



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. 2

Heard in Public

Questions 17 - 38

TUESDAY 9 FEBRUARY 2016

3.55 pm

Witnesses: Lord Lisvane KCB, DL

Professor Meg Russell

Members present

Lord Trefgarne (Chairman)
Baroness Andrews
Lord Bowness
Baroness Fookes
Lord Hodgson of Astley Abbotts
Baroness Humphreys
Lord Hunt of King's Heath
Lord Janvrin
Baroness O'Loan
Baroness Stern
Lord Woolmer of Leeds

Examination of Witness

Lord Lisvane KCB,DL, former Clerk of the House of Commons and Member of the House of Lords

Q17 The Chairman: Good afternoon. Before we ask questions, I am asked to tell you that this a formal evidence-taking session on the record, and webcast audio and video. A verbatim note is being taken, which will be put on the public record in printed form, and also on the parliamentary website. We will send you a copy of the transcript for any amendments or errors that you might want to identify. Lord Lisvane, I will ask the first question, if I may. Colleagues have a number of other questions to put to you, which I hope will be in order. You have referred to an “asymmetry of consideration” of secondary legislation between the two Houses, and you have described the Commons as a “legislative black hole” in relation to secondary legislation. What, in your view, is the current contribution of the Commons in ensuring the effective scrutiny of secondary legislation? We discussed this with Mr Grayling last week, and you may have seen his evidence on that.

Lord Lisvane: I have.

The Chairman: We would be glad to hear your view.

Lord Lisvane: The starting point, as with so many issues of the relationships between the two Houses, has to be one of complementarity and not competition. It is not surprising that the two Houses do things in different ways. The Commons is classically the place for the party battle and the ideological clash, and that is less so, of course, of this House. That is reflected in the ways in which the two Houses deal with secondary legislation.

Ruth Fox said to you last week that our House has the mechanisms, the appetite and the time, and I do not think the Commons has any of that, particularly the time. I am not being in any

sense critical; it is about the extraordinary press of competing priorities which Members of the Commons have to deal with. Delegated legislation committees are seen, in a way, as mini Devil's Islands, from which escape is desirable, but, as I think the information you have been given shows, the average debate in a delegated legislation committee is 26 minutes, so it is not a particularly long sentence. Sometimes, of course, the House of Commons becomes worked up about a piece of delegated legislation. It does not happen very frequently. You have already been told in evidence that so far in this Session there have been 10 affirmatives debated on the Floor of the Commons, although five of those were brigaded together, so that makes six events in total.

Looking at the statistics for the last two Sessions, in 2014-15—that was 133 sitting days—there were 1,378 instruments laid, 27 considered on the Floor of the House in the Commons and 315 in committee, and many of those, of course, were brigaded together. That was quite an unrepresentative Session. If you go back and look at 2013-14, you had 162 sitting days, 1,173 laid, 11 debated on the Floor and 315 in committee.

I apologise for the length of this answer. It is very easy to fall into a binary treatment of the problem. It would be much better if the events of the last few weeks were to result in Parliament as a whole getting a better grip on the totality of how to deal with delegated legislation. The threshold, which is something that you might want to talk about later, between primary and secondary legislation, is part of that mix.

Rather than say, “This is better. This is worse”, I would much prefer to see a collective approach which meant that in Parliament—this is not about Lords and Commons; I see this as about Parliament and the Executive—that was at the top of the list of priorities.

Q18 Baroness Andrews: That is very interesting, Lord Lisvane. I have two questions. Do you think the House of Commons would have an appetite for doing a review of what is clearly a very vexed issue? I appreciate you have seen Mr Grayling's evidence. Could you give your response to that?

Lord Lisvane: I think in many ways I have commented on his evidence in my first answer. In terms of the collectivity—and I think this is an important point—a few years ago I gave evidence to the Wakeham Commission. The issue of delegated legislation, and also European scrutiny, was at the heart of what I was there to talk about. Delegated legislation is very resource-hungry. Any detailed scrutiny is very heavy on scarce parliamentary resources: not only time, of course, but staff time and all the parts that go to underpin the work and reputation of committees in both Houses. I suggested setting up a joint committee on delegated legislation of both Houses with a single scrutiny and analysis resource, but with

satellite sub-committees. The great advantage that I saw was that the parliamentary culture, so to speak, of each House could be reflected in those satellite sub-committees, that you did not have a procrustean bed of one joint committee, but you had that adaptability and flexibility of the sub-committees around it. It was something which did not find its way into the Wakeham recommendations, but his Commission was very interested in the idea, and it might be something that could be looked at in greater detail in the current circumstances.

Q19 Baroness Fookes: Lord Lisvane, you have already made your views clear about option 1: that it should be “rejected out of hand”. Could we look more closely at that? If no changes were made in the procedure of the Commons, what would be the impact on parliamentary scrutiny, as a whole, of delegated legislation? You have probably half-answered already.

Lord Lisvane: To an extent. Clearly, it would take out a major area of activity. Perhaps there is a media battle to be won. If our citizens realised, in the scrutiny of what Ministers are doing, the degree to which they are trammelled by parliamentary accountability, responsibility, and which way the spotlight is going to swing next, this, if I may say so, classically boring and unglamorous area of parliamentary activity would take on a much greater degree of interest. That is a roundabout way of answering the half of your question I had not answered before, which is that we would lose out and the general public would lose out to a very great degree.

Baroness Fookes: Can we suppose for a moment that the Commons were prepared to make changes to their own procedures? Could that compensate for the loss of the Lords’ control, in practical terms as opposed to the theory?

Lord Lisvane: It is a big if. Very often, a bicameral approach—again complementary, not competing—is preferable to one House trying to do it all. That may be because there are differences of approach, certainly in terms of timing. You will know from practical experience, so much better than I do, how many burdens from an overflowing diary the average Member of the House of Commons has to sustain. If you take, for example, the calculation, which I think is fairly well-accepted, that if you are a member of a busy departmental select committee, that is about two days of your week one way and another, and you then have to cram all the other things in, I do not think a major shift in demand on Members’ time towards the scrutiny of delegated legislation would be a practical possibility.

Baroness Fookes: Could you enlarge on the point you made to Lady Andrews about this joint committee and its satellites that you referred to?

Lord Lisvane: There is no one size fits all. There are lots of ways that one could approach this. It is quite important not to become painted into a corner by the three Strathclyde options.

They are not the only options. A completely new approach, which might be by means of a joint committee, might raise awareness in the Commons of the sorts of issues that have arisen, although unfortunately the Leader of our House appears to have ruled that out in her reply to the Strathclyde debate. If we were going down an option 2 track then a re-run of the Cunningham committee, or something like it, might be a possibility. We have still what I described as almost a throwaway line at the end of the Strathclyde report. This business of the threshold between what should be the subject of primary legislation and in secondary legislation is really a much bigger question than any of the others that we have been trying to deal with. In a sense, the others are symptomatic of that basic problem.

