



Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 7 December 2016

10.25 am

Watch the meeting

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

Evidence Session No. 5

Heard in Public

Questions 76 - 88

Witnesses

[I](#): The Rt Hon Steve Webb, former MP and Minister of State for Pensions; The Rt Hon Professor Paul Burstow, former MP and Minister of State for Health, and Chair of the Joint Committee on the Draft Care and Support Bill; and Martin Hoskins, former Specialist Adviser to the Joint Committees on the Draft Investigatory Powers Bill and the Draft Communications Data Bill.

Examination of witnesses

The Rt Hon Steve Webb, The Rt Hon Professor Paul Burstow and Martin Hoskins.

Q76 The Chairman: Good morning. I welcome to the Committee Mr Hoskins, Mr Webb and Professor Burstow. You have all had varied experience of this area of our inquiry and we look forward to hearing what you have to say. As I mentioned to you outside, we have up to an hour if we need it. Without more ado, I will fire off the first question. To quote the Office of the Parliamentary Counsel, it describes "good law" as law that is "necessary; clear; coherent; effective; and accessible". You may have heard that already. What is your view, from your experience, of the extent to which that claim is justified in the context of legislation published in draft or under pre-legislative scrutiny at that stage of its process? Would you like to start, Mr Hoskins?

Martin Hoskins: Thank you, Lord Chairman. I was the specialist adviser for two Committees. The first Committee was on the Draft Communications Data Bill, which was a small 33-clause piece of legislation and was deliberately vague. It was deliberately difficult to understand, because the whole point was that the Home Office was trying to acquire powers to fill a communications capability gap, which it assessed at 25%, but it would not tell anybody what the gap was. It costed the legislation at £1.8 billion but could not come up with a proper analysis of where those costs came from. It claimed to have consulted the relevant stakeholders, but when the relevant stakeholders appeared before the Committee it became very clear that there had not been much consultation.

That Bill did not go far, but the proposals in the Bill were incorporated in another piece of legislation, the Investigatory Powers Bill, which received Royal Assent last week. That was certainly much better. It was much more coherent and much more necessary, although there were parts where it was still very vague. We can see that from the way the Bill expanded in scope during its passage through Parliament.

The Chairman: Was it the intention of the Home Office at that time to fill in the gaps through delegated legislation?

Martin Hoskins: Yes, it was. One of the criticisms by the Committee was that they wanted to see more of the delegated legislation in draft before them, in order that they could appreciate the totality of the measure. When the draft Bill was formally presented to Parliament, a lot of the statutory instruments were available to Parliament. To that extent, the scrutiny Committee did an extremely good job in making sure that there was a much fuller package available to Parliament when the stages started.

Steve Webb: It varies enormously, not surprisingly. One key criterion is whether it is the start or the end of the five-year Parliament. There is a problem on day one, particularly when there is a change of government. A new Government come in and they have, as it were, campaigned in

poetry and now have to govern in prose. They have to have something for the House of Commons and the House of Lords to do within a few weeks of being elected.

In 1997, when both Paul and I were newly elected, the Government had changed and Labour's first social security Bill was patently obviously the one the Conservatives had been about to bring in. If there is stuff on the books that you can just bring forward and has been thought about, that is fine; but if you are doing something completely new, doing it quickly and early is a real challenge. Likewise, at the end of the Parliament: coming up to 2015, I knew that the odds of me still being a Minister post-2015 were negligible, so I wanted to get stuff done. Sometimes that meant that it was more broad brush and more enabling with less detail. We just wanted to get the powers through.

The best legislation is often in the middle of a Parliament, paradoxically. Even if it has been thought about a lot in opposition, there is a world of difference. To take universal credit as an example, the Centre for Social Justice had spent years writing reports and clever people were thinking clever thoughts, but faced with the brutality of implementing a detailed benefit reform, there was still a huge amount of work that had to be done in government to write that flagship legislation. One of the reasons the programme suffered was that the policy, the legislation and the implementation were all being done at the same time, which caused real practical problems.

In short, you need to be most aware at the start and at the end. The other thing is the Treasury; everyone else has to fight for a legislative slot but the Treasury gets a guaranteed Finance Bill every year—often two. The Treasury, because of its position in government, is beyond challenge and of course does not get challenged much at this end of the building. It is probably guilty of some of the worst legislation.

