, Lord Strathclyde's specific wording was that a great many orders in this case are "unlikely to be in force yet". We have looked at that, and our suggestion is that 73% of negative SIs could be in force, so there is an issue that would need to be explored. We have not quite thought through the practicalities of what that might mean in delay, so I would not want to put an exact time on it.

On the issue of the ping and the pong, the question is: "Where does the ping start?" In order for the Commons to think again, it has to have already thought. One of the issues is that in the current Session, 11.4% of instruments laid since the start of the Parliament or carried over from the last were approved in this House before in the Commons. If they are approved here, you ping them back. Then what? We do not know how that will work in practice. We understand why Lord Strathclyde does not want to get into Commons procedures. Nonetheless, it means that you are being asked to make a judgment on the best option when you have only half the ingredients for the recipe you are being asked to look at.

Joel Blackwell: For MPs, it needs to be substantive consideration or reconsideration, which means that there has to be a debate, and therefore there would be an inevitable delay. I do not think it would be possible for business managers to rush in a debate on the same day. At least, we hope not.

Dr Ruth Fox: Other than in genuine emergencies.

Lord Hodgson of Astley Abbotts: Is there any mileage in the primary legislation containing an indication of how each statutory instrument is going to be dealt with by both Houses, or is that impractical?

Dr Ruth Fox: The difficulty is where you might have an SI with a financial and a non-financial element. How do you split it? That is one of the difficulties. One of the issues that we can tell by volume is that the size of SIs—in terms of the sheer number of pages of legislation contained in a single SI—has gone up significantly in the last few decades. They are more complex, they are more technical, there is more detail in them. How might you split it? If it has a financial element and non-financial elements, do you then say, "That is acceptable. It all goes to the Commons"? In practice, probably yes.

Lord Hodgson of Astley Abbotts: The reason for this, then, would be to try to clarify the skeleton nature of the Bill, so that the statutory instruments that hung from it had to be divided by the Government of the day, because the way they would be scrutinised subsequently would be much clearer. You would have an incentive not to try to mix money with policy.

Dr Ruth Fox: Possibly, yes. That might work.

Baroness Andrews: You seem to be rather sceptical that any of this can be done by legislation, a new arrangement or a new communication between us and the Commons. Am I right in that?

Dr Ruth Fox: Yes. We rule out option 1 completely, and we are sceptical about options 2 and 3 for various different reasons. We do not resile from our starting point, which is that this is all putting a band aid on a significant problem and it is not necessarily going to solve the problem that they think they have, because that is political. We are going to be back, potentially, in the future, dealing with these same issues. Exactly the kind of concerns that this Committee expresses about the instruments that come before it, and which the Delegated Powers and Regulatory Reform Committee expresses in relation to primary legislation, are all serious issues, and the Government just ignore them. In our view, this is all just band aid and ameliorative, and the fundamental problems with the legislation are going to continue. What we need is a proper review.

The Chairman: We are beginning to run out of time. Lady Fookes.

Q15 Baroness Fookes: Let us go back to basics. The Strathclyde report suggested that it would be appropriate to take steps to ensure that the necessary detail was in the Bill and not left so much to delegations. You will not be surprised to know that I say, “Amen to that”. Do you have any practical steps to offer that might bring this about, or is it like the old fable of belling the cat?

Dr Ruth Fox: One of the problems we found in our research was that there was almost no consensus in government among Bill teams at ministerial level about what should be in primary and secondary legislation. Until we can start to establish some clear boundaries on which there can be agreement, those problems are going to continue. That is why we think that a review is needed, because until we can start to define the criteria a little more closely—it will probably never be perfect and something on which everybody can agree, but there can be some clearer guidelines that can be understood in government and then implemented—I do not think we are going to get very far.

Baroness Foakes: Is there not a problem with Governments being in too much of a hurry? They bring forward Bills without adequate preparation, so it is easier to put it all in delegated legislation?

Joel Blackwell: Yes. One of the key problems we raised in *The Devil is in the Detail* is that delegated legislation is being increasingly used for political convenience rather than good legislative practice. That is the era of legislation by press release that we have witnessed and seen. Part of the problem is that now we are getting bigger powers with much wider scope, which has led consequently to statutory instruments that have gone beyond the boundaries of reasonableness and acceptability which the delegated legislation system was based on.