Baroness Fookes: Then the Government would have to take the initiative, would they not?

Lord Lisvane: The Government would have to take the initiative. It would require a very substantial shift of culture.

Baroness Fookes: Precisely.

Lord Lisvane: At the moment, senior Ministers, as far as I understand it and have understood it over the years, are not much engaged with the business of secondary legislation; they have their headline aims in their Bills. At the same time, I do not think that within government there are enough protocols to guide those who are setting the threshold. It is much too easy to say, “I will do a better job for my Minister if I suggest that wide discretion is given both to this Minister and his successors in this area of policy”, whereas the question that ought to be asked, and ought to be in the Cabinet Office guidance, and even to be policed by parliamentary counsel, is, “How will you do the best job for Parliament?”, because it is Parliament which is going to consider this legislation. There are many things that need fixing, and if they are not fixed we will simply have months, or years, of hand-wringing. It has to be gripped at a very high level.

I regard Henry VIII clauses as highly undesirable. If a secretary of state wanted Henry VIII powers—when you think about it, those are very substantial powers amending what Parliament through the whole panoply of passing primary legislation has decided shall be—it would not be unreasonable to ask a secretary of state to justify in front of a committee of either House, or a joint committee, why those powers were required. If you did that, I think you might find there were rather fewer of them.

Q20 Baroness Andrews: Given what you have said about the difficulty of achieving that change of culture, which is a shift in political attitudes, is that what led you to your earlier remarks that you thought it was unlikely that anything could be done to compensate for the loss of the House of Lords’ veto?

Lord Lisvane: Yes. That is absolutely the conditioning factor. It is pie in the sky, but if we went back to the sorts of expectations that people had of delegated legislation 40 years ago, the problem would not go away, but would be addressed very substantially indeed.

The Chairman: Before I ask Lady O’Loan to ask the next question, I wonder whether Lord Hunt would like to join us at the horseshoe. He is very welcome to do so.

Lord Lisvane: Might I add to the answer to Lady Fookes’ question? Another of the issues that needs to have a behavioural change is the Parliamentary Business and Legislation Committee of Cabinet. Again, 20 or 30 years ago—and I am thinking of the great luminaries chairing that, like Willie Whitelaw—it was a legend. Unless you had your Bills really sorted, you did not get them past what was “L Committee” in those days. PBL should be the gatekeeper. Looking at what comes out, I am not sure the gate is being kept very effectively. Perhaps to put it more kindly, the balance between what is needed by Parliament and what government wants to see in order to get its legislative programme through—and we have to be completely realistic about that, it is a huge pressure—is not being met as it might be.

Baroness Fookes: You mean it is an open gate?

Lord Lisvane: Certainly, it is creaking in an unhelpful way.

Q21 Baroness O’Loan: You described the Goodlad report as a “source of wisdom”. How does the recommendation of the Goodlad report, that the House adopt a resolution to use its votes on secondary legislation to delay rather than to defeat, compare with Lord Strathclyde’s option 2?

Lord Lisvane: It is very similar to Strathclyde 2. He says at the end of his consideration of option 2 that he is “doubtful whether a solution can be devised by which the House can qualify its powers by convention alone”. I would say that, rather than rush to a solution which is regretted at leisure, why not try that first? Clearly, we are talking practical politics, and legislation, or a bigger step, is always going to be kept in reserve, but why not try that non-binding resolution? We must remember the convention which preceded it was non-binding, and for a long time that worked pretty well. I think from both sides of the political divide it was seen to work pretty well.

It is important to put recent events in context. If the draft tax credit regulations were vitally important as a central plank of Government economic policy, why were they not immediately re-laid in a slightly different form? It is not irrelevant that when the Chancellor shared his change of heart, and his additional fiscal headroom, with the House of Commons, some very loud cheers came from behind him. It may well be that the “think again” phenomenon was timely and appropriate.

Going back to your question about the Goodlad formula: it seeks to delay. I am not sure that delay would necessarily be achieved by the Goodlad solution, because a Government who needed their order or regulations, or needed to overturn an annulment resolution, would probably lay a substantially similar—using the Goodlad language—instrument very quickly. You would have the iteration, but you would not necessarily have it under that formula accompanied by delay. I think you need something else in there.

Baroness O’Loan: I think you said that the convention had worked for years. Does that suggest that you think what happened under the Tax Credits Bill was the convention not working, or was it something different?

Lord Lisvane: I would have regarded the two Motions as fatal. I am not setting myself up as a Lords proceduralist. On the ordinary use of words, if you say at the end of that debate, after the decision has been taken, “Has the Lords approved that instrument?” the answer is, “No, it has not”. When a condition is attached to approval which is fairly evidently either unwelcome or wholly unacceptable to the Government of the day, that conditional Motion is very close to a fatal Motion.

Baroness O’Loan: Are conventions always binding on the House?

Lord Lisvane: By their nature they are not. I am rather attracted by Philip Norton’s distinction: that a convention which is broken is not a convention, but what remains is still a doctrine. If you can then house that doctrine in a new or reconstructed convention, you have a nice, shiny convention again.

Q22 Lord Woolmer of Leeds: As I understand it, the Cunningham Committee said that the convention is not that the House of Lords will never reject an instrument, but exceptionally they could. Is that your understanding? Surely the convention was that this House could exceptionally reject a statutory instrument. To say, in your words, moving a fatal Motion which was approved broke the convention is bordering on a different interpretation of the convention, is it not?

Lord Lisvane: If conventions are going to be supple, they will have subjective edges. There will be grey edges. I do not think I would enter into that conversation with you, except to say that I absolutely agree with you in your reading of the Cunningham report on the convention. If it is the case that since 1968 there have only been six examples, that is not a very high hit rate.

Lord Woolmer of Leeds: If the convention was to be interpreted that the House of Lords could never reject statutory instruments, the convention would clearly be that and would mean that this House, whatever the circumstances between the Executive and Parliament, would

never be able to reject secondary legislation. That would be a very, very substantial diminution in the balance between Parliament and the Executive.

Lord Lisvane: I agree. That would be an unprofitable interpretation of the convention.

Baroness Fookes: Surely the key point is the word “exceptional”.

Lord Lisvane: Exactly.

Baroness Fookes: A lot of people thought it was exceptional; the Government did not.

Lord Lisvane: Yes. Spot on.

The Chairman: 'Twas ever thus.

