



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. 4

Heard in Public

Questions 54 - 66

THURSDAY 25 FEBRUARY 2016

2.45 pm

Witnesses: Lord Butler of Brockwell

David Beamish

Members present

Lord Trefgarne (Chairman)
 Baroness Andrews
 Baroness Fookes
 Lord Hodgson of Astley Abbotts
 Lord Janvrin
 Baroness O'Loan
 Baroness Stern
 Lord Woolmer of Leeds

Examination of Witness

Lord Butler of Brockwell

Q54 The Chairman: Good afternoon, Lord Butler. You know what we are about and what we are considering. This is a formal evidence-taking session that is on the record. It is being webcast live both on audio and video. A verbatim note is being taken that will be put on the public record in printed form and on the parliamentary website. We will of course send you a copy of the transcript for any amendments that you might want to make or errors that you wish to correct. I have to read that out to everybody who comes before us.

Lord Butler of Brockwell: I am familiar with it.

The Chairman: I ought to know it off by heart, but I do not.

Do you think that the events of 26 October gave rise to a constitutional crisis, or, as Professor Russell suggested, something more modest—what she called a “political moment”?

Lord Butler of Brockwell: I suppose it was something between the two. I do not think it was a constitutional crisis, but I think it was an event with important constitutional implications. I also regard it as an opportunity for Parliament, and for the House of Lords, to do something about its treatment of statutory instruments, which for a long time many people have regarded as unsatisfactory.

The Chairman: What do you mean by “unsatisfactory”? That is a proposition.

Lord Butler of Brockwell: I mean what the royal commission drew attention to and what the Goodlad committee drew attention to, and that is that the House, when it considers statutory instruments, does not find itself in a position to do what it can do on legislation, which is to send it back to the House of Commons so that the House of Commons and the Government have to think again. At least, it can do that, but it does it so rarely that it does not do it as often as it should.

I regard the role of the House of Lords in scrutinising legislation, which now includes secondary legislation, as very important. The House of Lords does a very valuable job in doing it—indeed, it makes up for the deficiencies of the House of Commons in doing it— but in relation to statutory instruments the House of Lords has a sort of nuclear weapon that it has very rarely felt able to use. I see this as an opportunity not to reduce the powers of the House of Lords but to increase them so that it can use them in a similar way in which it uses them with primary legislation.

The Chairman: I think you are saying that we have nuclear weapons but no conventional weapons here.

Lord Butler of Brockwell: Yes, I think I would say that. I am not sure that it really is a nuclear weapon, but the House of Lords has felt that it cannot use it. It has used it very rarely—five times, I think, since the Second World War. Now, of course, we are in a different situation; the two opposition parties in the House of Lords outnumber the governing party by a considerable amount, so the House might well want to reject statutory instruments more often. Therefore, it is rather important to clarify the circumstances in which it can do so and the effect of its doing so.

Q55 Baroness Andrews: This leads on to my question. When you say that this is an opportunity for the House of Lords to increase its powers, which is what I think you are saying, do you mean that in the light of your experience of on the Wakeham committee and the Goodlad committee, both of which made slightly different recommendations about the need for a third option of power of delay, or do you accept the Government's argument, as put to us, that their propositions, the third proposition in particular, would actually increase the power of this House to do that? Are you saying that we should consider a power of delay ourselves and come up with something along the lines of what you debated on those two committees, or would you be satisfied with what the Government are proposing?

Lord Butler of Brockwell: The first thing to say is that I would like to see something happen and for us not to miss this opportunity. When I say that I would like to see the powers of the House of Lords increase in this respect, what happens on primary legislation is a good analogy; the House does feel free to pass amendments to government legislation, which has to go back to the House of Commons to be reconsidered. On secondary legislation, the procedure does not allow us to do that at the moment. We either reject it completely or we express a Regret Motion, which does not cause the House of Commons to think again. So I would certainly not want to see Lord Strathclyde's first option, but either his second or his

third option would give the opportunity for the House to say, in respect of the statutory instrument, “House of Commons, Government, please think again”.

Baroness Andrews: But in the context in which Wakeham and, to an extent, Goodlad debated this, a power of delay was an additional tool in the toolbox; it was not instead of a veto. As you say, it is either death or glory at the moment. In those committees, and in the Delegated Powers and Regulatory Reform Committee before Lady Fookes’ chairmanship, there was a debate over a third option, a delay option. Would you see that as compatible with a veto?

Lord Butler of Brockwell: Yes, a delay option would be satisfactory, but there are circumstances—Lord Strathclyde makes this point in his report—in which the Government could not accept a delay option. An example of that was the statutory instrument that was very nearly rejected on the day after the tax credit event, when the House came very close to rejecting a statutory instrument under the Electoral Registration and Administration Act. If that had happened, when there was an urgent timetable, the Government would have been justified in saying, “The rejection of this means that we cannot hold the referendum at the time we would have liked to have held it”. There has to be some flexibility. If the House of Lords rejected a statutory instrument, I would like to see not a fixed, prescribed period of delay but an arrangement whereby, if the House of Commons reasserted its original passing of a statutory instrument, the House of Lords would be obliged to pass it - after a reasonable delay, if the circumstances allowed that, but if the Government had a good reason why there could not be a delay, the Government would be free to make that argument and the House of Lords could decide whether it accepted it.

Baroness Andrews: That would imply that the Minister comes back to the House of Lords with the reason.

Lord Butler of Brockwell: Correct. Under Lord Strathclyde’s option 2 or option 3, the House of Lords rejects a statutory instrument, it goes back to the House of Commons, the House of Commons reconsiders it, and if it sends it back to the House of Lords the House of Lords is obliged to accept that. In normal circumstances it would be desirable that the House of Commons should reconsider it over a reasonable period, but there should also be an option that if, for good reasons, the Government say that it is urgent, and the House of Lords accepts that, the statutory instrument goes through.

