



Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 2 November 2016

10.15 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Brennan; Baroness Dean of Thornton-le-Fylde; Lord Hunt of Wirral; Lord Judge; Lord MacLennan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 1

Heard in Public

Questions 1 - 15

Witnesses

Dr Ruth Fox, Hansard Society; Sir Richard Mottram, Better Government Initiative.



Examination of witnesses

Dr Ruth Fox and Sir Richard Mottram.

Q1 The Chairman: Dr Fox and Sir Richard, welcome to the Constitution Committee. You need no introduction, although we have circulated a precis of your distinguished careers. We are very grateful to you for coming to start us off on this rather extensive inquiry. We are not quite sure where it will take us, and I hope that from today's session we will start to see the parameters of the different issues that we want to engage in more thoroughly. This is an opportunity for you to dilate. We have circulated some questions to you, but if you want to tell us anything that is not covered by those questions feel free to inject that into the discussion at any time.

The first question is probably bigger and broader than most of the others. Why legislation? What thought is given to whether legislation is necessary or the most appropriate method by which policy can be implemented?

Dr Fox: Thank you for the invitation to appear. I think the reality is that there is no standard test of why legislation is required that is applied upstream in Whitehall. It will differ from Bill to Bill. Sometimes there will be a process in place for consideration of the mischief that they want to remedy and, therefore, why legislation is required; sometimes it will emerge from a rather ad hoc political process in which it is more about Ministers being seen to act, show initiative, respond to media issues and so on. In those circumstances, what emerges is legislation as a means of demonstrating that something is happening and communicating a message, rather than a legal or legislative test about whether the policy you want to achieve is required in legislative terms and needs parliamentary time for it, instead of some other mechanism.

The Chairman: Is there a biblical text somewhere that you can draw to our attention? Has anybody set out to answer this question in three fine volumes?

Dr Fox: The nearest to it is the Cabinet Office *Guide to Making Legislation*. I do not know to what extent Ministers are aware of it, but it certainly sets out for civil servants the process by which they should approach legislation. If you are appointed to a public Bill team in a department, in so far as you have a bible that is what you have. They have minimal training, and a lot of what they are guided by is in that book, and that is regularly updated from time to time. What is interesting about it is that, often, it does not take account of the changing concerns in this place. For example, a particular obsession of the Hansard Society is that for the past few years it has not taken account of delegated legislation. It does not always take account of changing or developing views of the Delegated Powers Committee. That is highlighted in that Cabinet guide, but the ways in which the Delegated Powers Committee



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develops its views on certain things are not always reflected in an up-to-date way.

Sir Richard Mottram: When I was looking at who was going to be here this morning I thought it was a slightly odd situation. There are a number of former Ministers around the table who know an awful lot about the answer to that first question, in a way probably more than me. There is a whole set of procedures laid down, as Ruth says, and a very competitive process within government to try to get its Bill into the legislative programme, which will be familiar to a number of people round the table. It is all highly competitive; there always seems to be more demand than supply, and, as we will no doubt come on to discuss, the timetable is insufficiently constrained.

To make a very broad point, because of the nature of our democracy there is a natural inclination to think that the right way forward in relation to something is to legislate about it. There is a sort of bias in the system that says, "We have a problem. What should we do? Let us think about changing the law". The second quite serious issue is that political signalling, which is very important in our system, is often expressed through an argument in Parliament around a piece of law. In my former life as a civil servant, I thought it was a rather strange way to organise our system. You try to create divides—no doubt a number of those round the table can think of examples of this—between you and the opposition party by framing legislation in ways that potentially might embarrass them, or open up quite serious arguments about law and order in particular, some of which are basically about political signalling. That seems to me to be a very curious way to conduct business.

A great benefit of our system is that Ministers are rooted in Parliament. Possibly a disbenefit of that, certainly not one that would offset it in my view, is that people tend to see things framed in terms of, "How can I shine in Parliament?" One way of shining in Parliament is by taking your Bill through.

Q2 **Baroness Taylor of Bolton:** That is very interesting. One of the issues in looking at something like this is to inject the political reality that is there. You can have an academic exercise about how to legislate, but there is a political momentum. Sir Richard, you said that things were framed to embarrass and signal things that would cause difficulties later. I rather think that most Governments might want to divide but they do not want too many difficulties in getting through their legislation. What actually determines whether something is well drafted or not? Is it the clarity of the instruction from the Minister? Is it the timescale—the pressure on parliamentary time and parliamentary draftsmen, who have been squeezed over recent years? We have also had outsourcing. What do you think are the main factors that end up with somebody saying, "This is a well-drafted piece of legislation and this is not"?

Sir Richard Mottram: One of the interesting questions for the Committee is how far it is to go back in the process. You can have what is



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apparently a well-drafted piece of legislation, in that it is comprehensible, coherent and so forth, but it has no possibility of achieving the objective. From the perspective of the Better Government Initiative, we got into the legislative thing only because we were interested in the whole process. Obviously, you cannot in a sense do the whole process, but the prior question has to be: is there a basis on which this policy is founded, as it should be in my view, on evidence of some kind, and is what is proposed likely to lead to the outcome that the Government think they are trying to achieve through this change in the law? If it is not, however elegantly it is done and however much scrutiny it gets and so on, it will not succeed. I would have thought there was plenty of evidence of policies pursued by Governments of different political persuasions where the purpose was confused, the levers chosen were unlikely to achieve the objective and, unsurprisingly, therefore, the legislation did not achieve what it set out to do, even if it was clear on the face of it and in the explanatory material around it that the Government knew what they were trying to do.

The issue is how far you want to get into that in relation to all the quasi-technical issues, on which Ruth is a much greater expert than me, about how you conduct the process, although I do have views about that. My view is that if it is to be a good piece of law it has to be founded on a good piece of policy-making, and that involves a prior set of questions.

Baroness Taylor of Bolton: But, as you said, getting a slot in the legislative programme is quite a competitive process for Ministers. Therefore, there is a tendency to want to move it along and say that your legislation is ready when it might not be.

Sir Richard Mottram: In my experience, getting the slot is a very big deal for Ministers. Rather like airlines, once you have the slot you certainly do not want to give it up. Therefore, there is a serious issue about how far the bidding and policy-making process in government is effectively constrained so that when legislation is brought forward—we can all think of lots of examples of this—it is not brought to Parliament half-cooked at best, and then the Government race around trying to cook it properly, and they can keep changing it. I am not a great cook myself, but they can add new ingredients as they go along. That is an issue. That is why, certainly from my perspective, it would be a very good idea if there was more discipline in the process through which Bills get into Parliament, and that it be a requirement to establish, by mechanisms we can discuss and that are in the paper we sent to the Committee, that the Government know the purpose and why they have chosen the legislation as the means by which to achieve it, and can show later that it has or has not achieved that purpose. These are very straightforward, simple things, but I think we would all agree they are not necessarily always followed.

Dr Fox: I would agree with that to a large extent. We have always said, although we concentrate very much on the parliamentary end of the process, that you can design the perfect architecture for scrutiny and, if the policy-making process upstream has some fundamental flaws, that



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process should reveal those flaws. There can be a discussion, debate and partisan battle about it, but, ultimately, if the Government have a majority for it, it will go through. So, designing a perfect process and procedure does not resolve that problem.

We have argued—to some extent the Better Government Initiative has also put forward this case over the years—that part of this is an attitudinal approach upstream in government and a culture of taking initiative. Bills are a sign of ministerial virility; you must have a Bill; you do not want to lose your slot. There are issues about how time is used, which raises questions about whether, particularly in a fixed-term Parliament, if you want to be really radical, a sessional approach is helping, because it creates a cliff-edge approach to the management of time. I know that raises issues for this House in respect of legislation and its powers, but there might be possible solutions to that.