Q23 Baroness Andrews: I will move on to option 3, which implies some legislative form. My own reading of what Lord Strathclyde said is he was reluctant to contemplate legislation, but it is there. You said you have “an instinctive dislike” of Parliament legislating about its own proceedings. You have identified at least two risks, one around Article 9 of the Bill of Rights and another around the prospect of an option 3 Bill being prey to being opened up in all sorts of directions. Could you expand on those risks, and any others that you see attached to option 3?

Lord Lisvane: I will take the business of legislating and then the possible effect on Article 9 first. The mere fact of legislating means that, once you have done it, disputes are not settled by parliamentary and political discussion and, if necessary, compromise. It can happen very quickly that something is fixed in a meeting in a Leader of the House’s office in half an hour. Issues are not decided like that; they are decided by the courts. Before taking any legislative option, you have to ask yourself, “Am I happy to go down this road, with all the possibilities of the law of unintended consequences operating in parallel?”

There is the not unimportant question of whether the judiciary would welcome being drawn into these matters. In my previous life, I had frequent conversations with the most senior members of the judiciary. That was particularly in the context of a codification of parliamentary privilege, although obviously it ran much wider, and I formed the impression that they would not. It is worth looking at the evidence given by our learned colleague, Lord Judge, when he was Lord Chief Justice, to the Joint Committee on Parliamentary Privilege, where he very helpfully encapsulated some of these doubts.

The second issue is, if you do legislate, you get a possible encroachment of statute on the freedom of two Houses of a sovereign Parliament to order their affairs as they think fit. Once you say that this or that parliamentary function is regulated by statute, you may find that the courts extrapolate when another matter is put to them. For example, if they need to decide a case brought under a new SI Act—it is a bit difficult to imagine what it would be, but I am

sure that inventiveness could easily supply in the difficult circumstances the basis for a case to be stated—the courts may well decide that in order to do so they need to examine parliamentary materials, which would include those which are specifically put out of their reach in Article 9. That is what I mean by a diminution or dilution of the effect of Article 9 of the Bill of Rights.

Baroness Andrews: Is it your understanding that any legislative change would hang on the 1946 SI Act, or would we be looking at new legislation?

Lord Lisvane: People produce the 1946 Act as a sort of amulet. It is the most appalling piece of drafting.¹ All it did was bring together a sort of Heinz 57 set of different procedures that were in force before the Second World War, where anybody who was putting a delegated power in an Act would decide how they were going to do it. There were different lengths of praying time, all sorts of different provisions—so it was the uniformity, really, in the 1946 Act. It is probably too far gone for modular amendment. If you were going to do something legislative, you would start again.

The Chairman: If legislation is decided upon, and starts in the Commons—and you said there would be a risk with such a Bill being amended in all sorts of ways which we would regard as irrelevant or undesirable—in this House, and in the Commons as well, there are restrictions as to what you can move as amendments and must be in accordance with the terms of the Long Title. Is that a serious restriction, or not?

Lord Lisvane: It is not quite like that. The Long Title reflects what is in the Bill, but it is not the only determinant of scope, or, in this House, relevance. That is determined by what the Bill does. If you need a current interpretation you will have to talk to current practitioners. From my experience in my previous life, if you were advising on the scope of a Bill, you would look at what it did. If the answer to your question was, “This restricts the power of the House of Lords to vote on a particular type of legislation”, the question in determining the scope would be, “Well, does that admit amendments on other types of legislation? Is the similarity close enough to bring those within the scope?” or “If it limits the powers of the House of Lords in other respects, could it, for example, be a vehicle for amending the Parliament Acts 1911 and 1949?” That is a bit far-fetched, but you see the sort of hazard that would need to be scoped out—no pun intended—before you went down that road.

¹ Note from Witness: “I did not intend to be so censorious about the drafting, which is a little antique, but serviceable.”

The Chairman: I bear the scars of the 1999 Act, when two or three of my amendments were ruled out of order by the clerks, and that was that. Quite right too, I dare say. Thank you for that.

Q24 Lord Janvrin: Still on option 3, what changes in Commons procedure would have to be made to compensate for the loss of the Lords' veto? For example, how could it be made certain that Members of the Commons could have a genuine opportunity to "think again"?

Lord Lisvane: You have to overcome two difficulties. The first is that the phrase "think again" is predicated on the Commons looking at an affirmative SI before the Lords, so you get a "think" again. If, as in this Session, in which, I think I am right in saying, 11% of orders so far have been taken in the Lords before the Commons, the succession of events becomes different and you would have to have Lords, Commons, Lords, Commons.

The second difficulty is how you assure a substantive "think again". If Commons standing orders allow a second Commons Motion to be decided without debate, perhaps decided by a deferred Division, there is not much thinking involved. It may well be that the nature of the approval of the Motion in the first place has not—forgive my sounding overly critical—involved very much thinking the first time round. Thinking again may take on a slightly different tenor. In order to ensure that those things happen, you would have to do them by legislation. We are back in Catch-22 again.

I come back to the agreement I would by far want to see: perhaps a beefed-up version of option 2, if it included these other things, where it is very clear that the Government of the day have committed themselves, and even though Parliaments cannot bind their successors, perhaps there are types of governmental undertaking which can survive into a following Parliament. That is the way to do it.

Lord Janvrin: Can I probe a little more on the "what if"? Under this option, what mechanism could there be to let the Commons know the reasons why the Lords had blocked the passage of secondary legislation? Do you see a delay for a period? Under this option, what "think again" period would you envisage? As I say, it is a "what if". I accept that you think we should be going elsewhere.

Lord Lisvane: On the first point, the instrument could be considered again very quickly. Let me deal with the messages point first and come on to delay. Strathclyde does touch on messages, but is not too detailed about how they would work. That is not important. It might be that a message is put together by the House authorities to express the principal concerns expressed in a debate which preceded the instrument not being approved, which the House is

asked to agree. That would be done as are messages on a Bill. That need not worry us too much.

Regarding the delay, Wakeham talked about three months. The question is how you can achieve that. Given the pressures on all modern governments, three months is going to look like a pretty serious delay. I would be quite surprised if three months remained a runner. If your priority is “think again”, you do not necessarily have to couple that with a three-month delay. On the other hand, if it is an, “Oh crikey, this is a mess. Have a delay and get it sorted out”, that is different. We are very largely talking about “think again”, and, if we are, a week or two ought to be enough.

Baroness Fookes: Let us suppose we have the message system going back to the Commons, but it would also go back to the relevant Minister, or Ministers, at a department. Could they not be asked, at some time convenient to themselves, to answer whatever points are made in the message?

Lord Lisvane: They could be. There is a danger of putting another layer of exchange on top of what has already happened. If there has been a debate where it is very clear to the Government what the view of the House of Lords is and why the instrument is not going to be approved. If I understand you correctly, are you thinking of another dialogue, or would it be when the message gets to the Commons that, as it were, it forms a Motion that this House agrees with, or “do now consider”, the message of such and such for the Lords? If the message were a serious résumé of the faults of the order, that would form part of the charge sheet, as it were, which the Minister would have to answer in a debate in the Commons.