Baroness O’Loan: I would like to ask two very brief follow-ups. First, in your description of the process for primary legislation, you said that we have the opportunity to make amendments, quite rightly, and that you wanted this power for this House. Were you implying

that you want an opportunity to make amendments to statutory instruments? Secondly, does it make any difference if the decision that the House of Lords reached is predicated on the receipt of information that the House of Commons did not have when it reached its decision, so that the House of Lords' decision might be argued to be more informed?

Lord Butler of Brockwell: No, I would not be emphatic about either of those things. The position at present is that neither the House of Lords nor the House of Commons can amend a statutory instrument. For such a power to be introduced would require legislation. I would not object to that; indeed, it would make the process even more analogous to that for primary legislation. But that might be too complicated. The House of Lords' objections to the statutory instrument would come out in the debate, so I am not sure that you really need a formal process of moving amendments for the House of Commons to follow. Similarly, I do not think that I would predicate the procedure on having to give reasons. Those reasons would be obvious, I think, from the conduct of the debate in the House of Lords.

The Chairman: We often consider Commons reasons for disagreeing to Lords amendments to primary legislation. Those reasons are not always terribly helpful. There is not much to them, usually.

Lord Butler of Brockwell: That is right.

Lord Woolmer of Leeds: If the suggestion was followed through, I assume it would mean that the House of Commons would also have to be given the power to amend the same legislation. That must be the case.

Lord Butler of Brockwell: Yes, it must follow.

Q56 Lord Woolmer of Leeds: On page 20 of his report, Lord Strathclyde raises the question of what would happen if the power to delay was used on more occasions. Of course, if that also applied to amendments, there could be even more possibilities. Lord Strathclyde said that there could be two consequences, implying that this could have an adverse effect on business in the Commons. One was that the Commons might need to find ways to expedite its override procedures—in other words, do it pretty quickly—which would affect your ambition for more careful consideration. Secondly, he said that it might lead to demands to proceed with option 1. That is a threat to the Lords. Do you think that would be a helpful approach on the part of the Government? Your suggestion is to improve scrutiny and to improve statutory instruments, but Lord Strathclyde—or the Government—appears to be concerned with expediting business.

Lord Butler of Brockwell: Of course, the Government never welcome any interference by the House of Lords in their proposals. If the House of Lords sent statutory instruments back, that

would be no more welcome than amendments to primary legislation. None the less, it is part of parliamentary scrutiny. I regard it as rather a remote danger that the Government could say, “The House of Lords is sending so much material back that we are going to take away its powers of dealing with it altogether”. If Parliament is to perform a useful role, and the House of Lords is to perform a useful role, that is part of it. I do not think that the Government would get much public support for saying, “The House of Lords is asking us to think again on too many occasions, so we shall take away its power to do so”.

Baroness Fookes: Lord Butler, I was going to ask whether you thought that option 1—to remove scrutiny powers from the Lords—was worthy of serious consideration. I think you have probably already answered that. Instead, would you spell out what you think the value is of the current way in which the Lords scrutinises legislation?

Lord Butler of Brockwell: It is enormously valuable, all the more so because, as most observers would accept, the House of Commons does not do that job of scrutinising primary or secondary legislation adequately. I am not being supercritical. The House of Commons is the main forum of political debate in the country—and so it should be. The business of Parliament in scrutinising legislation is detailed and often unglamorous, but it is very important. I think that the House of Lords does it very well at the moment and that there is more public appreciation of that than we sometimes recognise.

Lord Janvrin: You say that this is an opportunity to do something about this power of scrutiny and to look at the introduction of a delay. Going to Lord Strathclyde’s option 2, do you think there is a possibility that one could introduce this kind of change through a resolution or some kind of agreement, as he sets out?

Lord Butler of Brockwell: Yes, I do. I read carefully Lord Strathclyde’s doubts about option 2. One doubt—perhaps the principal one—was that it would be very difficult to define the occasions when the House of Lords would feel entitled to delay or reject a statutory instrument. I do not think it is necessary to produce a defined list of those. The House of Lords should feel free, as it does on primary legislation, to reject statutory instruments—not frequently, but from time to time—when it feels that those statutory instruments are unsatisfactory. The resolution does not need to define the circumstances; the House of Lords should be given discretion to do it. So I do not think that that is a decisive objection to proceeding by way of a resolution. Similarly, the resolution—if that was the way it went—should say that the House of Lords would undertake, if the House of Commons had given a decent interval to reconsider or had explained why it had to reassert its position urgently, to

let the statutory instrument go through. I am not an expert, but I think that a resolution could be defined in those terms, which the House would accept.

Baroness Fookes: I think you said “decent” delay. What would that be?

Lord Butler of Brockwell: I would put it in those terms, although that is perhaps not a drafting term. The House of Lords would bind itself in this resolution to pass the instrument when it was satisfied that the House of Commons had given proper consideration to the House of Lords’ objections. I use that term because, as I say, one has to allow flexibility. There will be cases when it is urgent and there will be cases when it is not urgent, when the House of Lords can reasonably demand that the House of Commons takes a month or so to think again about it. But there needs to be a margin of flexibility in that.

Lord Woolmer of Leeds: So you are suggesting that the power to reject would remain but the resolution would not be dealing with that; it would be dealing with how you treated the matter if it came back again, as I understand it.

Lord Butler of Brockwell: That is correct.

Lord Woolmer of Leeds: That is an important point that has not previously been made. There seems to be a good deal of similarity between what Lord Goodlad suggested in this area and what we call Strathclyde 2. Would you agree?

Lord Butler of Brockwell: I would, the difference being that Strathclyde’s objection to the Goodlad option is that he thought it would be very difficult to define the circumstances in which it should be used. I do not think it is necessary to define in the resolution the circumstances in which it should be used; the House of Lords would decide the circumstances in which it felt it necessary to reject a statutory instrument.

Baroness Andrews: As it does at the moment.

Lord Butler of Brockwell: As it does at the moment.

Baroness Andrews: So no change, the status quo, but this additional option to articulate a period of delay based on our judgment about the significance and the difficulty posed by the SI.

Lord Butler of Brockwell: Yes, but then with the rider that if the House of Commons did not agree with that delay and the Government had a good case for saying, “Sorry, we can’t hold it up for as long as that. We’re going to pass it and send it back to you urgently for these reasons”, the House of Lords would accept that.