We have argued that part of the problem is that, because there is nothing in Whitehall through the Cabinet committee system, in terms of the way the Parliamentary Business and Legislation Committee operates, to act as a brake on Ministers who want to push their Bills through and get the parliamentary time, and because the culture of competition does not in any way seem to relate to whether or not a Bill is ready, in effect Parliament has to take from government whatever it throws at it whenever it decides it is ready to throw it. Government will say, “We have won the election; we have a mandate; we have a right to get our business through”. Yes, but not in any form they choose to send it down to Westminster from Whitehall.

We have argued that, if the Government are not willing to take steps to improve the culture and attitudinal approach upstream, Parliament could try, ideally on a bicameral basis, to take some of those steps to create what you might call hurdles, or a legislative chicane, at the beginning of the process of introduction through something like a legislative standards committee. We do not want to turn it into a tickbox exercise, but, on the other hand, government should not be able to bring forward a Bill that does not have the impact assessments ready and accompanying it at the time it is brought forward. It should not be able to bring a Bill where the consultational aspects of it are still going on. Some minimum standards could be agreed so that a Bill cannot get past that stage and come forward unless those tests are met. Alternatively, you could do it through a Minister having to lay a motion to bring forward a Bill and there would be questioning, but I do not think that is as substantive as a bicameral committee that would look at legislative standards and consider it Bill by Bill to try to push upstream Whitehall to act.

Sir Richard Mottram: If I may make a very quick comment on what Ruth said, for those who have worked in government what is interesting about the process is that there is always a committee, usually chaired by the Leader of the House. The Leader of the House and those who support that individual do try to inject some discipline into this process. We have



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all had experience of this. You can get to a situation where your Bill is about to be chopped because parliamentary counsel have said it is such a mess and so on.

When we suggested there should be such a mechanism that would be vested in the committee, usually chaired by the Leader of the House of **LordsCommons**, the Lord President or whatever title they carry at the time, in a way we were saying this would be helpful to you, because it would empower you still further to be much stricter with your colleagues. If you are the Leader of the House, the problem is that you are often outranked by some very big beasts. The Prime Minister, in my experience, is never that interested in this subject, so the big beasts will do you over and their Bill will head to Parliament, and then the Government will do Parliament over, to put it crudely.

Therefore, the argument is not that there is no mechanism, but that the people operating it within the framework of government—this is not to disagree with Ruth; it just adds a qualification—are always at risk of being outgunned by the very big players, who just say, “Thanks very much”.

Lord MacGregor of Pulham Market: I was Leader of the House for some time, but it is a long way back.

Sir Richard Mottram: It does not bear any resemblance to your experience?

Lord Hunt of Wirral: He is a big beast.

Q3

Lord MacGregor of Pulham Market: Not particularly. I do not think it is the “big beast” thing, but very often it is the general feeling that this is a political priority. Somebody who is coming forward with even a minor piece of legislation that has suddenly hit the fan has a better chance of getting stuff through. I remember one example of exactly that, which I will not mention. It all went wrong. It would be very helpful to have some examples from your more recent experience of a particularly bad process leading to bad legislation, and how it should have been put right. I throw that out to you in the hope you can provide some for us. The first Session of a Parliament is a very interesting one, because there is huge impetus in implementing the major manifesto issues. In your experience, does that lead to insufficient preparation of legislation in that first Parliament? Later, one sometimes has a much longer time to prepare it and so on. If that is the case, how would you deal with that?

Dr Fox: In terms of implementing the manifesto in the first term, it has always been the case that the Government want to make their mark with a rush to get an early Bill into Parliament. It is partly about managing time and not wasting too much up front. If you look at the previous Parliament and the coalition, the Academies Bill came forward incredibly quickly and was brought forward with very limited consultation, and there were all sorts of procedural issues around that as a consequence. We did



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quite a lot of work on the Public Bodies Bill. That, too, had that sense of being rushed. Whether you regard it as an example of bad legislation emerging is a subjective matter and depends on your perspective, political views and partisan approach. If you look at the Public Bodies Bill, they ended up with a Bill bringing forward the legislation and they were still consulting on what was going to happen with the public bodies. They were offering consultation as part of the bartering—the horse-trading—particularly with this House, about powers in that Bill as to what would happen to bodies that were already winding down. How could you consult on bodies that were already going almost into hibernation?

Some elements of the impact assessments were not ready and available. As a result, you ended up with horse-trading on all of this. The Government were seeking wide powers that the delegated powers in this House tried to constrain. You end up with a new strengthened scrutiny procedure that takes so long to utilise that the Cabinet Office has not brought forward anywhere near the number of public bodies orders they expected. In some instances they take longer than primary legislation. You get into the position of thinking, “If they had just taken a little longer, they would have saved themselves and both Houses an awful lot of time and resource”.

Baroness Dean of Thornton-le-Fylde: Talking about explicit standards, we are wandering away from the first question and there is a lot to cover. Talking about the political realities or the mood of the moment with a piece of legislation, one thing that surprised some of us in recent years is an almost “Christmas tree” effect where a Bill might deal with a specific area, but when we see the final Bill to go before Parliament it has all sorts of bits within it that do not actually directly relate to the original intentions of the Bill. One could argue that, therefore, it detracts from the Bill and requires much more time in Parliament than a Bill to deal with the initial issue would have done. We are looking at explicit standards. How would it deal with that? It may well be that part of the knobs and knockers in the Bill are there because of the political reality or the mood of the nation at the moment and it is the only area where government can feel it can get some changes.

Sir Richard Mottram: Let me deal with a number of these points in turn. Going back to the question of first Session legislation and so on, two questions arise. First, how do things get into the manifestos of the political parties? If you are thinking about evidence-based policy, what we now have is a sort of system that says that what is in the manifesto will be implemented, and there is now huge machinery in Whitehall to ensure that every commitment in the manifestos is shown to be implemented, to show that the Civil Service is doing it, or whatever. Yet there is a very interesting question about the process, which we will not spend time on today, by which things get into manifestos.

There is an issue about the evidence behind the policy. There is another serious issue, which is that Governments want to get on with things. The



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mantra now is that you must do a lot in your first term. I think that came from a previous Prime Minister. Therefore, we have argued, for example, that, if you have fixed-term Parliaments, there is a case for giving the Opposition help in the run-up to the election in thinking about what it is they are seeking to do and giving them support. This is obviously sensitive because of the political impartiality of the Civil Service, parliamentary counsel and so on, which is vital, but could there be mechanisms whereby they are given more assistance? This is what they do in Scotland, and we think there is a case for doing that. If you are rushing things in, at least in the period before you come into power, you would have extended the process, which already exists and is familiar to a number of people round the table, of shadow Ministers being able to consult senior civil servants and giving them a bit of help so the process of rushing is less risky.

On the question whether I can think of recent examples of not great legislation, the Health and Social Care Act might merit a lot of attention. I think it is a very interesting case of legislation that probably was not strictly necessary, and the ostensible purposes were probably not the ones that lay behind it. It is also a good example of the tensions that arise—we may not have a coalition Government for a while, but I do not know—when you have an agreement in a coalition, also done in a rush, and you are trying to introduce things, as Ruth said, very quickly. We need to recognise these problems and think about some of the mechanisms that are driving them.

On the “Christmas tree” question, this is the dynamics of departments. Departments often have lots of stuff lying around that they have been dying to get into a Bill for ages. Again, this will be very familiar to the former Ministers round the table. They will say, “I have this thing. I can never get it to the top of the list, but now I have a Bill”, as Lord MacGregor said, “that has real political imperative behind it, so I am definitely going to get it in”, and then civil servants come along and say to the Minister, “Why not add these few clauses about this? It is sort of related”. Then some awkward person says, “You have to change the title”, and so it is changed. This is very bad practice, is it not? A Bill should be about something that has a defined set of purposes and everything not related to it should not be in the Bill. But it is a bureaucratic dynamic.