Baroness Fookes: That is what I am assuming—not necessarily a delay, but you would have to have substantive answers to the criticisms made.

Lord Lisvane: Absolutely. Yes, I agree.

Q25 Lord Hodgson of Astley Abbotts: Lord Lisvane, I am going to ask about protocols and the policing by parliamentary counsel. The Strathclyde review was prompted by a vote on an instrument which had significant financial effects. Is there an argument for limiting the powers of the House of Lords where it should be confined to financial instruments? Could we find a way to build into primary legislation, which would therefore be scrutinised, different levels, as opposed to the two we have at present, plus the super affirmative, so that issues that might have serious consequences could have a different procedure, which would not have the fatal arrangement but the delay arrangement built into it, rather along the lines Baroness Fookes was referring to a minute ago?

Lord Lisvane: If I can take that back to front. If you were to do that, you would have to legislate for it, because all the five levels—no parliamentary procedure, nothing laid; laid, no parliamentary procedure; negative; affirmative; super affirmative—have a statutory basis. I am not saying you could not do that, but you would need to think carefully before you did it.

On the first question—what is a financial instrument?—in one sense, all this is a non-event, because parent Acts have already taken the decision for us. If an instrument is financial in character, then the parent Act will provide that it is laid before only the Commons and any further proceedings take place only in the Commons. The terms of trade, as it were, have been set long before an SI is anywhere near Parliament.

In the case of the tax credit regulations, the Tax Credits Act 2002 provided that they should be laid before both Houses. That was probably because, looking at the debates at the time, both the debates on the Bill and on the first set of regulations—even though, in the jargon, the Bill for the 2002 Act was a main purpose money Bill—were quite clearly seen as social security measures and not taxation measures. Be that as it may, what was unexpected was to use the power for a major rewriting of the tax credit regime.

It is said that the provisions in all Acts relating to instruments which could be of a financial character should be revisited. This is objectionable on two grounds. First, it is retrospective legislation, and one legislates retrospectively with great care and a lot of forethought and profound agreement. Secondly, it is reinventing the basis on which the original power was decided upon by Parliament. Again, that is something that you approach very carefully.

At the heart of this is what is defined as a financial instrument. Here you need to be very careful, because if you are going to go down this road then the criteria need to be as exacting as in section 1(2) of the 1911 Parliament Act. They are very exacting, because out of every 10 Finance Bills, for example, three or four will not be certified as money Bills because they have administrative provisions in them which spoil the purity of their compliance with section 1(2) of the 1911 Act. It would be essential to avoid, as it were, the Trojan horse hazard of a department thinking, “Whoopee, an SI is going to be easier to get through. Let’s make it a financial SI, but let’s stick all these other provisions in as well”. If you have a mechanism for deciding whether something is a financial instrument or not, the criteria have to be exacting and there has to be the concept of spoiling it as a financial instrument.

Lord Hodgson of Astley Abbotts: You have described the tax credit situation as “pilot error”. How do we get better buoys into the channel, so to speak? If you think it would be difficult to legislate for a different framework, how would one achieve a level of agreement that gives a better way for the pilot to avoid running aground?

Lord Lisvane: I would go quite a long way upstream. I was very surprised that officials in the Treasury, as they must have done, thought that this was an appropriate use of the statutory power which was at the Chancellor's disposal. In those circumstances, I would have said, "Look, all these things have been used for the previous 13 iterations. There is a lot of fine tuning. Is it really sensible to try and rewrite the regime?"

You heard evidence from Ruth Fox last week, and one of the things that she and Joel Blackwell make quite a point of in *The Devil is in the Detail* is the increasing lack of embodied knowledge in the Civil Service and lack of guidance. In training, guidance and an overall consistent approach to what you put in legislation, and the delegated powers that you give to Ministers, there is something to be said for a policing function, as I suggested earlier, which Lady Fookes took up, of parliamentary counsel having a role. At the moment, it seems to me it is a pretty haphazard process. I have a lot of sympathy with the officials who are involved, because if they are trying to operate without guidance and doing the best in the interests of their Minister, they need a pretty authoritative and loud voice from elsewhere to say, "Don't do it like this, do it like that, and you will be smiled upon from above".

Baroness Andrews: As we discovered, there is some guidance.

Lord Lisvane: Indeed.

Baroness Andrews: It is very general. Last week, we put it to Mr Grayling that it was not being observed, and he looked thoughtful.

Lord Lisvane: I declare an interest as a member of the Delegated Powers and Regulatory Reform Committee under Lady Fookes' great leadership. That is something we can say we find with almost monotonous regularity.

Going back to the Henry VIII power and my suggestion that a senior Minister would have to defend it, I am sure that officials who write the delegated powers memorandum to Parliament would say, "Oh well, we've defended it". Answer "no", because all of that is happening under the radar. In the reality of parliamentary exchange you need profile and exposure. When things become inconvenient for Ministers, generally they stop happening.

Q26 Baroness Stern: Can we continue by going back to the boundary between secondary and primary legislation? You described the changing boundary as "the real reason that we are in this fix". The Strathclyde report, slightly vaguely, said that we need "to take steps" to ensure that Bills contain the appropriate level of detail and do not leave too much to regulations. We have talked about Henry VIII powers and the "L Committee". I wonder if you could give us thoughts on what steps could be taken to move the boundary in a more acceptable direction. Last week, Ruth Fox and Joel Blackwell described having "statutory

instruments that have gone beyond the boundaries of reasonableness and acceptability”. I do not know if you agree with that.

Lord Lisvane: I think I do agree. When the Strathclyde review was initiated, I went through the reports over the last two Sessions of the Delegated Powers and Regulatory Reform Committee and the Constitution Committee and looked Bill by Bill at what each committee was saying. The sum total of that very much reflects the unacceptability.

There is a subtlety about this, because if we are in the business of bargaining, in a sense, it will be tempting to bid up in a Bill and put serious delegated powers in, much more than you had any hope of getting past the Delegated Powers Committee, so you end up with something which is acceptable to the department, although still too much in parliamentary terms, but that process of bidding and bargaining gets you there. Clearly, the vigilance of committees is an important factor.

If I can digress for a moment, the Joint Committee on Statutory Instruments, which Lord Strathclyde makes something of, and, as I saw, Mr Grayling made something of in his evidence to you last week, does two important things in my view. One is to ensure that an instrument is not ultra vires, and, two, that there is not any retrospectivity about it. Everything else it does is a sort of drafting clinic. When I had closer involvement with these matters, I was very tempted to see if there was a way that we could actually do away with the JCSI and redeploy its resources elsewhere. I did not think it reflected the time—not a lot of Member time but a lot of staff time—and whether that could be used better elsewhere.