Q57 Baroness O’Loan: I would like to take you on to option 3, because it involves legislating on parliamentary procedure. What do you see as the risks of a statutory solution?

Lord Butler of Brockwell: Of course it was the Wakeham commission that recommended that statutory option. My recollection—indeed, it says this in the royal commission report—is that that would not be very major legislation; it would require an amendment to the Statutory Instruments Act 1946, but it would be primary legislation. The difficulty is that it might be thought too difficult a thing to get through Parliament, so the Government would retreat from it. Because my primary desire is that something should be done, I would not like to see reform rejected because of the objection to legislation.

The question of whether one chooses option 2 or option 3 would be enormously facilitated if there was agreement in all parts of the House on what we were going to do to solve this problem. One thing that is regrettable about the circumstances in which this circumstance has arisen—the tax credits issue—is that it has created a recriminatory atmosphere, with one side saying, “You were quite unjustified in rejecting the statutory instrument”, and the other side saying, “No we weren’t. We were completely justified in doing so”. That has rather soured the atmosphere.

What I hope might result from the deliberations of this Committee is the production of something that all sides could coalesce on. The royal commission of course included representatives of all political parties, and so did the Goodlad committee. There has been wide recognition in all parties that it is desirable to do something, so I hope that your deliberations can produce circumstances that will allow all the parties to agree. That is an essential condition either for option 2 or for option 3.

Baroness O’Loan: I take you to the evidence that Lord Lisvane gave us on 9 February; I do not know whether you have had the opportunity to read it. He said, with regard to option 3, “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”. If we legislate, he said, “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?’” Do you have a view on that? Also, do you feel that there are any Bill of Rights implications?

Lord Butler of Brockwell: I do not feel competent to comment on the last part of your question. On the first part, when I gave evidence to Strathclyde I supported the royal commission recommendation, in which I took part, which involved statute. As Strathclyde says, that would give some clarity and firmness. The problem with a resolution, I suppose, is that it could always be amended; I doubt very much that it would be. Option 3 would set the

thing in stone and set a new procedure, which would give certainty, but I would also be happy with option 2. Indeed, I see in it the advantage, which the evidence you read out implied, that it would give the parties more flexibility to settle things in the way they ought to be settled, by discussion and compromise.

The Chairman: Option 3, with only a resolution and not a statute, is option 2.

Lord Butler of Brockwell: Yes, it is.

Baroness Stern: Lord Butler, would you develop for us your view on what a financial instrument is, if you do not mind? You said in the House on 26 October that it would be “a constitutional infringement of great gravity” for the House to vote in the way it eventually did, for three reasons, one of which was that, “It may be a welfare matter as well, but it is certainly a budgetary matter”. You did not say that it was a financial instrument but that it was a budgetary matter, so my first question is: did you mean that it was technically a financial instrument and that therefore it was inappropriate for the House to vote in the way it did?

My second question, if you can remember the first one, relates to Lord Lisvane’s evidence, which has been referred to. He told us that the question whether it was a financial instrument or not was a non-event, because the Tax Credits Act 2002 said that tax credit regulations should be laid before both Houses. So my second question is: are you suggesting that Lord Strathclyde should have recommended a new approach to what a financial instrument is?

Lord Butler of Brockwell: No, I was not trying to make a technical point. Indeed, I am not sure that I know what a financial instrument is. I did feel strongly, however, that if the House rejected that statutory instrument, it was trespassing significantly on the financial privilege of the House of Commons and that that was constitutionally wrong. One of the disadvantages of the present procedure is that, unlike primary legislation, a rejected statutory instrument does not go back to the House of Commons. Legislation that is amended does go back to the House of Commons, which can then assert financial privilege. There is no opportunity for that under the procedure that we have at the moment for statutory instruments. Under the sort of procedure that we are discussing under Strathclyde options 2 or 3, it would go back to the House of Commons for it to consider again, and at that point, if it felt justified in doing so, it could assert financial privilege.

The Chairman: Thank you very much for that.

Q58 Lord Woolmer of Leeds: The Strathclyde report mentions the need to take steps to ensure that Bills contain the appropriate level of detail and do not leave too much to regulations. That is almost like saying that we are all against sin. Nevertheless, it was a point

on which a lot of people would at least nod their heads. You are obviously deeply experienced in the arts of the Civil Service, Cabinets and Ministers. What steps should or could be taken?

Lord Butler of Brockwell: I think it is a general observation that, as time has gone by, less and less has been put into primary legislation and more and more has been put into statutory instruments. It is another reason why the issue that we are discussing is important. The Government's preparation of primary legislation is very unsatisfactory. We see this in the number of Bills that are introduced that prove to be impracticable, have to be repealed and are never brought into operation.

If I may bang another drum—this also appeared in the Goodlad report—I have long been in favour of Parliament setting up a legislative standards committee that could look at the standard of preparation of legislation and consider whether the policy had been properly stated, whether there had been a Green Paper, whether there had been an opportunity to consult on it before the legislation was introduced. That could embrace the very good work that is done at the moment by the Delegated Powers Committee in the House of Lords, on which I have served. That Committee does very good work in criticising the Government for Henry VIII clauses, or clauses that should be passed subject to affirmative rather than negative resolution.

I would beef up the powers of that Committee, because this is an area where Parliament could be more assertive when the Government's preparation of legislation has been unsatisfactory, not just on statutory instruments but more generally. If that happened, it would reinforce the processes within government of what I used to know as the Legislation Committee, which is the last committee of Ministers that approves legislation before it comes to Parliament. They have a difficult job when their colleagues are itching to get a Bill into Parliament and saying, "Don't hold us up with fuddy-duddy objections". If that internal committee of Ministers could say to the Secretary of State who was wanting to introduce the legislation, "Look, if you go ahead in this very poorly prepared form, we are going to get a roasting from the parliamentary committee", that might have some effect inside Government as well. That, quite apart from this point about statutory instruments, is desirable.