I would argue that there needs to be more discipline in the process. I can think of examples, which of course I will not quote to you, of Bills when I was Permanent Secretary of a department. They grew and grew because we kept thinking, “Look at that. We can at last get that done”. It is often very meritorious. It never quite made it across the hurdle and now you can get it over the hurdle, but it is very unsatisfactory for Parliament and the public, in so far as they are watching these things.

The Chairman: I think it is the “et cetera” syndrome, is it not?



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Sir Richard Mottram: Yes. They are not just baubles; they are valuable things.

Q4 **Lord MacLennan of Rogart:** I wonder how the role of parliamentary counsel is discharged. Are they brought in early in the process, or do they go through the end results? I remember having civil servants in my department who were lawyers, but I do not quite recall how the parliamentary counsel feed in.

Sir Richard Mottram: My experience is now a little out of date because I left the Civil Service quite a few years ago. When I was a Permanent Secretary there was a very significant change in the way all this was done. There used to be a time when parliamentary counsel were considered to be incredibly austere figures to be consulted only when necessary, and they were themselves slightly separate from others, and so on. Departments also worked with policy civil servants. They would feed the legal civil servants, who would feed parliamentary counsel and so on.

In my experience, all this changed. We created joint teams that were working on policy development with the lawyers, who would still have their own separate hierarchy in terms of maintaining standards, how they were managed and so on, but the lawyers were integrated into the joint teams and often parliamentary counsel would be consulted at a very early stage informally. I suspect, although Ruth probably knows a bit more about how this works now, that that is the process we have now, which is a very good process. I am not in any way criticising parliamentary counsel; quite the reverse. You obviously have to watch, because they are a very scarce resource, how they are used, but I think they are now more willing to be involved in that way.

Dr Fox: When we did our research on delegated legislation we looked at a number of legislative case studies in the previous Parliament. We were trying to find out how they get their instructions and where the decision about delegation and scope of powers comes from. It varied from Bill to Bill and depended upon the willingness of draftsmen to want to engage at ministerial level and be willing to sit around a table with Ministers, the Bill team and departmental lawyers and thrash it out. Some liked that; some really did not. In some instances, the Bill team get the policy instruction from Ministers and they will relay it to the government lawyers on their team. The government lawyers would convert it into legal instruction. That would then go to parliamentary draftsmen, and there would be a back and forth over a draft. A lot of that would be electronic. In some instances there were very few meetings and personal face-to-face discussions and debate.

Parliamentary draftsmen have a major problem in terms of the limitations of resource and the pressures on time when suddenly a Bill is demanded. They can produce a good draft only if their instructions are clear. If a Government are at mid-consultation on an aspect of policy, it is very difficult for the draftsmen to draft accordingly. As a consequence, in



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terms of delegated legislation that is where you sometimes get the inclusion of powers in quite broad scope, because the Government have not quite decided what they want to do. It is not policy ready; it has not properly completed its consultation processes, and draftsmen have to take account of that in how they approach the work. They are, however, the nearest thing to policing precedent.

Lord Maclellan of Rogart: Would you argue that parliamentary counsel should be brought in at an early stage and a structure for asking them might be formed?

Dr Fox: It certainly would not be harmful to the process. I think there would be a resource issue from their perspective about the use of their time and their injection into the process.

It is interesting that in a couple of instances in our legislative case studies there were clearly tensions the other way, where Ministers felt the draftsmen were being too conservative in their approach to the way in which they were drafting, and there were suggestions from Ministers that they wanted to bring in external drafting assistance to put pressure on draftsmen to draft more in the direction they wanted. That is a big tension about what Ministers see as their role. The perception of counsel was that Ministers wanted to draft their own legislation, like senators and congressmen, and perhaps did not understand the legal realities of the way in which our legislation is drafted. Therefore, there are tensions in that relationship. Bringing them in earlier might help address that, but it would have resource implications.

Baroness Taylor of Bolton: We can probably all agree that we do need some discipline in terms of policy-ready legislation, to use your phrase, coming forward. Before we blame Ministers too much, what Lord MacGregor said about political priorities and realities has to be taken into account. When Ministers say to civil servants and parliamentary draftsmen, "We have to do this and we have to do it quickly; we are not quite ready, but we are going in this direction", to what extent do parliamentary draftsmen and civil servants say, "No, you cannot do that", or do they just say, "Yes, Minister", and then try to do the impossible? That is a dynamic that needs to be there.

The other point I want to raise is about outsourcing parliamentary drafting work. I know that a few years ago there was a lot of pressure to outsource more. If you do not have the relationship that was being talked about, surely that is the time it is more likely to cause problems as well.

Sir Richard Mottram: Perhaps I should do the "Yes, Minister", having spent a lifetime in that position. There will always be this argument. In the departments where I worked where there was a very significant legislative programme—a lot of my time was spent in defence, which obviously was not in that situation—very close relationships developed between the Ministers and the people who worked on a Bill. There were often very close relationships between Ministers and the civil servants



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working on policy. I am certainly not saying this is the fault of Ministers, or that politics and political considerations are a bad thing in a democracy. That is just ridiculous. The reality is that this is the system we have, and quite right too. I do not think that is a big problem. There are sometimes issues about quality of staff. I think Ministers are frustrated about whether the staff are good enough. We need not spend time on that today, but obviously that is a serious issue for the Civil Service; it is very well attuned to the need to get on with things.

Parliamentary counsel have a resource issue. In my experience, they can say things to Ministers that civil servants in the department are not willing to say, which may or may not make them popular, for example that the Bill is a complete mess, dressed up in parliamentary counsel language, and it cannot be sorted out in the next two weeks, or whatever. Of course, parliamentary counsel do have a line to the Leader of the House, which is also something that makes Ministers nervous, but parliamentary counsel turning up to say that the Bill is a mess is not in my view an argument for outsourcing the work of parliamentary counsel. There were experiments along those lines and they were not very successful for all sorts of reasons that the lawyers in the room can explain. This is highly technical work, and parliamentary counsel need to be resourced properly to do it. That is always a big consideration inside government.

Dr Fox: In terms of the interviews we have done for our research, civil servants and parliamentary counsel always say that their responsibility is to deliver what it is Ministers want, within reason. For example, parliamentary counsel see themselves as the guardians of the statute book. They would not draft in such a way that they thought was fundamentally wrong, and if they were pushed by Ministers to do so they have the same recourse that accounting officers have in registering a concern and effectively seeking ministerial instruction to do it, even if they do not wish to.

There is an important issue about Civil Service corporate knowledge on legislation, which goes to training. There is a lack of training when they start and an enormous amount of movement. We found there were very few heads of Bill teams who had worked on more than one Bill. We found one who had worked on two and had expressed an interest in a third and had been told that that would be career suicide. Legislation is something you tick off on your career path; it is not something in which you specialise. I think that is wrong, because we are losing a lot of experience and memory.

Sir Richard Mottram: It is completely wrong. I should have said that the way parliamentary counsel think of their role in Whitehall has changed very significantly. They are now much more open and proactive in championing the importance of good law-making. When I started off as a civil servant they were very remote and quite terrifying. They are now the people out there championing the importance of these issues, which I



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think is very constructive. They champion them in public as well and work with people like Ruth. This is all very positive stuff.

The Chairman: You have painted a broad canvas for us. I hope we can fill in some of the specific details as we press on with 13 more questions, which, at the current rate, will take us to about 2.30.