Back on track: it is about the vigilance of committees, but we have become a little punch drunk. To take the Housing and Planning Bill, for example, there are 36 delegated powers of one sort or another. Some are entirely routine. Some are very substantial indeed. Ministers are saying, “We’ll try and get drafts of the regulations to the House, but it takes a long time”. I am afraid I would not be as understanding as that. If regulations are going to contain a significant matter of policy, and they are not ready, the Bill is not ready to proceed—just like that. If that could be given effect, it would concentrate ministerial minds very wonderfully.

Baroness Andrews: When you came up with your ideas for the Wakeham Commission, did you raise whether failure to produce regulation would be a legitimate reason for a pause in a Bill? Would that be something a joint committee could consider, for example?

Lord Lisvane: Absolutely. Life was a little different when the Wakeham Commission was sitting. We have come quite a long way down the wrong road since then. I agree, that is a very good example.

Q27 Baroness Humphreys: The final question is, what would you like to see happen next, following the Strathclyde review?

Lord Lisvane: Joint committee, option 2, deal with the threshold, and deal with Henry VIII clauses.

The Chairman: Thank you very much indeed. Lord Hunt has been listening, he is not a member of our Committee, but is very welcome to ask anything if he would like to.

Q28 Lord Hunt of King's Heath: Can I ask one question? Last week, Chris Grayling drew a heavy distinction between negative and affirmative SIs. He described negative SIs as being “mundane and technical”. My experience is there is a huge grey area. The use of negatives and affirmatives depends on which department you are in. Would you agree there is very little distinction to be made and, looking forward, it is a false distinction to say you can have a separate mechanism for affirmatives as opposed to negatives?

Lord Lisvane: You have to have some sort of discriminatory mechanism, otherwise you become overwhelmed. You have to have a hierarchy. I agree with the implication of what you say. There will be a considerable element of subjectivity. If one moves towards much more co-ordinated, integrated guidance within government as to how these things are to be done, it is not good enough to say, “Oh, it’s technical, so we’ll put it in an SI, or it’s technical, but quite important if boring, so we’ll make it an affirmative”. You need a set of criteria. Apart from anything else, it is unfair to criticise people for getting it wrong if there is not good enough guidance they can follow. If there were to be a joint committee, that is the sort of business that the joint committee could engage in and have political agreement on, which would be one strand of improving the whole situation.

The Chairman: Lord Lisvane, thank you very much indeed. We are enormously grateful to you.

Lord Lisvane: Thank you very much, my Lord Chairman.

Examination of Witness

Professor Meg Russell, Professor of British and Comparative Politics and Director of the Constitution Unit

Q29 The Chairman: Professor Russell, good afternoon. Thank you very much indeed for coming to talk to us. We have heard your views on various occasions, in writing mostly. You have addressed at least one other committee on matters similar to this, if not identical. I think you have spoken to Lord Cormack's committee.

Professor Meg Russell: I have not actually, no.

The Chairman: That pleasure may yet be waiting for you. Thank you very much for agreeing to come and talk to us.

Professor Meg Russell: You are very welcome. Thank you for inviting me. I did speak to the Public Administration and Constitutional Affairs Committee very recently.

Q30 The Chairman: That is the one I was thinking of. In your evidence to the Commons Public Administration and Constitutional Affairs Committee, you described the effect of the Lords' vote on tax credit regulations as "a political moment" rather than a "constitutional crisis". Would you clarify that?

Professor Meg Russell: I was asked by somebody on the committee whether I thought it was a constitutional crisis, and I thought it was neither constitutional nor a crisis. Something significant happened, but it was political rather than constitutional. I do not think it was a crisis. I am not sure whether "moment" was the right word; it was maybe a juncture. It was certainly a row. It was a bit of a mess. I do not think it was a constitutional crisis.

If there was a constitutional crisis in the air, it was in some of the rather wild suggestions that were made by unnamed government sources about the consequences of the House of Lords going ahead with a defeat. The suggestion that the House of Lords should be "suspended", whatever that meant, and that the House of Lords might be "flooded" with Conservative peers in retaliation at this action, either of those would have caused a constitutional crisis.

What happened was not a constitutional crisis. Nothing particularly unusual happened. Fatal Motions are not that unusual. Looking back at the record, they have happened on average twice a year, not only since 2000 but since 1992. We have occasional defeats. There has been roughly one per Parliament since 1997. The Joint Committee on Conventions indicated that in exceptional circumstances a defeat might be appropriate. Indeed, the Hansard Society report, which has been much discussed in this context, urged the House of Lords to use its powers to defeat more frequently. To call this a constitutional crisis was overblown.

Q31 Baroness Andrews: In the context of considering the Strathclyde options, interestingly you referred to Back-Benchers in the Commons resisting “any apparent government ‘power grab’”. The question does arise as to whether this is a debate, or worse, between the House of Lords and the Government or the House of Lords and the House of Commons. What is your view on that?

Professor Meg Russell: Clearly, there are some who want to present it as an argument between the House of Commons and the House of Lords. Mostly it is the Government who want to present it that way. There are some others in the Commons who would want to present it in that way. Most people accept that it is fundamentally about Government versus Parliament. One of things that I have sought to do in my work, and have commented upon in the context of this “moment”, is the extent to which the two Chambers do have ways of communicating. I do not think that the tax credits “moment” was about the Lords seeking to overturn the Commons. In some respects, it was about the Lords listening quite carefully to the mood in the Commons and responding to it.

It is interesting that this whole affair has brought secondary legislation to the attention of many people. There are still many people who do not understand how it works, and ultimately I include myself among those. If you read what is in the newspapers, and so on, there are plenty of people who do not understand the intricacies of what is going on. The fact that this exists, and there may be concerns about it, has come to much wider attention. I gain the impression that the extent of the use of powers was already troubling people somewhat in the Commons. The tax credits regulations brought that very much to the attention of people in the Commons. I know there has been disquiet over some other use of delegated power in the Commons. This is why I would say the power grab would not be welcome at the other end of the corridor either. I cannot speak for that House or your House, but there is concern at the extent of power that Ministers have already, including from the other end of the corridor.

Baroness Andrews: It would be quite useful to have some evidence of that.

The Chairman: Certainly, if that is possible.

Baroness Andrews: Can I pursue that in the context of what you have said? You have talked about it being political, as Ruth Fox and the Hansard Society described it as a political issue, not a procedural issue. If you characterise it as political, can you have a procedural solution to it?