To add one further point, why is so much legislation poorly prepared within government? One reason, which I remember well from my experience, is because the contents of the legislative programme are decided too late in the day. Ministers are competing for a place in the legislative programme, it may not be decided until very shortly before the new Session, the departments then rush their instructions to parliamentary counsel, parliamentary counsel has to draft under quite unnecessary haste, which is why legislation often reaches Parliament in

such a poor state. So my answer to your question—rather a long answer, I fear—is that I would like to see Parliament being very much more assertive and critical of the Executive when the Executive produces poorly prepared legislation.

Lord Woolmer of Leeds: In your helpful and wide-ranging response there, you mentioned the Parliamentary Business and Legislation Committee and the role of the Civil Service. Ultimately, of course, it lies with Ministers, but do you think that the Civil Service and the processes that are followed before matters get finalised and firmed up in primary legislation could be strengthened, as well as the role of the Lords Committee?

Lord Butler of Brockwell: Yes, I am sure that they could be strengthened. They could be strengthened if, at all points in the process, there is more requirement for policy to be better thought out, better justified and better consulted on, but, in the end, Parliament is the backstop for that. If Parliament were more assertive in saying, “Look, we are not going to put up with this”, that has a ripple effect back to Ministers and from Ministers to civil servants. The fact is, of course, that Ministers do not like being criticised by Parliament, but it is Parliament’s job, often, to do that in the interests of getting high standards. So, as I say, I would like to see Parliament being more assertive in these matters.

The Chairman: Of course, not all Bills are drafted at the last minute, although many are, as you say. Some of them have been sitting in the queue for years before they get to the front of the queue and into the Queen’s Speech.

Lord Butler of Brockwell: Yes, and those are not the Bills about which I am being critical. I just sat on the pre-legislative committee for the Investigatory Powers Bill, which is being produced with great urgency, but I very much applaud the Government for making it available to Parliament at a stage when it was still very much in the process of cooking. Parliament has been able to have a go at it and the result will not be perfect, but it will be a lot better. The longer the executive machine takes to prepare Bills, the better they are likely to be.

Q59 Baroness Andrews: Do you have any sympathy with the suggestion that has been put to us by quite a few people now that, de minimis, we should have a review of the balance between primary and secondary legislation as it is presented to us in view of the many skeleton Bills we have had to deal with? It is not so much the quantity of secondary legislation but the scope of it. Do you think that a review would serve the purpose?

Lord Butler of Brockwell: Yes, I do. I think it would help a great deal. It is an important issue and I think it is timely to look at it. However, in the end, if we are going to enforce better behaviour with Ministers, it is only Parliament that can act on the results of that review and try to enforce its recommendations.

Baroness Fookes: My ears pricked up when you referred to beefing up the powers of the Delegated Powers Committee, of which you were once a member. Could you be more precise as to how that might happen?

Lord Butler of Brockwell: As things are, the Delegated Powers Committee, as you will know, because I think you serve on it—

Baroness Fookes: I chair it.

Lord Butler of Brockwell: You chair it. I served on it under Lady Thomas. That committee takes a Bill when published, looks at it with tremendous speed and thoroughness—very good legal advice, very good clerks—and publishes a report before Second Reading. That is a tremendous service to Parliament. That, I think, would still need to be done, but the Delegated Powers Committee might reinforce the criticisms it makes of Bills, saying not, “This is a Henry VIII clause”, but, “We think that the amount of detail this leaves to statutory instruments, to delegated legislation, is unsatisfactory. Too much is left to regulation and the Bill is not sufficiently specific”.

Baroness Fookes: We say this with monotonous regularity, but how can we enforce it? We are advisory only, as currently constituted. Would you foresee some kind of greater power given to the committee?

Lord Butler of Brockwell: No, because of course the committee is subject to the House. The committee’s recommendations are effective only if the House supports them. But I think there can be two effects. One is that the House might well criticise and perhaps even refuse to give a Second Reading to a Bill which the Delegated Powers Committee—what I would prefer to call the legislative standards committee—has severely criticised. The other thing is that, as I said, Ministers do not like criticism. If they are warned by their colleagues—the Leader of the House of Lords and the Leader of the House of Commons—that they are going to get a roasting from the Delegated Powers Committee or the legislative standards committee unless they improve the Bill and make it more specific, that would have some effect on ministerial behaviour.

Baroness Fookes: Just for the sake of accuracy, we look at the Bill after Second Reading and before Committee. Perhaps I could follow up on another matter that might be helpful: much greater use of draft Bills going before Committees before they are set in stone. Would you advise that as an improvement?

Lord Butler of Brockwell: I would—and it happens more now than it did some years ago. That has been a great help in improving legislation. Even so, more could be done. I very much

praise the Government for the way in which they have subjected the Draft Investigatory Powers Bill to parliamentary scrutiny.

Baroness O'Loan: You have spoken at length and given us many ideas. You may have already answered this question, but is there anything else that you would like to see happen next, following the Strathclyde review?

Lord Butler of Brockwell: I repeat what I said before: I want to see something happen. I served on the royal commission and we made a recommendation on this that was not taken up. I served on the Goodlad committee and we made a recommendation that was not taken up. The Hansard Society has made recommendations. I know that Baroness Fookes' predecessor, Baroness Thomas, made recommendations about handling statutory instruments. Baroness Hollis put something to the Procedure Committee that the Committee did not accept. So, primarily, I hope that the consequence of this is that something will be done.

Secondly, I think it will be done only if we can get away from the recriminatory atmosphere that followed the tax credits Bill and if all sides of the House can come together in agreement that something needs to be done—and do it.

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

Examination of Witness

David Beamish

Q60 The Chairman: Mr Beamish, good afternoon. I am obliged at the beginning of our proceedings to remind you that this is a formal evidence-taking session on the record. It is being webcast live—both audio and video. A verbatim note is being taken that will be put on the public record in printed form and on the parliamentary website. We shall of course send you a copy of the transcript for the correction of any errors or the making of any amendments. Option 1 of the Strathclyde review would remove the Lords altogether from the scrutiny of secondary legislation. Dr Ruth Fox of the Hansard Society told us that it would “drive a coach and horses through the concept of having a system of parliamentary government”. What is your response to that analysis?