Lord Norton of Louth: I want to tease out some of the things you have said. In so far as there is a tension between what Ministers want to achieve—the political imperatives—and the process of delivering good legislation, how extensive is the problem? We have identified examples, but they could be the exception. How extensive is it quantitatively, and from a quality perspective how important is it? Is it producing significantly bad law? I take it from what you said that you see the problem not so much in terms of process but attitude. Therefore, the starting point has to be an attitudinal change. If that is so, who is responsible for achieving that?

Sir Richard Mottram: It depends on your criteria. If your criteria are that all of us as citizens can comprehend the framework in which we are meant to live our lives in a society dominated by the rule of law, I would say there is quite a serious problem, because the law changes too quickly. It is almost impossible for anyone to keep up. In certain areas this is all very familiar stuff, but that does not mean it is not important.

In certain areas, such as tax or the one I was responsible for a few years ago when I was Permanent Secretary of the Department for Work and Pensions, the frameworks established are incomprehensibly complicated, often for good and well-motivated political reasons to do with trying to treat citizens in a very fine-grained way. We have produced a framework that is far, far too complicated. It changes too much and it is too complicated, and then you have extraordinary cases that strike you as very poor legislation. Then we have the issue, which we will probably come to, about the Government being very keen on giving themselves very wide powers to do things for which they should not, in my view, be given such powers. Therefore, I would say there is a big issue.

Dr Fox: In terms of quantification, nobody has been able to do that. We have been having similar discussions since at least the 1970s with the Renton Committee and Hansard Society's Rippon commission on *Making Better Law*. We keep going over the same ground all the time. The reality is that qualitatively we have clear examples; quantitatively, it is very difficult to assess.

It might be helpful if at this point I say that we at the society are developing a new project called Westminster Lens to try to look at some aspects of this by collecting data not yet collected through sessional returns or individual committee reports. The scale of it is too great for us to do it as comprehensively as one might wish. To give just one example, how many Henry VIII powers are there in Bills? Nobody actually counts. We know they are an issue, but nobody can give us an exact number, so



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we are going to count. We will be able to make a comparison Bill by Bill, Session by Session and Parliament by Parliament over time as just one example of how one might start to quantify these things.

Baroness Taylor of Bolton: It is not just the number—

Dr Fox: Yes.

Sir Richard Mottram: How many clauses in legislation have not been commenced? I have old data, but why is that not regularly reviewed?

Dr Fox: Our hope is that by doing this kind of work it will, if nothing else, at least shine an annual light on some of the issues and problems in the process more regularly and put a figure on it. When you put a figure on it, you might start to make a little bit of progress.

A related question is that at the point a decision is made to press forward with legislation, in whatever form, there is huge debate about use of time and so on. Part of the problem in terms of the cost-benefit analysis is that the people who were around making decisions at the start are not there at the point at which the results are experienced, whether that is Ministers or civil servants. For example, a huge amount of parliamentary time is being expended, frankly wasted, debating huge clauses of Bills that never commence and move forward. There is no test.

Q5 **Lord MacLennan of Rogart:** How effectively do the Government use research and evidence in the formation of policy and subsequently legislation? Do they initiate policy because of research, or do they consult after it has been politically initiated?

Sir Richard Mottram: This is an area where there has been significant improvement over the years. There is still an issue about the policies that appear in the manifesto and what drove them. Some of them are driven by and grounded in experts outside government, and are very well founded; some may not have a research base. As to the dynamic of what government keeps coming back to, although in resource terms it is probably being cut back, there is a very significant capability and strong drive towards more evidence-based policies.

To give you two quick examples of that, we have all the initiatives the Government have taken over things called What Works Centres to try things out and so on. There has been a very significant shift in those departments that are concerned with policies that might be informed by science and technology, with, for example, ~~there has been a very significant shift with~~ the introduction of government departmental chief scientific advisers. Therefore, we ~~and the Government~~ could detail for you the very significant improvements that have been made under successive Governments, not just the most recent ones, in thinking about how we inject more consistent research and evidence-based policy.

Dr Fox: I agree there has been a lot of progress. I would just counter that with some concerns that, very often in the consultation processes of



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government, the research base upon which it has reached its conclusions is not published or available in a transparent way that people or, indeed, sometimes that Parliament can access. That is problematic. The actual consultation processes, in terms of the traditional Green Paper and White Paper, appear to have gone by the board, although the Prime Minister has indicated she would like to restore that approach. When there are consultations, often the Government's own best practice guidelines around timescales for consultation, analysis and so on are breached, and obviously there are no penalties as a consequence.

Lord MacLennan of Rogart: Would you wish to structure the publication of the evidence that has been obtained by the Government?

Dr Fox: When you say "structure", what do you mean?

Lord MacLennan of Rogart: Would you make it a requirement?

Dr Fox: Unless there are very clear reasons why it ought not to be or cannot be published, for example if there are security issues and so on—I have reservations in relation to commercial confidentiality, because often that is applied as a reason for not publishing things—if the Government are bringing forward a policy and proposing legislation and basing it on an evidence base it has collected, they ought to be required to subject that evidence base to public scrutiny. Simply providing a footnote saying, "This was where we got our evidence from", which none of us can access, is not good enough.

Lord MacGregor of Pulham Market: I think you said that huge parts of Bills are passed and never used. Can you provide us with examples, not now?

Dr Fox: I can. I know that a huge part of an education Act in a previous Parliament was not implemented or not brought forward by commencement orders. I believe Lord Norton collects commencement order information through PQs regularly.

Lord Norton of Louth: Various questions have been put down about all the measures that have not been commenced, and it is a rather substantial list.

Lord Beith: Is it not the task of Select Committees to question Ministers and civil servants as to whether a policy is evidence based, and this applies to legislation as much as to policy in general?

Sir Richard Mottram: Yes. Obviously, this is a much broader issue. Departments invest quite a lot of money in research. Should the assumption be that that research will be published? What are the guidelines that operate on, for example, expert committees and so on? There have been controversies around this, which are very familiar to those round the table, but the general principle should be that this information should be made available. The reason why it is not made



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available, or people try not to make it available, is that, funnily enough, it is embarrassing; it does not actually support the policy.

When you come to some of the later questions about the public, they are paying for this stuff. When I was a Permanent Secretary, my general principle was that—leaving aside security, which is a narrow point, and commercial confidentiality, which is often abused—the information generated through this process should be published. If you look at, say, the Department for Work and Pensions, they published tons of research about the areas in which they were engaged, some of which was, to be honest, quite embarrassing for us, in that it suggested our policies did not necessarily work.

The Chairman: I think Lord MacGregor's question has been covered to a large extent.

Q6 **Lord MacGregor of Pulham Market:** I think it is really a matter of pulling together the threads. What changes would you make to the development and drafting process to improve the quality of legislation introduced in Parliament?

Sir Richard Mottram: I would introduce the process that we, Ruth and others, including a Committee of the House of Commons, recommended, namely there should be a whole process of more discipline on both the Government and Parliament. It is in our paper, and I think it reflects the report of the Select Committee of the House of Commons. It is very interesting that both the Government and Parliament did not want to go down that path, but that would be a simple, straightforward step that would improve discipline inside government and Parliament. It is very interesting that neither party wanted to do it.

In the case of government, they said it was not necessary. In that case, why not pilot it and see whether it is or is not necessary? If it is not necessary, you would still have an interesting question about whether it was not necessary because you had at last injected the discipline, but at least you would be there. I have no idea why Parliament did not pursue the recommendation of its own Select Committee in this area.

Dr Fox: We recommended the same. Our approach is a legislative standards committee, coupled with something akin to a legislative standards document, not dissimilar to an impact assessment, which would require Ministers to explain and confirm why they are bringing forward this in legislative terms rather than by some other mechanism; that they have checked there are no other criminal powers on the statute book that could be utilised so you are not creating duplicative criminal powers, which has been a problem; and that more preparation is required in terms of consultation. It would require the Minister of the day formally to confirm to Parliament that that process had been gone through.