Professor Meg Russell: Ultimately, the answer to that is no. One of the things that I emphasised in my evidence to the Commons committee a few weeks ago was that, ultimately, if you have a political problem, the solution is a political one and the politics have to be sorted

out. I have said several times that this occurred in the context of a rather unprecedented situation, which was a Conservative Government facing, for the first time, a House of Lords potentially controlled by parties of, let us say, the centre left. Potentially, Labour and the Liberal Democrats can form a bloc and vote against a Conservative Government for the first time. This is uncomfortable for the Government. It is also very new territory for those parties in the House of Lords. There is a need to adjust on both sides to the new situation. There is a lot of politics around it. There were clear misunderstandings on the part of Government.

There is a lot of talk about the convention, and we may come on to that, whatever we think the convention is. I have said what the joint committee thought it was: that in exceptional circumstances the Lords may use its power to defeat these instruments. The maintenance of a convention such as that depends not only upon the behaviour of the Lords, but that of the Government. One of the reasons why there have not been more defeats is that when there is a whiff in the air that there is trouble brewing in the Lords, the Government have often withdrawn, and sometimes amended and re-laid instruments in order to avoid the row. Somehow, the Ministers in this new Government did not realise that was the way of diffusing the row; they chose to talk up the row in the hope that if they spoke more loudly to the House of Lords, it would listen and back down.

Baroness Andrews: Lord Strathclyde and Mr Grayling have referred to the option to strengthen processes in the House of Commons as giving extra powers to the House of Lords. This is the capacity of “think again”. Do you think anything compensates for the loss of the veto in the House of Lords?

Professor Meg Russell: Do you mean option 1?

Baroness Andrews: Whatever we come up with, whether 1, 2 or 3, does anything compensate for losing our power to say, “Absolutely no”?

Professor Meg Russell: I suspect not. The House of Lords is a Chamber in which the Government, certainly since 1997, and indeed before, have not had a majority. It depends how you interpret the term “majority”. It is a very long time since a Government had a majority in the House of Lords. Governments have been significantly outnumbered in the House of Lords since 1997, and at other times in history before that. The fact that there is a veto lying with a House in which the Government cannot depend on a partisan majority is a real threat. Some people have referred to it as “a nuclear option”. Philip Norton pointed out that was not a very good analogy, because the point about the nuclear option is it is never, ever used. He denies that the convention is that it is never, ever used. The fact that power lies there, even if its use is seen as extreme and occurs only in very unusual circumstances, gives the Government

pause for thought. Therefore, the fear that it might be used is a greater incentive to think through what is being put into legislation rather more than the fear of a Chamber in which you have a partisan majority.

The Chairman: Before we come to the next question, I ought to say this is a formal evidence-taking session on the record, being webcast by both audio and video. A verbatim note is taken, which will be put on the public record in printed form and on the parliamentary website. We will send you a copy of the transcript for any amendment or correction.

Q32 Lord Janvrin: I want to ask about option 1, which you have described as “extreme”. If I were a cynic, I would wonder whether it was there simply in order to have three options—to have a “compromise”. How realistic is it? What would be the consequences for effective scrutiny by Parliament of secondary legislation?

Professor Meg Russell: It is interesting that you describe it that way. I do not know whether you saw what I wrote a few days after the report had come out. I said I thought it was probably there to make the other options look reasonable and, therefore, I must be a cynic.

The report makes a very good case against option 1. It says that it would bring into question the whole existence of this committee and the Delegated Powers and Regulatory Reform Committee, which are two very valued instruments. It raises a question about what would replace them. It also makes the point that if the House of Lords was cut out of the process as a result, and again this is politics, the House of Lords would surely become much more reluctant to delegate power in the future knowing that they did not have, as it were, the nuclear option. Those are two very good arguments against option 1, which appear in the report. Then you come to the factor that, even supposing it happened, the quality of scrutiny would decline if it were left only to the Commons. I notice that Ruth Fox referred to this as “driving a coach and horses through the scrutiny procedure”. The arguments against are very strong and are in the report.

Q33 Lord Woolmer of Leeds: Can I turn to option 2? You said to the House of Commons committee that you thought that was the most viable. Why are you more optimistic about option 2 than Lord Strathclyde? Where do you think the principal points of tension would arise in finding a consensus under the terms of any resolution to achieve option 2?

Professor Meg Russell: I am not sure I am more optimistic about option 2 than Lord Strathclyde. Maybe I am less optimistic about option 3. Reading between the lines of the report, and listening to Lord Strathclyde giving evidence to the same committee as I did, I am inclined to think that he is somewhat drawn to option 2. In the preface to the report he laments the decline of conventions.

The reason I have said option 2 is the most viable is to do with the analysis of option 3, which is, what is the benefit of putting this in legislation rather than relying on political agreement and convention? The only real benefit I can see is that potentially, legislation can be enforced on this House against its will, because otherwise you need political agreement. You need political agreement for option 2 or in order to negotiate option 3. Forcing something on this House against its will would be an unwise thing to do, because there could be all sorts of retaliation. We might come on to that if we talk about option 3.

Ultimately, this situation requires a political solution. Maybe that solution is in train already. In part, this whole exercise is about firing a shot across the bows of the House of Lords. Notably, we have not had another defeat subsequently, although we have had some other fatal Motions. Ultimately, the resolution of this requires people to get around the table and discuss what the terms and the appropriate forms of behaviour are. I am not sure where the sticking points would be.

You may want to come on to the Goodlad proposals. I think what is interesting is that the Goodlad proposals, and what is implicit in option 2, mean that you would have some sort of agreement—which is also what would be in option 3 but in statutory form—that after a defeat in the House of Lords something goes back to the House of Commons to be considered again, and if the House of Commons insists then the House of Lords backs down. I am not sure that is not the case already. I do not think it has ever been tested. If it had been tested on tax credits, I suspect that is exactly what would have happened. I am not sure there is disagreement, but you are the ones in this House, so you know better than I do.

Lord Woolmer of Leeds: Do you think that option 2 in the Strathclyde report is very similar to the Goodlad recommendation? What is the difference?

Professor Meg Russell: My difficulty particularly with option 3, but also option 2, is they are not particularly detailed. The Goodlad report is clearer on exactly what kind of resolution is required. It sets out the terms of the resolution quite clearly. I have it in front of me: “The House of Lords should adopt a resolution asserting its freedom to vote on delegated legislation, and affirming its intention to use such votes to delay, rather than finally defeat such legislation. The resolution should contain the following elements: That the House asserts its freedom to decline to approve any draft affirmative instrument, or to pass a prayer to annul any negative instrument”, but that it would back down if this was overridden by the House of Commons.

Interestingly, in the Goodlad report above the bold paragraphs, they say: “As a safeguard, we suggest that a minimum time interval be built into the process. We suggest at least one month

should pass between the House rejecting an instrument and the Government inviting the House a second time to agree it.”