David Beamish: I am not sure that is a question on which I have any particular view, but plainly the whole landscape would be extremely different if that happened. You can just imagine the passage of a Bill to implement that change—and, likewise, the impact that it would have on any delegated powers in future Bills after that if the House knew that allowing

something to be done by ministerial order would deny the House the opportunity to scrutinise it. But perhaps it is more for people such as Ruth Fox to judge the constitutional question.

The Chairman: So what would you see as the principal procedural difficulties if option 1 were to be adopted?

David Beamish: I do not think that the difficulties are procedural: in some ways, it is quite straightforward. The issues are practical and political.

Baroness Andrews: Are you suggesting that something would have to be put in place in the House of Commons that it does not have at the moment if we were denied the opportunity to exercise any scrutiny powers?

David Beamish: Again, that is a matter for the House of Commons. But historically, perhaps since the setting up of the Delegated Powers Committee in 1992, this House has taken a bit of a lead in doing more thorough investigation of secondary legislation and the powers under which it is made. Unless the Commons did something significantly more than it does, it would certainly drive a coach and horses through what we have at the moment.

Lord Woolmer of Leeds: Could option 1 be achieved without legislation?

David Beamish: Absolutely not, I would say—unless you have some ingenious scheme in mind. Options 1 and 3 both require primary legislation.

Baroness Andrews: Would that be an amendment of the Statutory Instruments Act 1946, or are you talking about primary legislation—for example, the Parliament Act?

David Beamish: By primary legislation I mean an Act of Parliament. It would not need to be something of the nature of the Parliament Act, although perhaps in its impact it might be similar. But yes, either an amendment to or a substitution for the Statutory Instruments Act 1946 might be the sort of method. I think this is a matter for the parliamentary drafting experts in government rather than for my colleagues or me.

Baroness Foakes: As Chairman of the Delegated Powers Committee, which would be abolished, I would not go down without a hearty fight to the death.

David Beamish: That comes as no surprise, and I do not think it would be too controversial of me to say that one striking and perhaps heartening thing in the 1990s was how quickly that Committee acquired a strong reputation and how Ministers—Lord Trefgarne may have been a Minister at the time—ignored it at their peril.

The Chairman: Indeed.

Baroness Andrews: But what you are describing is a real constitutional challenge.

David Beamish: It would certainly be a big upheaval in the operation of parliamentary scrutiny of secondary legislation, yes.

Baroness O'Loan: So just to clarify—if you were in effect to abolish the Delegated Powers Committee, on which I served, and this Committee, on which I am currently serving, there is no similar process at the moment in the House of Commons that could take the function, and it would require a significant change in the way the Commons operates.

David Beamish: You have heard evidence to that effect from people who are much more qualified than I am—Chris Grayling and Lord Lisvane—and that is indeed my understanding.

Q61 Baroness Andrews: I will ask about option 2. It is perhaps the most nebulous of the options, if I may put it like that. It says that the intention is to “retain the present role” of the House in relation to secondary legislation. What do you think that actually means?

David Beamish: I mentioned that options 1 and 3 would require primary legislation. The point is that option 2 would not require primary legislation and would perhaps just represent a clarification of how the House would implement its present role. You used the word “nebulous”. It does not need to be nebulous, but there are a lot of different flavours of option 2 that you could go for. If you are going to have a standing order or a resolution of the House, obviously different things could be said there.

Baroness Andrews: Could you give us an example of what one of those options might look like?

David Beamish: It depends on what you want to achieve. In a sense, option 2 was not new because the Goodlad report of the Leader’s Group on Working Practices from 2011 had something of the sort and proposed a resolution “asserting its freedom to vote on delegated legislation, and affirming its intention to use such votes to delay, rather than finally to defeat, such legislation”. There were then four bullet points. So there is one example of something that is perhaps a version of option 2.

Baroness Andrews: So from your reading of option 2, it sounds as though you think option 3 and option 2 involve an equivalent mechanism. Is that correct?

David Beamish: Not necessarily, because option 3 explicitly allows the House only to invite the Commons to go round the course again, whereas option 2 could circumscribe without removing the circumstances in which the House might go for the nuclear option of rejection. In the proposals of the Cunningham Joint Committee on Conventions in 2006, the Committee suggested a wide range of circumstances that could be exceptions. Indeed, the first of those is where “special attention is drawn to the instrument” by the predecessor of this Committee, which of course would leave huge scope. So there are different options, and option 2, as well as being non-legislative and therefore not formally binding, could also have less impact than option 3, which would completely remove the possibility of total rejection.

Baroness Andrews: That is helpful. Thank you.

Baroness O'Loan: Mr Beamish, on option 2, you have already referred to the fact that a resolution would set out more precisely the restriction of the House of Lords' power to deny approval or to annul secondary legislation. Perhaps you could tell us a little more about how that would work in practice. In particular, what sort of Standing Order changes, if any, would be needed to give effect to option 2? Would option 2 also require a resolution of the House of Commons?

David Beamish: The easiest part of that question is the last bit, on which I would say no, it would not need a separate resolution of the House of Commons. As regards the form, it would depend what you wanted to achieve. The first point I should make is that if you want to make this bullet-proof, you have a problem. Let us take a well-known example of Standing Orders: that no two stages of a Bill may be taken on one day. That is quite frequently suspended or dispensed with, so by agreement you can get rid of Standing Orders. If the House chose to do it, you could probably come up with a procedure that would be quite restrictive. In rather the same way in which we do not accept Motions that are out of order, the House could say that in certain circumstances—let us take the example of the Government coming back with delegated legislation after the process had been gone through—it would be out of order to table a prayer or whatever. Legally, that might be a bit dodgy, but in effect if you told me and my colleagues that we were not to accept certain types of business, that could probably work in practice. Perhaps a question that this Committee will need to decide is where, if you want option 2—I am rather with Lord Lisvane, who suggested when he gave evidence that it would be worth giving it a try at least—you want to draw the line in how far the House can go in holding up delegated legislation. Once you have decided that, I am sure that we could find a way of making it work.