I am not suggesting for a moment that it will be a panacea, but even if it was done only on a trial basis—that might be the best we could hope



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for—it would at least make people in government stop and think and confirm it. Then it would be for the Committee to question Ministers if it did not feel that the information that had been provided was adequate, or, if Ministers were saying, “We have an exception here for political reasons. This is why we need to proceed; we cannot meet these standards”, the Committee could reach a view on that. That might not stop the Bill going forward; the onus might still be on the Government to proceed, but at least there would have been a discussion and Ministers would have been held to account for that need to step away from standard practice.

Lord Morgan: It is very fascinating. It seems to me that much of the discussion would fit naturally into a model of single-party government. We had a coalition in 2010 where the policy-making ideas and processes were not merely distinct but in some cases—for example, in Europe and that particular Government—opposed to each other. Does that make the process of legislation you have described, where incidentally the Government did not have a manifesto because a coalition was not anticipated, more difficult?

Sir Richard Mottram: Potentially, it does make it more difficult, and it has a set of benefits. There was a clear framework for the coalition’s programme. I have forgotten what it was called technically. It was put together in a rush for a mixture of reasons, many of them good. It was put together without advice and support from civil servants, for a mixture of reasons, some of which were good but some of which perhaps turned out to be not so good. Therefore, you ended up with a programme, which had been agreed, and a mechanism for driving it forward, which I think worked quite well. I do not think there is any evidence that the coalition’s legislative programme was, as a whole, more shambolic than some of its predecessors.

The plus point of the coalition is that I think there was a lot more discipline inside the Government, as we would see of benefit, in relation to Cabinet Committees working in a highly structured way and decisions being taken in a proper way. That would be the plus. The issue would be, “Did we, for good reason, go too fast with the programme? Did it need to be worked out more?” Perhaps the example I gave earlier might be one where the coalition itself tried to skate over fundamental differences, produced a dog’s breakfast and then legislated on it.

Dr Fox: One advantage that perhaps arose out of it, in comparison with prior Labour Governments, was ministerial tourism and reshuffles. The reach for a Bill by a new Minister was arguably less of a pressure because Ministers stayed in post for longer. That was arguably a good thing. There was an issue about how, with the coalition, you could see the way in which the legislative programme developed. You always get a significant output at the beginning because Governments want to make their mark, but it was very clear towards the end of the Parliament that it ran out of steam because of the differences, and there were great swathes of time



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when no legislation was going through, despite the fact that earlier upstream you had had a lot of big pieces of legislation going through, in some instances with limited scrutiny.

Lord Beith: That was because the House of Lords reform was dropped from the programme.

Dr Fox: Yes. There is an issue about how to manage time across the Parliament. With a fixed-term Parliament that should be easier and more manageable, but for all the political reasons and the sessional cut-off the system we have makes that difficult.

Q7 **Baroness Dean of Thornton-le-Fylde:** Reading as many of the papers as I can—your submission is very straightforward and easy to read—there is very little reference to the potential support and impact of new technology. With the demise of Green Papers and the help that that brought, referring to the earlier question about the publication of research, in your considerations—because it is not there in the written submission—have you had any thoughts about how technology could help, for instance, in the drafting process to begin with, and the subsequent public consultation process that takes place?

Sir Richard Mottram: In the submission of the Better Government Initiative we did not get into this because we were basically talking about what we have already set out for the Committee about injecting more discipline. The underlying assumption in what we said—this bears on the point Ruth made about how government now makes policy—is that it is all done internally in government, obviously relying on digital technology and so on, which has both benefits and disbenefits of a kind that are very familiar to all of us.

On the public consultation process, there are issues for departments and Parliament about how far they are at the leading edge of using digital technology to communicate with the public, and that raises a whole set of very interesting issues, which we did not discuss, about how the thing called “the public” responds to consultation, because the thing called “the public” is a number of different sorts of publics and the process of consultation is open to manipulation of various kinds, which I agree we did not touch on. This is fundamental to how Parliament thinks about how it will work in future, and—I do not know whether we will come to it later—the way in which the whole legislative process is framed, the language used, how it is introduced and so forth. These seem to be charming in themselves but quite out of kilter with the way in which the mass of the population now conduct their lives and think about things. So, there might be an issue there about whether the whole process is one that people will comprehend.

Dr Fox: The House of Commons has piloted a Public Reading Stage with mixed effects. Some of the Bills were arguably small and very technical, and attracted interest from lawyers. When we talk about the public, whom do we want to engage? The issue is one of audiences. If you



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present a Bill in draft form and expect ordinary citizens to engage with that, given the way in which we draft legislation, its technical nature, the way in which it cross-references to other legislation and so on, it is very difficult for ordinary citizens without a legal background to understand and engage with it. In a sense, it would have to be rewritten in plain English to get to that.

I would like to highlight one matter, which I would be happy at a later date to demonstrate to any Committee members who are interested. We are involved in a research and technology development project with colleagues from Southampton University, the Open University in the UK, Stockholm University, the Leibniz Institute in Germany, an NGO in Brussels and the University of Koblenz. It is funded by the European Commission and is looking at how digital tools could be utilised and developed to support the consultation and scrutiny process both within government departments and Parliament.

To give just a couple of examples, if you get a huge number of responses to consultation, very often close to the deadline, for a parliamentary committee it is a huge burden on the clerks to analyse all that in a rigorous way in a very tight timescale, which is often a matter of days. The question is: can that be done effectively and rigorously when all you have is basically a manual eye-balling of the information and you are trawling through it? There are digital tools that would allow for text analysis, structuring and ordering of information to help make that process quicker and more accessible, particularly in a policy area with which clerks in a new Committee might not be familiar.

The second example is social media conversation sentiment analysis. There is a huge potential for that, but at the moment most of the sentiment tools give you a positive or negative interpretation of the conversation. Tools that have been developed at the Open University would allow you to dig down into more detail about why discussion on a policy issue is positive or negative. There is also linked open data. For example, Committees always want to reach beyond the usual suspects—people like us—to engage broader organisations and citizens in consultation processes, but, as we know, that is quite difficult to do. Through linked open data tools, it may be possible to do that much more effectively and quickly in the future. There are also things such as policy simulation models. Tools for that are a developing area on which colleagues at Stockholm University are working.

We have some tools in prototype form that we think will help. We are about to engage with staff of both Houses and government departments in user-testing some of that over the next few weeks. If perhaps the clerks want a demonstration of that, I would be happy to bring in my laptop and show them what we have.

The Chairman: Thank you.

Q8 **Lord Norton of Louth:** I know that a particular interest of the Hansard



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Society—I declare an interest as a member of the advisory council of the society—is the relationship between Parliament and the public. You have just indicated that technology might be a means by which the public and stakeholders gain a greater awareness of the process and what is going on, but that by itself would not necessarily produce engagement, particularly coming back to Sir Richard’s earlier point about the way we do legislation, because you have to have a prior understanding of what is going on to be involved in the process.

What are the impediments to public engagement and stakeholders getting involved? Is it process? Is it the timing of the process? You mentioned that Green Papers and White Papers, which went out of fashion, were a means by which one could get some input fairly early on. What is the impediment at the moment? What should we be addressing, apart from technologies as a means of engagement? What else would assist?

Sir Richard Mottram: Green Papers and White Papers may have gone out of fashion, but they may be making a comeback. I think it is a jolly important thing that they do make a comeback, and that brings in the point we touched on earlier. Ideally, you would have a process whereby Green Papers and White Papers were looked at by Select Committees, which in turn could advise and so on. Therefore, we need to think about the process through which Select Committees also engage with the public. The ones I deal with are also thinking about it. Do they have effective means of communication when they are going about their evidence, and how do they get round the problem of the usual suspects—people like us? I have no magic bullet for this.