Dr Ruth Fox: The other thing in relation to our research is that the Government can bring forward their legislation in whatever form at the time of their choosing, and there is nothing fundamentally to constrain that if it is poorly prepared. There are not even any minimum standards, for example if a policy is in a Bill and the consultation is still ongoing. As we found with some of our case studies, Public Bill Committee sessions in the House of Commons have been held and the consultation has not yet finished on the policy that is being decided in the legislation. It is nonsensical, but there is nothing to stop that. One of our arguments was that a legislative standards Committee, as a brake that would look at some of the technical issues around production of legislation, might help. That has been endorsed by a number of Committees, both here and in the House of Commons, but obviously the Government are not remotely interested in it.

The other issue is in relation to your Committee. The sense from our case studies was that the more they bring forward framework Bills, the more they put in quite broad powers—Henry VIII clauses and the like—and the more there is a bartering element to this in Government. Part of it is that they put in powers because they do not really know what they want. They have not decided the detail of the policy, so they put them in almost as holders, pending the decisions they are going to make, to give themselves flexibility. But there is also an element that they put in something knowing that the Lords and the Delegated Powers and Regulatory Reform Committee might not like it or want it, and it becomes the procedure that your Committee wants to constrain that power, so the debate about enhanced affirmatives for example becomes part of the bartering process. They have it in their back pocket to say, “We will agree to this. We will have this scrutiny”, so that the power goes through, albeit with an enhanced scrutiny procedure, and the debate about whether the power should have been in there in the first place becomes almost secondary.

Baroness Fookes: We usually make that quite clear in our language when we say, “It is not appropriate”. The point is that our Committee does not have the power to stop. It can only advise.

Dr Ruth Fox: The Government know that. In some circumstances, not all, we found in our case studies that in government, in Bill teams, in the management of the process, the procedures and the debate about what the procedure to restrain the unacceptable power would be were part of the process of trying to get that power through. You focus the debate more on constraining the power than whether it should be there in the first place, once it hits the Chambers for discussion.

Baroness Fookes: What you are saying is quite significant, is it not? You are saying essentially that this is a political problem, but in fact you are describing an administrative problem here. How do we get into the DNA of legislation and Bill-making with the critical officials who lead on a Bill, who are doing by and large what their Ministers want but who also have quite a lot of scope to manipulate a Bill to make it easier for themselves? Part of the challenge is how to reach into the processes of government.

Dr Ruth Fox: One of the issues that we found, which goes back to the earlier point about the lack of collective knowledge, is that in many instances civil servants serving on a Bill team may do it only once. They come in cold to a Bill team, having never been involved before. They have to learn on the job. They get guidance, but not always the same guidance. They always get the Cabinet Office guidance, but they do not, for example, always necessarily get the reports from the Committees that would improve their knowledge about what expectations were and about precedent, and so on. They have learned a lot by the time they get through to the end of the Bill, but that is it, and they disperse across the department to work on other things.

Baroness Fookes: This was one of the very points that we made in our report. We made the point strongly that there seemed to be no common history to which they could refer. One of our suggestions was that they should put some system in place to ensure that that did not happen.

Q16 The Chairman: We are coming to the end of our time, I am afraid. There is just one last question we would like to put to you, and that is: what next?

Joel Blackwell: We think that the only thing that should happen next is an independent inquiry along the lines of the 1975 Renton review into the preparation of legislation. It needs to look at how both primary and secondary legislation is drafted and prepared in Whitehall, and scrutinised in Westminster. It needs to talk and really think about where the balance

should lie between political convenience and good legislative practice. It needs to have a look at rationalising the procedures, particularly in relation to secondary legislation. We have five main procedures. We have 16 variants on those procedures. We need to think about redesigning the scrutiny process, and we spoke earlier about where we could do that, particularly in relation to the House of Commons. It needs to think about what role Members in both Houses can play in relation to delegated powers, when and where. We really want to push this idea of establishing an inquiry.

Dr Ruth Fox: That is our fourth option.

Lord Woolmer of Leeds: Is the problem not that this issue has been presented as a tension between House of Commons and the House of Lords, whereas your argument is that it is really a tension between the Executive, the Government, and Parliament?

Lord Woolmer of Leeds: Is that a fair summary?

Dr Ruth Fox: Yes.

Lord Woolmer of Leeds: The emotion and political ambience behind this is a tension between the two Houses, whereas your proposition is that that is really not the point at all. It is really the Executive and Government in relation to parliamentary scrutiny. Is that fair?

Dr Ruth Fox: Yes.

Joel Blackwell: Yes.

The Chairman: Thank you both very much indeed. We are enormously grateful to you.