The Chairman: Although Standing Orders can be changed by resolution of the House—as you say, suspending the period between stages of a Bill often happens—that is always done by unanimity, is it not? If anyone opposed the Motion that the Committee stage of a Bill should not be held next week, the Government would back off.

David Beamish: You are absolutely right. There are understandings about how a lot of things in the House are done. The Motions to suspend or dispense with Standing Orders are customarily moved by the Leader of the House and agreed through the usual channels. The trouble is that when somebody tries to test the rules you cannot stop them. It depends a bit on how far you need to make the resolution or Standing Order totally binding. If you take Lord Lisvane's approach to give it a try, you perhaps need not worry too much about that.

Everybody would accept that if people did not stay in line and tried to play games of that sort, we would be moving to option 1 or option 3.

The Chairman: But as somebody once said, “The advice of the clerks is the advice of the clerks and that’s that”.

David Beamish: It says in the *Companion* that Members are expected to take the advice of the clerks. Unfortunately, it needs to say that because I cannot say, “That’s my ruling and that’s that”, except in rare circumstances.

Q62 Lord Woolmer of Leeds: When you were talking about option 2 and seeking to set this out in some clear or agreed procedure, you appeared to be talking not about the circumstances for—in the words of the Strathclyde report—“a more precise way” of setting out the use of powers but about setting out what would happen if the Government came back with essentially the same instrument. That was what I understood to be the tenor of your remarks. Lord Strathclyde is struggling not with that issue, as he does not suggest it at all, but with the grave difficulty in setting out in a precise—and one must mean by that, I assume, determinate—way the circumstances in which the House could reject a statutory instrument. On that issue, which is the Strathclyde point, would you be brave enough to say that you think that you could embody some solution in Standing Orders?

David Beamish: First of all, what you say is fair comment. I said earlier that there were different flavours of option 2 and I was trying to suggest that one might be able to use procedural limitations on what could be tabled as a way of giving such a provision some teeth. Going back to the simpler version, where the House replaces the resolution, moved by Lord Simon of Glaisdale many years ago, asserting its right to do what it likes in extremis with a statutory instrument with something else, we are back with the sort of thing that I was saying a moment ago. Formally, it is hard to make it stick, but if it is recognised that that is the understanding, you can at least be confident that any maverick who tries to do something different will not get the support of the House as a whole. That is perhaps true in other areas already. Only last night, we had a Motion to annul a statutory instrument, which came from the Liberal Democrat Benches. That is not infrequent, but the Labour Front Bench will not support such a Motion because it understands how things are. It is worth a try, but you are right: it is a different approach, and if you do it that way you cannot then formally prevent the House from choosing in extremis to do something different.

Lord Woolmer of Leeds: If you set out or attempted to set out more precisely the way in which the House used its power of veto, as it is called, and embodied that in Standing Orders,

who would settle disputes about whether the precise terms set out had been met? Would that fall on your advice to the House? Who would reach the decision?

David Beamish: It would depend how it was drafted. Conceivably, some of the Standing Orders are aspirational rather than the kind of rules that can be clearly enforced. To take one very old example, which has in fact recently changed, it used to be that Lords were to attend the House or, if unable to do so, to take leave of absence. If you had asked a similar question in relation to that, I would not have had an answer. I would say that Members of the House were expected to be gentlemen and, when they passed that Standing Order, they were all gentlemen. That was all that was needed. There is no necessarily clear answer, depending on the way in which it is drafted. It would just have to be by general consensus.

Baroness O'Loan: Can I just follow that up? I do not want to refer to the situation that gave rise to this particular inquiry by the Committee, but your answer on option 2—you say that, as Lord Lisvane suggested, it is worth trying the option—is predicated on the House being able to agree and accept whatever Standing Order or resolution is agreed by the House. I suppose what I really want to ask is whether, in the particular circumstances and having regard to the history of the House, you think that option 2 as currently suggested is a sustainable solution, or do we need to look more carefully at the whole operation of the scrutiny of statutory instruments in both Houses?

David Beamish: I am not sure that those two things are necessarily alternatives. On the first, provided that sufficient agreement can be reached—it probably could be, as there is a pretty general understanding that anything other than an innocuous Regret Motion is a bit of a nuclear option on statutory instruments—that is worth trying. Whether it is sustainable and people stick with it depends perhaps on the political scene over the next few years.

On your second comment about a more general review of the way in which statutory instruments are looked at, that could be worth doing anyway. As has become apparent from your inquiry—and was perhaps apparent already from work done by the Hansard Society and others—rather less goes on in the House of Commons than it might do. In some ways, it is quite nice for me when talking to outsiders about the role of the House of Lords to be able to flag this up as something in which the House has a particularly valuable contribution to make to the role of Parliament as a whole. However, that is no reason for not trying to look at it more generally, as what we have has grown like Topsy. The Delegated Powers Committee was suggested back in 1992, and later there was the Merits of Statutory Instruments Committee, which subsequently become this Committee. I think I am sort of saying yes to both.

The Chairman: Lady Fookes, your question has largely been covered, but you are welcome to ask it if you would like to.

Q63 Baroness Fookes: Perhaps I could approach it slightly differently. Lord Strathclyde was a bit dubious as to whether option 2 could be made to work, but to get it clear in my own mind, could I present a scenario to you? Under option 2, through Standing Orders presumably, we would then say that the House of Lords retained its right to annul statutory instruments but perhaps get rid of the conditions that were attached to a previous one and simply have a straight annulment—or, of course, the lesser Regret would be retained—but it would in effect be referring it back to the House of Commons rather than killing it stone dead. In the same way, I remember that in councils years ago, if a full council did not like the decision of a committee that came before it for ratification, it would refer it back so that the committee could look at it again. That is the sort of scenario I am thinking of. Whether it reflects option 2 may be more doubtful, but will you reflect upon that?