The Chairman: Dr Fox, do you have any magic bullet?

Dr Fox: I am afraid not. Clearly, time in processes is a problem if you are talking about ordinary citizens and small organisations. Take the Hansard Society as an example. We will be asked by a Select Committee of either House on anything remotely to do with constitutional or parliamentary issues. If we get five or six requests at very short notice to provide evidence, that is a significant drawdown on our limited resources. If you take a community group, for example somewhere outside London, that is asked to provide a submission to a Committee, it has to be in a particular format, which I think can be inhibiting. It is very often on quite a limited timescale, say five or six weeks. Even 12 weeks for some organisations will be a struggle if they are quite small scale and they want to amass evidence to support their arguments, and you want to get anything beyond opinion.

I think the process is intimidating if you are not used to the committee environment and you are asked to come to Parliament and give evidence. With the best will in the world, this is not a normal experience for most people. People are motivated by issues they care about or that they are affected by. They are not going to engage with a legal text, so it is a question of the format in which the information is presented and the way



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in which you reach out. If Parliament wanted to advertise its Select Committee consultations or seek evidence, things should be going up in GP surgeries, the post office and supermarket—the places where people are. You should not expect people to come to you. That does not work. You have to get to where the public are and where they live their everyday life. We have argued that a Committee of the House could experiment with working with institutions in the communities to get information out there more than they do. Outreach teams for both Houses are very effective, but an awful lot more could be done.

Lord Norton of Louth: That involves a time aspect and quickly wanting to get legislation through. How do you get the information out there? This comes back perhaps to Sir Richard's point about the value of reverting to Green and White Papers and getting input earlier. There has been experimentation with the use of social media by Select Committees. You mentioned the Public Reading Stage experiment.

Dr Fox: On new technology—I cannot imagine it in these rooms—for example, it is possible to have video-conferencing facilities, Skype, Zoom or whatever, which are the ways in which young people particularly communicate these days. In the context of restoration and renewal, both

The Chairman: Let us move on to a battlefield that is familiar to this Committee.

Q9

Lord Judge: Dr Fox, before I start, I want to record how valuable I have found so many of the things you have written on this subject. My question is fairly simple. Where, if anywhere, do we find a clear identification of the principles that identify when Parliament should or should not delegate power to the Government?

Dr Fox: I would say nowhere in terms of clear principles.

Lord Judge: Sir Richard, do you take a different view?

Sir Richard Mottram: I do not.

Lord Judge: In that case, should there be and how should we achieve it?

Dr Fox: I think there should be. However, I do not underestimate the difficulty of getting there. Certainly, in the book we produced, we tried to move in that direction and struggled with the people we were engaging with, both in government and Parliament, to get any kind of consensus on what those principles would be. Therefore, I do not underestimate the difficulty of it.

It is easy to argue, on the one hand, about detail and administrative convenience versus policy principle, but, on the other hand, you can see where Bills, which require a huge amount of technical detail, arguably could and perhaps should be delegated, and where for readability purposes it would be best to put them through the delegated process. For political reasons, they may well be things that Members want to debate



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and discuss and, therefore, perhaps ought to be on the face of the Bill. We have struggled with this question.

There may also be a case that in certain areas of legislation it is easier to reach a view. Certainly, in our discussions, anything that involved algebra was given as an example of the defining of the line between primary and secondary, if it had a number, but, as we saw in the debate on tax credits, that is not an easy line to tread. If it is anything that involves moving something on a form, is that something Members really want to debate? One parliamentary counsel put to me, "Is this something that would justify a stand-part debate by Members? Can they use that as a justification to decide on which side of the line it should fall?" At the moment, partly because of the problem of finding a definition that would work, the reality is that for most parliamentary counsel and those working on Bill teams it is a matter of gut instinct.

Lord Judge: In that case, if we do not have principles, is not the inevitable consequence that Parliament will delegate more and more powers to government?

Dr Fox: I do not think it is an inevitable consequence, because they can choose not to.

Lord Judge: How is it to be avoided?

Dr Fox: Part of it is the House taking a view on powers, perhaps not a line of principle but what it views as acceptable and unacceptable elements of delegation, and utilising the body of work that has been done by the Delegated Powers Committee to inform that process. At the moment, part of the problem with where we are is that so much of the horse-trading is around the ratcheting-up of the scrutiny procedure to constrain the power. That is where the focus of debate is, rather than on whether the House is content that the powers should be there in the first place. I accept there is a problem. How you decide that without resort to foundational principles is very difficult.

Lord Judge: Does the House of Commons effectively scrutinise the delegation of power?

Dr Fox: Not at all.

Lord Judge: Does the House of Lords?

Sir Richard Mottram: More.

Dr Fox: Yes—much better than the House of Commons.

Lord Judge: Has it been very much better?

Dr Fox: But not perfect.

The Chairman: We had to drag it out of you, but we got there.



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Dr Fox: We have made very clear in our work that the House of Commons procedures are utterly inadequate. In part, it is also about Members' resources in terms of time to devote to it and the very technical nature of it. This House has responded over the years in reforming some aspects of its scrutiny procedures for delegated legislation; the Commons has not. Its procedures have remained largely as was. Delegated legislation committees are wholly inadequate. For an MP, getting on a delegated legislation committee is regarded as a punishment. They are actively encouraged by Whips to turn up and do their constituency correspondence.

Lord MacGregor of Pulham Market: It is a question of time.

Dr Fox: Absolutely.

Q10 **Lord Pannick:** It is good to hear that we are doing a better job in this respect than the other place. How could we improve our procedures?

Dr Fox: I would take a step back. Part of the difficulty in getting to grips with it is taking a single-House approach to it. I would much rather have a bicameral approach in which there is recognition of complementary scrutiny procedures and tackle it from both sides.

If you wanted to look simply at the House of Lords, although it would not necessarily improve the House of Lords procedures but would improve the legislative process overall, it would be beneficial if the point at which a Bill was introduced was the point at which the Delegated Powers Committee considered the Bill and the powers within it. If it is a Bill that starts in the Commons, the Commons does not have access to that information and commentary until much later in the process, whereas that is clearly beneficial to the debate in the Lords. That is not to say MPs will engage much with it and take much notice of it, but some will. That would be useful, although I recognise that would cause some resource issues for the House. I think that would be a huge help to the process of debate and understanding powers at the outset.

Sir Richard Mottram: I make one point that goes back to one of the questions Lord Judge asked. One interesting thing about the way government works is that it is a sort of doctrine-free zone. Both Ministers and civil servants, compared with other professions in society, even other bits of government, such as the military, the police or whatever, are not too strong on doctrine. Accepting all the points that Ruth made, which are obviously right, about the difficulty of framing a perfect way of thinking about this problem, it is extraordinary that parliamentary counsel and government lawyers do not have a set of doctrine about what it is they are trying to do when thinking about how legislation should be framed in this way.

That would be an interesting question to ask the Government. Do they think it is odd, or do they have such a doctrine that perhaps they have not quite got round to sharing with Parliament? I can think of lots of



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other examples, which I will not give now, where government is a doctrine-free zone, partly because the Civil Service and Ministers quite like to operate like that. But is it good enough? You would expect there to be a set of doctrine and standards against which Ministers could absolutely explain why in a particular case they decided to do X rather than Y, and civil servants and parliamentary counsel would be expected on Bill teams to apply all of this consistently. Have I missed something here?

Dr Fox: There is a minimum amount of guidance in the Cabinet Office *Guide to Making Legislation*. There are some criteria.

Sir Richard Mottram: Are they good enough?