It is one of the shortcomings of the Strathclyde report—you talked with Lord Lisvane about delay—that it comes out against any fixed period of delay, whereas the Goodlad report seems to be suggesting building in a delay. It seems to be suggesting what the resolution should be, which seems quite a constructive suggestion, looking back.

Q34 Baroness O’Loan: You have talked quite considerably about option 3 and made your views very clear. It would replace our power of veto with a power of delay by statute. What do you think the risks would be of taking a Bill through Parliament to achieve option 3 for, on the one hand, the Government and, on the other, the House of Lords?

Professor Meg Russell: You spoke at some length with Lord Lisvane about amendments being in scope, and so on, and the possibility of hanging other things on the Bill. That is one of the risks for the Government. This is an area on which his procedural knowledge is much more detailed than mine.

There are problems in the lack of clarity with respect to what the Commons procedures would be. The fact that it is not specified that there should be a debate on the Floor of the House if the Commons is being asked to consider something subsequent to a Lords defeat is my biggest concern with option 3. There is no clarity about whether it would be a deferred Division or one through the Division Lobbies. Those would be very difficult to put into legislation, which is another reason for going for a conventions option rather than a legislative option.

Although it is not brought to the attention of the reader in the Strathclyde report in association with option 3, the same concern applies as in option 1, which is, if option 3 were enforced on the House of Lords—if it were pushed through under the Parliament Act against the House of Lords’ wishes—there is plenty that could be done to retaliate, not least refusing to delegate future powers. That is quite risky for the Government.

There is also the point about retrospectivity, which you may want to come to. There is a danger of retrospectivity in legislating for option 3, unless it is substantially amended. I imagine that would be considered in scope.

Baroness O’Loan: You have referred to the issue of the reluctance of the House of Lords to agree to the delegation of powers in primary legislation if option 3 were adopted. Are there any other behavioural changes you might anticipate?

Professor Meg Russell: With option 3?

Baroness O’Loan: Yes.

Professor Meg Russell: One of the questions, and this would apply to option 2 as well, is whether, if you make the power more useable, it is used more often. This was raised in the Commons committee with me. This was one of the arguments made by the Wakeham commission and in the Goodlad report for revising the procedures, because it would be better if you were not left with this so-called nuclear option, but you had a useable power. One of the unpredictable elements is how often that power would be used and whether it would be used to excess. As I said to the other committee, that is an unknowable question.

When you look at the number of fatal Motions that have been proposed and the relatively small number that have been agreed, your best estimate of the number of defeats that might occur with a more useable power would be that all those fatal Motions might be agreed. For example, we had one last week from Baroness Featherstone on renewable energy. We had one the day after the tax credits defeat on individual electoral registration. Maybe those would have been agreed on the basis that the House of Commons could have readily overridden, which they probably could anyway, but if the power were more useable maybe it would be used two or three times a year on quite significant issues.

Members of this House are sufficiently attuned to the need not to have major arguments with the elected House. The power would probably be used quite cautiously, but it might be used more often than now.

Baroness O’Loan: Which would not necessarily be what the Government are trying to achieve.

Professor Meg Russell: No. If they feel they are on firm ground, putting something to the House of Commons again need not be a difficulty for them. If you look back, the other one in recent years was the super-casino order in 2007, where I believe if the Government had taken that back to the Commons and asked the Commons to vote for it in a vote on the Floor of the House, in the Division Lobbies, and the House of Commons had said, “Yes, we want the Manchester super-casino”, the House of Lords would have probably said, “Okay, you’ve considered it. We are now content that you have given it your proper consideration and we are not going to stand in your way”. The question is always what the politics in the Commons are. If the House of Lords can find things which are going to cause difficulties for the Government on the Floor of the Commons, that is when Ministers will not like it. That is where the deterrent effect comes in.

Q35 Baroness Stern: You told the Public Administration and Constitutional Affairs Committee that the Lords would not agree to option 3 unless we were “convinced that there were better scrutiny standards in the House of Commons”. We have had evidence today of

some weaknesses in the scrutiny standards in the House of Commons. What safeguards do you feel should be introduced in option 3 so that the current level of parliamentary scrutiny of secondary legislation is maintained?

Professor Meg Russell: I respond to those words by saying that was rather presumptuous of me to tell them what the House of Lords might or might not agree to. You are better qualified to comment upon that than I am, and ultimately you would decide. I was probably referring to what was mentioned about the lack of safeguards. There are different questions here. There is the standard process for considering delegated legislation in the Commons, which becomes a major problem with option 1 if that is the only scrutiny process there is going to be.

The concern that I have with safeguards in option 3 is what will happen when something is sent back to the Commons, and whether there is a delay, a proper debate on the Floor and a vote in the Division Lobbies rather than by a deferred Division. If I remember rightly, the parallel is drawn in the Strathclyde report between wanting to bring these procedures more closely into line with the procedures for primary legislation. With respect to primary legislation, you get a debate on the Floor of the House and a vote in the Division Lobbies when you consider Lords' amendments. To not have that would not be an adequate safeguard.

Q36 Baroness Fookes: We have touched upon this already, but can we explore further the problem of retrospectivity, a depressingly ugly noun. You mentioned it in connection with your concerns about option 3. Could you explain more clearly what the problem is?

Professor Meg Russell: I did not invent the word, of course. Thank you for bringing me back to that. I had assumed, reading the Strathclyde report, that the way that option 3 would work—although Lord Lisvane has maybe thrown some doubt on this—would be that it would be an amendment to the Statutory Instruments Act 1946. Therefore, the presumption would be that it would apply to all order-making power currently on the statute book, which seems rather problematic.

Until I looked back at the Library note earlier today on the number of fatal Motions, I would have said that there was a turning point in 2000 when Lord Strathclyde famously declared the convention dead and there was the first defeat on a piece of delegated legislation since 1968. Since that moment, it has been in people's minds that the use of this power is possible in extremis. Therefore, in agreeing to delegate power subsequent to that statement and defeat, there has been an understanding that if the power were misused by the Government in some way, a veto and defeat by this House would be possible. Actually, when you look back, it did not begin with Lord Strathclyde. If you look at the figures from 1992, there have been on average a fairly consistent two fatal Motions per year. Clearly, people have known that power

exists for a long time and have been delegating power in primary legislation on the understanding that the veto exists. Your Committee will have been thinking about this. To retrospectively remove the veto from the delegated powers in all those things on the statute book seems problematic. If I were in this House, I would be quite tempted to put down an amendment to remove the retrospectivity in that regard.

Q37 Lord Hodgson of Astley Abbotts: Another familiar issue is the boundary between primary and secondary legislation. 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. The first question is, what steps do we need to take?