David Beamish: A version of that could be made to work. It is already the case in the House of Commons that you cannot table amendments of the form, “But regrets that” on statutory instruments; you either pass them or you do not. There is no reason why, as a version of option 2, this House should not do the same. The trouble with saying explicitly that you are referring them back to the House of Commons is that unlike Bills, which are physically in one House or the other, that is not quite how it works. You might need to agree an understanding. The trouble, if the Commons has already passed an affirmative instrument and the Lords then does this, is in devising a procedure whereby the Commons has another look. It might be difficult without legislation or at any rate without some change of procedure by the House of Commons. So that bit of what you are saying might need a bit of thought to make it work.

Baroness Fookes: It would be difficult but not necessarily impossible.

David Beamish: I hope that a way could be found of doing it, yes.

Lord Hodgson of Astley Abbotts: So would there be value, following Baroness Fookes’ idea, in having within the original Bill, where we have a skeleton Bill filled up with statutory instruments, where they are sufficiently important, a procedure for amending them, which I think the Cunningham recommendations included? In other words, if you wish to fill up your Bill with resolutions, and have very outline primary legislation, the price of that is that the statutory instruments that will follow from it are amendable and debatable.

David Beamish: In recent years, as part of the various deregulation and better-regulation initiatives, a range of varieties of scrutiny, super-affirmatives, and legislative reform orders have grown up. So the short answer is that there is no reason why you should not add to those

something along the lines that you have described. I am no historian, but I believe that in the 1930s there was some category of delegated legislation that was amendable. I am sure there are experts who could review the experience of that. The obvious problem with something that needs to be agreed by both Houses is that, without a mechanism for shuttling to and fro, making sure both Houses agree to the same amendments might not be very straightforward. That is the big practical problem, but if an answer can be found to that, then, yes, where it was thought that that was the legitimate quid pro quo for giving quite wide-ranging powers in a Bill, why not?

Q64 Lord Janvrin: Moving on to Lord Strathclyde's option 3—in fact, we are covering some of the same ground—if you had a new statutory procedure to allow the Lords to invite the Commons to think again, could you outline some of the practical implications of that and the procedural difficulties that you might envisage? This is going over some of the same ground.

David Beamish: I said earlier that option 3 would basically need primary legislation. The short answer to your question is that the ingenious lawyers who draft Bills would have to work out the appropriate procedure. With Bills, it is relatively straightforward because they shuttle to and fro. At the moment, that is not what happens with affirmative instruments, but maybe they could make some provision that the Lords does not take them until the Commons has, for example. The short answer is that it could be built into the legislation. If you have to have primary legislation, you can adapt the current procedures as far as you need to make that workable. I do not think that the practicalities are the show-stopper. The issues are, first, the difficulties in getting that legislation through this House in the first instance, and, secondly, the impact on the way the House behaves in future, both in how far it uses the power and how it deals with delegated powers in future Bills.

Lord Janvrin: Could I ask you to expand on one point? What would the mechanism be for letting the Commons know the reasons why the Lords have asked them to think again?

David Beamish: At the risk of sounding flippant, I am tempted to say that they should read *Hansard*. If you look at Bills, we formally send a reason, but frankly they are very light-touch, because if you have a three-figure number of Members voting for an amendment, they will not necessarily all have the same reason. Different people may have different motivations, so I would not advise the Committee to get too worried about devising a procedure for having the text of a reason, as we do for Bills. Let us be honest about this: with Bills, my colleagues in the Legislation Office are aware of what is going on and produce a draft entry, and the mover of the amendment that has been carried, along with the Minister

and some other involved Member, are invited to ratify the text. The House never sees it until it appears in the minutes. I come back to my first answer: they can read *Hansard*, frankly.

Lord Janvrin: I have one final point on option 3. Do you think that any Bill of Rights issues arise?

David Beamish: You are presumably referring to Lord Lisvane's references to Article 9 and so forth. Yes, you have to be a bit careful. On the whole, we have done quite well to avoid the courts interesting themselves in the internal mechanisms by which legislation is passed. Although there are plenty of bits of primary legislation that do involve that sort of thing, and in answering Lord Hodgson about the various categories of higher-level scrutiny that have been developed recently, those are perhaps examples. I do not think it should be overstated, but it should certainly be borne in mind that the more you go into detail about what we do in Parliament, the more risk there is. I should perhaps say that, on the whole, the UK courts have quite a good understanding. I get nervous when things go to, say, the European Court of Human Rights. Things like Article 9 of the Bill of Rights do not have the same cachet for an international bench of judges, so we have to look at that as well, but perhaps not so much in this area.

Baroness O'Loan: I want to take you back to Lord Lisvane's evidence to the Committee on the issue of legislation under option 2. You have dealt with the difficulties of passing the necessary legislation and you have said that counsel could draft the legislation for us and it might ultimately be agreed, but Lord Lisvane referred to the fact that we would lose a lot of flexibility, and he thought that there might be very significant consequences upon that. Would you like to say anything about that?

David Beamish: Yes, I would simply associate myself with that. There is perhaps always a tension between getting things exactly settled so that you give just the right amount of scope and finding that you do not have enough scope to cope with the unexpected. So I would endorse what he said.

Baroness Fookes: Was not one of his points that it might then open it to the courts to interpret?

David Beamish: That is what I was trying to say in response to Lord Janvrin. I do not think it is a big risk, but it is worth bearing in mind that the more you describe the processes that have to happen in Parliament, if there is any room for dispute, it might invite the courts to interpret.

The Chairman: The courts have long expressed great reluctance to get involved in our affairs, have they not?

David Beamish: That is why I said that my fears in relation to the British courts are not that great. I think there is quite a good mutual understanding on that point. Our sub judice rule reflects our wish in Parliament not to meddle with things that are matters for the courts, and they try to avoid getting involved in things that go on in Parliament. Despite what I said about the European Court, we had a success some years ago with the failure of an action brought by somebody who claimed that her human rights had been infringed by something her MP said. So the record is okay. It is a risk but not a show-stopper.