Dr Fox: It refers to matters that may need adjusting more often than seems sensible; rules which may be better made after some time experience rather than at the start; precedent and powers may be uncontroversial; transitional and technical matters, which would go to things like algebra and matters that change over time; and the draftsman's test. Will it work technically so the Bill and powers achieve what you want?

Sir Richard Mottram: Is that enough?

Baroness Taylor of Bolton: If all those are covered and properly applied, we would not have the problems that we have.

Sir Richard Mottram: It might be enough.

Lord Beith: It is broad.

Sir Richard Mottram: It is too broad perhaps. Here is the starting point. An interesting question is why it is in this slightly thin, broad form when it is a fundamental part of what government is doing.

Q11 **Lord Judge:** What is the principle that leads us to say that in relation to delegated legislation we either take the whole or lose the whole, so that, if there are 67 provisions that everybody thinks are admirable and one that everybody thinks is a complete disaster, we either lose the 67 we want or we have to put up with the 68? What is the reasoning behind that? What is the process? It is a parliamentary process, but why does this happen, and what should we do about it? I am genuinely seeking information.

Dr Fox: I am not sure I follow. Do you mean that there are 67 powers within a Bill that you are content with?

Lord Judge: No. We are now in the delegated legislation.

Dr Fox: I am sorry.

Sir Richard Mottram: The only thing you can do is strike it all down.



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Dr Fox: It is the amendment issue. The argument has always been that, if you have the power of amendment, you undermine the principle of delegation in the first place, and, politically, it has always been resisted on the grounds that it would risk reopening the prospect of relitigating the earlier primary legislative stage debate about what you are doing. There is a good argument for having an indicative amendment approach. You have a delaying instance where you say, "We are not rejecting it, but we want you to come back taking into account these concerns". Therefore, it is not a formal amendment process but a conditional amendment indicator.

I think there is a danger. This House has tried to adopt that third-way approach to SIs. That was tested in the debate on tax credits. The tax credit SI was withdrawn. Whether or not the delay has any real standing as far as the Government are concerned has not been tested. There was an earlier SI when a delaying motion was tabled in relation to a welfare regulation. The Government indicated they would come back to the House and consult. We do not think they have. We are trying to track this at the moment, but we think they have gone ahead and implemented it. That would suggest that the Government do not accept the standing of a third way of a delaying element to an instrument. We will have to see.

The Chairman: I think now is the time to move on. We will come back to you, Lord Beith, under the next question on Brexit, which Lord Pannick will ask.

Q12 **Lord Pannick:** A substantial proportion of our legislation, primary and secondary, derives from Brussels. I, and I am sure the Committee, would be very interested to hear your views on what will be the impact on the legislative process of this country leaving the EU.

Sir Richard Mottram: Please answer in five minutes, in one sentence. I will ask Ruth to respond to this.

Dr Fox: It is what they call a hospital pass. The Government have indicated that there will be a great repeal Bill in the Queen's Speech—it will not be called a great repeal Bill because, apparently, you cannot call something "great" in the short title—which will re-enact the European legislation so that we do not fall over a cliff edge, and there is a question mark about what then. There will have to be a review process, as the Government have indicated, to repeal, amend or improve the legislation, but it is not clear what form that review process will take and how it will be done. It is inconceivable to me that, given the pressure of dealing with statutory instruments under existing procedures, the House of Commons in particular, but also this House, will be able to deal with a significant review of that much legislation, even over an extended period of time. I think that with the procedures and time constraints it will collapse under it. I do not think we have heard anything from the Government yet about how they might resolve that.



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As to options to think about, first, there will be a whole debate about the great reform Bill, which will be a skeleton Bill, seeking no doubt Henry VIII powers. There will be a whole debate about whether there should be a strengthened scrutiny procedure to constrain that and what it might look like. We get into a debate, therefore, about adding further complexity to the process and scrutiny of these things. But there is the issue of whether the review process is done purely by Parliament, or does Parliament need help? What might be the options for external support in terms of technical assistance?

For example, the Social Security Advisory Committee advises on welfare legislation. We had a Banking Liaison Panel that advised on Bank of England instruments in terms of the legislation after the financial crisis. They report to government—not to Parliament. There is a good case, depending on how this goes, for Parliament to think about whether it wants a mechanism or mechanisms for providing it with expert advice and capacity to do this work, or at least to support it in doing some of that work, perhaps modelled on the way the NAO supports the Public Accounts Committee, looking possibly at the Law Commission and what its role will be. However, its resources are constrained, so, unless there is to be an increase in resourcing, it will not be able to do some of this work. There are some very significant challenges ahead.

Sir Richard Mottram: It is almost worthy of the Civil Service to say there are some significant challenges ahead. I would have thought the answer to this question is that either the process of changing the legal framework for most of the activities of government will be a very slow one or there is a high risk that the process of parliamentary scrutiny will be massively abused. I agree with everything Ruth said about thinking about ways in which you can underpin Parliament in providing better scrutiny, but there must be a massive risk that the Government will try to come forward with a whole series of changes that impact very directly on people and all aspects of their lives, cloaked under a rather more generalised formulation. This must be the biggest issue that Parliament has faced for a very long time.

Lord Pannick: Do you think the Civil Service is adequately resourced, particularly in those areas? In many of them, such as telecommunications, competition and aspects of taxation such as VAT, our law is almost exclusively based on EU law. Therefore, for some time there has been no domestic legislation in this area. Are the resources there to tackle these topics?

Sir Richard Mottram: We have had a capacity inside the Civil Service, leaving aside negotiating trade deals and so on, which we were not doing, to think about and negotiate with a process through which all the Brussels-based legislation came about, and how it would then be expressed in British law. That capability exists. It is more a question of thinking about the pace at which you can possibly change all of that. How much of it are you going to change, and over what sequence? That is a



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massive sequencing issue. No doubt it has been thought about, but the parliamentary scrutiny bit is crucial.

- Q13 **Lord Beith:** I declare an interest as someone who has participated in Better Government Initiative conferences in the past, although for obvious chronological reasons we did not discuss this. I have also been involved in the Hansard Society. Surely, given the impossibility of proceeding on the basis of one-and-a-half-hour debates on the basis of take it or leave it for statutory instruments, in all the areas of law covered currently by European law, as you said, there is a sequencing issue. You would be saying to a Minister, with words stronger than, "This is challenging", if he told you, "We are going to review every aspect of two-thirds of our law that covers this area over the next Session of Parliament", that it would be a ludicrous thing to do. Even if just a little of it is attempted, does it not make it very difficult to have much else of a legislative programme? Would you have to have a Queen's Speech that said, "Hardly any other measures will be laid before you"?

Sir Richard Mottram: "All the measures laid before you will be measures to change a framework that we have inherited and have just repealed", although technically we have not repealed it. I would have thought that was right. The Government will have a set of immediate priorities that are politically salient, and presumably they will be about controlling immigration and so on. Then you would, surely, just put off whole swathes of the rest. I am speaking in a politics-free zone, so I will just finish my sentence. You would put off dealing with all those things that do not need to be changed to do with the environment and aspects of agricultural policy—well, you would have to deal with agricultural policy and fisheries. I am already generating a list, and then you have all the politics of the people who thought that through this big change they would be able to change everything we have legislated in the past 40 years. It is an absolutely massive issue.

I am not a civil servant any more, but the Civil Service will be thinking about how it can sequence it so it can get the Government's priorities and put to one side, because it does like to prioritise, all those second-order things that can wait. In my experience, if you are a Minister in one of those places dealing with second-order issues, you do not necessarily see them like that. If you were a passionate Brexiteer and you are now in charge of one of these departments, are you going to be told by civil servants, "Sorry, there is a sequencing issue here, and we are just going to stay with what we have, because people are generally comfortable with it"?