Professor Meg Russell: That is a very interesting observation, and a sign that Lord Strathclyde was aware of this wider mood that I was talking about, not only in this House but in the other House, and it suggests that he has some concerns. This is consistent with the Hansard Society’s findings and recommendations in 2014. Perhaps with some irony, this row has put those issues squarely on the political agenda and people want to look at this. It is not for me to ask you a question, so this is not a question. I do not know what Baroness Fookes and her committee think about this, but potentially it seems a nice area for the Delegated Powers and Regulatory Reform Committee to do an inquiry into. The possibility of a joint committee has been mentioned. There are concerns in the Commons as well as the Lords, so maybe a joint committee looking at the appropriate boundaries in delegation of power would be a possible way forward.

The Hansard Society wants a root-and-branch review of the legislative process. That might be going a little too wide. I do not deny there are other elements of the legislative process which are worth reviewing and considering, but I would fear that a root-and-branch review of the entire process might lose sight of this one point. Some type of review or inquiry into the boundaries and the plethora of different types of delegated legislation, and so on, that they draw attention to in their report might be a good thing. Ultimately, part of the solution might be tougher criteria from the Delegated Powers Committee, which hopefully would spur the kinds of changes inside government that Lord Lisvane was talking about in anticipation of the reception in Parliament. If Parliament toughens up its teeth, then government will think more carefully about what it is putting down on the page.

Baroness Andrews: Whitehall has been hollowed out in the past two years. We have had witnesses to this committee in another context who have made it clear that there is not the degree of experience and continuity in Whitehall that we were used to a decade ago. Do you have a perfect storm whereby you have a Civil Service which is less used, and has less time,

collective expertise and memory to do the right job on secondary legislation to get the criteria right and stand up to Ministers? At the same time, we have had tremendous amounts of legislation with categorical Henry VIII powers on matters which are better served in primary legislation.

One of the suggestions Lord Lisvane made is that any time anyone brings legislation forward with Henry VIII powers, it should be defended personally by a Minister to the Delegated Powers Committee. There may be a whole series of things one can do which both identify the problem and address parts of it, possibly within the context of a review. Would you see that as a way forward?

Professor Meg Russell: I thought that was a very interesting suggestion from Lord Lisvane. I had not heard it before. I can see the merit in it. I always hesitate to make sweeping statements about change and decline without collecting and analysing the evidence with care. I would not want to make bold statements on the turnover in Whitehall and the growth of delegated power without having done the work. The Hansard Society has done the work on the latter and seems convinced in a very meticulous study that the breadth of delegated power has become larger and this should be a cause of concern. I hear common complaints about the hollowing out of Whitehall. There is an interesting study by Professor Ed Page at the LSE of Bill teams in Whitehall, in which he comments how relatively junior the people who often serve on Bill teams are. They are often novices. Many people will only ever be on one Bill team. Lord Lisvane talked about policing from parliamentary counsel, who clearly deal with legislation all the time and have much experience in this area. Ultimately, I would say Government will react to the checks that Parliament puts in place. If you want Government to behave better, Parliament probably needs to sharpen its teeth in order to encourage that improvement.

Baroness Fookes: How would you like to sharpen the teeth of the Delegated Powers Committee? I am all ears.

Professor Meg Russell: The extent to which you are listened to on the big questions, and not only the small ones, came up in your session last week. You are referred to with reverence in the Cabinet Office *Guide to making legislation*. Your recommendations are almost automatically taken on board. Speaking to people around the committee in the past, I have been told—I saw evidence of this on the Public Bodies Bill, which was one of the Bills that I studied in the last Parliament—it is less automatic that the committee's recommendations are adopted by Government when the committee is protesting at the extent of power delegated,

and not only the mechanisms. The small changes, turning negative into affirmative, do tend to happen, but when big points are made the Government are much more resistant.

Baroness Fookes: How do we increase our power to make them listen?

Professor Meg Russell: That is a very difficult question. I do not wish to criticise the committee in any way. The committee is greatly respected, including by myself, but there is a danger that there is attrition in what is considered acceptable by people in Parliament. There is precedent for these things. The Hansard Society comments on this—that once a power of a certain kind has been delegated, the Government will claim precedent to do that same thing again.

Baroness Fookes: It is often challenged by my committee, as Baroness Andrews and Baroness O’Loan, who are former members, will bear out. It will continue to be challenged.

Professor Meg Russell: Your challenge needs to be noisy and frequent. You do not want to get into a trope with the Government whereby you are criticising all the time and become a voice that is not listened to. I can see it is a difficult situation. Maybe that is why we need a larger-scale review, perhaps involving people in the Commons on a joint basis, to look at where the boundaries are drawn, in the same way that the Joint Committee on Conventions took a step back and said, “Where are we on all of this? Where should we be?” and put down some statements of principle. Perhaps the boundary between primary and secondary is where some people need to take a step back and lay down what the principles should be for agreement by both Houses.

Baroness Fookes: You appreciate that the recommendations we make have no force.

Professor Meg Russell: Yes... Well political force.

Baroness Fookes: The fact that on many occasions our views are listened to and taken on board is something to be desired and praised.

Professor Meg Russell: Absolutely.

Baroness Fookes: I still would welcome any further sharpening of teeth.

The Chairman: Professor Russell, thank you very much indeed. I would now like to ask Lady Humphreys to ask our closing question.

Q38 Baroness Humphreys: Following the Strathclyde review, what would you like to see happen next?

Professor Meg Russell: What I said at the time, and maybe this is happening, was the first thing that needed to happen was that tempers needed to cool on both sides. As I said earlier, this was an unusual political situation, people adjusting to being in government on their own,

and weaker in the House of Lords, and other people adjusting to being in opposition. That adjustment is happening and tempers are cooling.

Now that it is on the agenda, it would be very valuable to have a review of the boundary between primary and secondary legislation. I am delighted that this serious piece of work by the Hansard Society, which is more than a year old, is now receiving all this attention. To turn to the agenda that they proposed of reviewing these boundaries would be a very good thing.

I have my other pet obsession, which is beyond the scope of this committee. Two big issues were put on the agenda in this row: first, the scope of delegated legislation and, secondly, the Prime Minister's powers to "flood" the House of Lords when he pleases with people of whichever political colour he pleases. I would like that to be sorted out as well. I know that is beyond your scope.

Lord Janvrin: How much appetite is there in the other place for a joint committee to look at the boundaries?

Professor Meg Russell: I do not know. You would need to take soundings. I certainly detect some appetite on the Opposition side.

The Chairman: Professor Russell, thank you very much indeed for your answers and the written contributions that you have made previously, and your blog that we read with such interest. We are most grateful to you. Thank you.