Q65 Baroness Stern: I want to turn now to the rather complex question of financial instruments—you may have seen the help we had from Lord Lisvane in his evidence on that matter—and the question of when an instrument is financial. There has been some discussion about limiting the powers of the Lords only when an instrument is a “financial instrument”. First, do you think this idea is workable? Secondly, how could a financial instrument be defined? Finally, who would have the role of doing the defining?

David Beamish: Gosh, there are some quite tricky questions there. You said “financial instrument” in quotes at one point. In a sense it happens already, because when you have something in relation to, say, tax law, it is understood that any parliamentary procedure is Commons only. So you could say that without doing any defining you could go wider in the range of instruments that are subject to Commons-only scrutiny. That is perhaps fraught with logistical difficulty, because on each Bill that came up doubtless there would be amendments in the House of Lords stating that it was not a financial Bill but a welfare Bill—rather as people try to change the negative procedure to the affirmative procedure and so forth.

So obviously you could define it, but I am certainly not going to try. I have brought with me Section 1(2) of the Parliament Act 1911, which provided the definition of a money Bill for the purposes of the Act. It is really quite long, but it is perhaps worth stressing that the situation is not quite the same, because when you look at financial privilege asserted by the Commons in relation to primary legislation, it long predates the Parliament Act 1911—and, as I am sure you are aware, there are things that are subject to privilege that do not involve money Bills. So I claim no expertise, and to draft something that would be comprehensible and easy to apply would be challenging.

As regards your last question about who would decide, that is probably equally challenging. It is not too bad with the money Bill procedure, where it is clear that it is the Speaker, with advice from two members of the chairmen’s panel. Because it is a Bill that formally starts in Parliament, it is relatively straightforward, but applying it to a ministerial order or regulations

laid before Parliament I do not have an easy answer to. So, with apologies, I have to say that I am not the right person to give you an authoritative answer on that one.

Lord Woolmer of Leeds: Who would be the right person to give an authoritative answer?

David Beamish: My ducking the question perhaps reflected the thought that I cannot immediately think of an answer. If you would like to suggest an answer for me to comment on, I am willing to try, but I cannot immediately think of one.

Baroness Fookes: Most of the things we do in Parliament have some financial implication, even if they are not straight money-raising or tax-raising Bills or instruments of any kind.

David Beamish: That is a very fair point. If you had, say, a Bill to set up a new quango, it is bound to cost money for its staff and offices and so forth. Lady O'Loan wanted to avoid getting involved in where all this started, but, if it is not too daring to do so, I might mention that the Tax Credits Act 2002 was seen as a social security rather than a financial provision. So drawing a line that, first, people will agree to, and, secondly, when it comes to deciding which side of the line a particular case falls that everybody can agree on, is far from simple, I suspect.

Lord Woolmer of Leeds: I will certainly follow this up, Lord Chairman, but is it the case that a financial instrument, as currently practised—that is, Commons only—can only contain financial matters? Could you have a hybrid instrument that someone declared was financial and therefore considered only in the Commons, even though it had non-financial elements?

David Beamish: The scope of an instrument that is subject to Commons-only negative or affirmative procedure will be laid down in the Act under which it is made. Typically, that might be a Finance Act, or whatever, but that is the point at which that is determined. Whether it is possible, within such an instrument, to have something that people might not think of as financial would depend on the terms. Again, these things can be difficult to define. Many years ago, there was some upset in the House when a Finance Bill was certified by the then Speaker even though it included provisions about access to premises by tax inspectors, or something like that. The logic was that this was so closely connected with tax-raising powers—it was enforcement—that it did not stop it being a money Bill. So there is no easy answer, but the short answer is that it is all in the enabling powers.

Q66 Lord Woolmer of Leeds: The Strathclyde report mentions the need to take steps to ensure that Bills contain the appropriate level of detail and do not leave too much to regulations. From your now-wide experience here, what, if any, parliamentary procedural changes could be included in such steps?

David Beamish: We probably already have the apparatus. I talked earlier about the Delegated Powers Committee, which was set up in 1992. At the heart of what it was about was establishing that the degree of delegation to order-making powers and the degree of parliamentary scrutiny to which they were subject was appropriate. So I do not think that there is any magic way of defining which side of the line things should fall. There may be occasions when everybody wants the powers to be comparatively broad. If you have an urgent issue that everybody thinks something should be done about but you cannot quite define in a tight way what powers the Minister should have, people may be willing to pass an Act that gives quite broad powers. Another example is when the deregulation initiative got going in the 1990s. Part of the idea was that if you want to sweep away bureaucracy, or have a bonfire of bureaucracy, you do not want to make it too hard. So there is no easy answer, but, as I say, I would like to think that part of the function of this House's Delegated Powers Committee is to judge which side of the line things should fall.

Lord Woolmer of Leeds: Ultimately, in considering secondary legislation, the House of Lords, and the House of Commons, is conducting a duty on Parliament to scrutinise the Executive. The Executive, with secondary legislation, are putting through legislation, and as the House of Parliament we scrutinise it, with the power to reject it. Professor Russell referred to Parliament toughening up its teeth rather than going the way Lord Strathclyde's report appeared to go. She implied that if anything, Parliament—and let us assume we also mean the House of Lords here—far from being reduced in its impact should be toughened up. Baroness Fookes and her Committee, for example. Being practical about this, is there any way in which that could be achieved?

David Beamish: There is a limit to how much I could usefully say on this, but, plainly, the important thing is that, within whatever powers are given to each House, they are used in a way that makes the best of those powers. I sometimes think that if you reduce powers, the danger is that you cause more trouble for the Government, because the House will then use to the full the powers that you leave it. As I was saying earlier, I think this House has quite a good record in having set up this Committee and the Delegated Powers Committee that examine delegated powers and the enabling legislation in that way. Keep up the good work is perhaps one answer, and where things are going wrong, summon Ministers to explain themselves.

The Chairman: Which we do from time to time. Mr Beamish, we are enormously grateful to you. Thank you very much for coming.

David Beamish: Thank you very much. I remember Lord Strathclyde winding up at the end of the debate on his review and saying that it was going to be challenging to come up with something in the light of everything that had been said. I wish this Committee well in coming forward with something.

The Chairman: We will do our best.