- Q14 **Lord Brennan:** Under the Constitutional Reform Act Parliament has the ultimate decision in ratifying treaties. First, if we leave the European Union, at the very least there will be a transitional treaty arrangement made that will require parliamentary supervision and agreement. Secondly, if we have to change WTO arrangements, that may involve quasi-legislative changes to deal with those commitments. Thirdly, if we enter into free trade agreements with different and new countries, that



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will definitely require Parliament to approve them. All of that is going to happen. You can sequence and push back the social and political stuff, but the economic stuff will happen.

Do you agree with the idea that there should be a bespoke Brexit treaty and legislation team, involving lawyers, economists, diplomats, experts and parliamentary draftsmen, starting now to prepare for this? This is following up Lord Pannick's point about the technicalities of everything. You can negotiate the content of a tariff arrangement, but its ultimate effectiveness depends upon whether you change the tariff legal system around the percentage or price you have agreed. At the moment—I have checked it—the only unit in government dealing with treaties, if it still exists, is the Foreign Office treaty section. There is no other unit dealing with it.

What do you think of the idea? If it were put into practice, would it not become limited by your suggestion about Parliament having reports made to it by expert panels, and your sequencing points, Sir Richard? These three things—Europe, WTO and new free trade agreements—all interlock and require sequencing, and, without proper management, this could be a disaster.

Sir Richard Mottram: What you say is very interesting. I am now at the limits of my knowledge, to be honest with you. My guess would be that the FCO's treaty section is the custodian of all the treaties the Government have entered into. If you think about the government machine as a whole, it has lots of people in it who have a great deal of experience negotiating internationally in their own little bits. For instance, when I was the Permanent Secretary of the Department of the Environment, Transport and the Regions, or whatever it was called—it kept changing its title—we were the experts; we had the biggest experts in international environmental law sitting in our department, and we were the people capable of doing all that stuff. In so far as there were treaties and so on, we always worked with the Foreign Office in a very amicable and constructive way.

My guess would be, absolutely, that the whole government machine is currently being addressed—but I am not the person to answer this question—precisely to meet the point you make. Individual departments will be gearing up to think about the political sequence in which their Ministers are interested. You can already see some of the tensions within government about this. How might we bring all those things about? You absolutely need to think about the legal aspects of this, but first you have to formulate our negotiating position and then no doubt the Government will turn to what would be the sequencing. It is just the politics of it that is so interesting. I think you can organise the machine, although it will probably require significantly more resource. You will need a lot more civil servants and lawyers. Every legal firm in London now is encouraging government to think how marvellous it would be to employ them, and they will have to be employed. I can see how you would organise that bureaucratically.



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The interesting question would be the much more political one: what does it mean if we leave in 2019, and what will the Government put into the Queen's Speech that year? Is there a great risk that they will essentially want to be given a lot of free choice as to the changes they make?

What is interesting about the European Union is that it impacts directly on the day-to-day lives of the population in a way that lots of other government policies do not always do.

Dr Fox: I want to throw the management of this issue back on Parliament, which is also my area. What is the mechanism in this place, in both Houses, for figuring out a route to deal with this, when today, staring us in the face, we know that the Commons procedures are utterly inadequate? Even though the Lords is better, both Houses will struggle to manage the volume. There is the question of external expertise. Has either House enough lawyers as a resource to support them in this process? What is the mechanism by which Parliament is going to get its act together in time to put in place a system to deal with it? It is not clear to me at the moment how that could be done. The Procedure Committees of both Houses going off to do their own inquiries separately will make some progress, but that will not be an ideal solution. We have lots of Select Committees looking at Brexit with a mind-boggling number of inquiries, but nobody is getting to grips with the management and procedural issues that are already problematic under existing legislative programmes; so they will certainly not be able to cope under a much greater burden. It is certainly not the time to be reducing the number of MPs in the House of Commons. That is a bigger question about reducing the capacity of the Members.

The Chairman: Let us not get drawn into that. We will have a very short supplementary from Lord Brennan.

Lord Brennan: It will be very short. If we have to come to an agreement by 2019 without an agreement under Article 50 to postpone it, there is every incentive on the side of the European Union to wait to the end to come up with final positions, whereas we want to have it earlier. If we do not do the kind of thing I was suggesting, all this will collide in a very unhappy way.

Sir Richard Mottram: Unfortunately, having spent 39 years or so in the Civil Service, I tend to have a capacity to see the downside in things. I would have thought there was a very strong and high probability that it will all collide in a very difficult way for us. The idea that in a two-year period we can successfully establish a new framework with the European Union, where every country can veto that framework and no doubt is looking, in a very excited way, at its benefit from doing us down in various ways, is a mind-bogglingly difficult thing to negotiate. I have not yet quite seen, although this is not an area of my expertise, how we can get from the position we are in now to a position where we can successfully trade with lots and lots of countries in circumstances where



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we are not permitted to strike any trade deals with any country, because that is a competence of the European Union of which we are a member.

There are no doubt lots of people cleverer than me in the Brexit department and elsewhere who have already figured this out. Parliament is busily setting up frameworks, such as the new Select Committee on Brexit and so on, which are all very constructive things. I do not quite know what this House is doing, but no doubt you will think about the same sorts of things.

The fundamental issue is: when it comes to the crunch, is Parliament going to be willing to give the Government the power to change lots and lots of things that really do need proper scrutiny? Therefore, the choice for Parliament is either not to live up to its obligations, in my view, or put a big road block in the way of lots and lots of change happening very quickly following our exit from the European Union.

The Chairman: I am very conscious that we are overshooting our time, having overdone it with you, but Lord Hunt has been waiting patiently to ask one final question.

Q15 **Lord Hunt of Wirral:** To draw back from the focus on Brexit for a moment to look at parliamentary involvement generally, to what extent is Parliament or are parliamentarians involved in the development of legislation before it is introduced in Parliament, both formally and informally?

Dr Fox: It will differ from case to case, but you can see Members working through things like all-party groups developing policy proposals that sometimes are picked up by government departments. Select Committees are a key mechanism where that is picked up. An interesting gap in the process is the extent to which there are effective mechanisms to pick up the experience of individual Members as constituency representatives early enough and feed that into the policy process, rather than as committee members on thematic departmental committees and so on.

Lord Hunt of Wirral: Before Sir Richard replies, I sense that we are within grasp of a disciplined process that could be introduced: consultation papers, Green Papers, White Papers, draft Bills and Bills. With a five-year Parliament it should at last be possible to measure that. I keep meeting Ministers who say, "We now have a Bill in the fourth Session". There is adequate time, so how can we take advantage of that?

Sir Richard Mottram: Without going back over everything we have discussed, we can take advantage of that by pressing now for Parliament and the Government to agree a more disciplined process, with all the things that we have recommended, and that would definitely have benefits for the quality of legislation. We can exploit the fact that we have five-year Parliaments; we can exploit different rules about the Opposition having the capacity, in thinking about the next Parliament, to draw on the



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resources of government and so on. We could change the system, make it more disciplined and produce a better result.

Dr Fox: If you are talking about greater streamlining of Bills and Bills in the third and fourth Sessions, you have the opportunity to consider pre-legislative scrutiny, which would have benefits at a later date. That does appear to have dried up.

The Chairman: Thank you very much. I am so glad that from the windswept high peaks of Brexit and delegated legislation we have managed to get down to the sunlit uplands of pre-legislative scrutiny. But, seriously, thank you both very much indeed. Both of you have been unsparing in your very helpful answers and have given us a huge amount of material to chew over and think about. It will undoubtedly influence the direction in which we steer our inquiry. Thank you again for being with us for so long, as well as the forthcoming answers you have given us. Now we say goodbye to you.

Sir Richard Mottram: Thank you, Chairman.