Professor Paul Burstow: I certainly echo what Steve has just said. That variability is also partly contingent on the source of the legislation. I was involved in chairing the scrutiny of legislation that was the product of departmental drafting, but based on work by the Law Commission. A Committee I served on some time prior to that dealt with the mental capacity legislation, which again had come from the Law Commission. Quite a lot of the detail had been worked through, but Steve is absolutely right; parliamentary drafts, when people work them through into legislation, do not always produce something that is clear and easy to understand, or that necessarily delivers the stated intention.

Reflecting more generally on the question you are looking at, having been in Parliament for 18 years and having been through quite a lot of legislative processes as a result, very often it has seemed to me that the distinction is that in a pre-legislative scrutiny process people bring their expertise and knowledge to test ideas, whereas in Standing Committee, although Standing Committees play their part, there is necessarily a playing out of the adversarial part of our process, and sometimes that

gets in the way of deploying knowledge and expertise to scrutinise legislation.

The Chairman: I gather you had the exceptional privilege of scrutinising after you left Parliament something that you had designed as a Minister when you were in Parliament.

Professor Paul Burstow: I was still a Back-Bench Member of Parliament at that point. I was appointed as a Minister of State at the Department of Health in 2010, and was given the responsibility of taking through the outputs from the Law Commission's review of adult social care law in this country. At that point, it was the first time the legislation had been looked at in a systematic way for practically 60 years. I took the view very early in that process that I would have pre-legislative scrutiny. I had been impressed by it when I had been involved as a Member previously. I thought the measure needed that because it was unlikely that the legislation would be revisited for another long period of time. It was an important contributory part of the process.

Q77 **Lord Norton of Louth:** I want to tease out what Professor Burstow has just said about pre-legislative scrutiny. When this Committee reported in 2004 on Parliament's legislative process, it placed great emphasis on pre-legislative scrutiny. The Political and Constitutional Reform Committee in the Commons in the last Parliament drew attention to its value, and said it was "one of the best ways of ... ensuring that it meets the quality standards that Parliament and the public are entitled to expect". Do you think that is a fair description of the value of pre-legislative scrutiny?

Professor Paul Burstow: I think it is. Steve has already made a point about the particular legislation that the Government bring forward. There may be some very immediate political priorities that relate to a manifesto such that a Government, for many reasons, not least the desire to get legislation in place and implemented during the lifetime of a Parliament, may decide they do not want to add that additional stage. Reflecting on this, coming to the Committee today, it struck me that pre-legislative scrutiny has been added to our process without much thought about the other stages, and whether they should in any way change as a result of that quality input at the outset through pre-legislative scrutiny. Looking at the process end to end and considering the resource constraints in government departments is another factor.

Steve Webb: My experience of pre-legislative scrutiny as a Minister—I hesitate to say as a victim—is what became the Pensions Act 2014. Perhaps you will forgive me for giving you a slightly longer answer on this because it covers a number of your other questions as well.

We had a Green Paper; we had a White Paper; we had pre-legislative scrutiny; and we then had oral evidence at the start of the Public Bill Committee. The Bill obviously then went through its normal process. From my point of view, it added almost nothing. Instinctively and emotionally, I am really in favour of pre-legislative scrutiny. Why would you not be? I guess the argument for pre-legislative scrutiny is that it is a

point when the Government are less wedded to stuff. It is less of a climbdown; it is not a defeat and you can just have open discussion.

To be honest, by the time we got to pre-legislative scrutiny I knew exactly what I wanted to do. I might have been wrong, of course, but it was not that we had not been talking to people about it for the last three years. I had been on conference platforms, and there were consultation documents, events and all the rest of it. I have looked at the record of the people who gave oral evidence to the pre-legislative scrutiny and to the Bill Committee. There were 14 witnesses to the pre-legislative scrutiny. About three months later, seven of those 14 then walked back through the same door to give the same evidence to the Bill Committee. A further two, interestingly, sent their deputies because they thought it was a waste of time for them to come back to say the same things about the same Bill to the same people.

Lord Norton of Louth: Could that be because by the Bill stage it was repetitive?

Steve Webb: It could be. As Paul said, we have not really thought through the knock-on effects. One of your questions is about stakeholders. The oral evidence was given by trade bodies: the Association of British Insurers, the National Association of Pension Funds, the CBI, the TUC and the IoD, all of whom I saw on a regular basis. I spoke at their events and they all gave evidence at both things. When they sat down and gave pre-legislative scrutiny evidence they did not tell me anything they had not said to me 100 times, or indeed had not said repeatedly in the national media. Nobody was surprised by what they said.

When I looked at what the Committee—a Select Committee in that case—recommended on the Bill, the Bill was changed in only two respects. One was that the start date was put on the face of the Bill. Fine; but it did not change the start date. The other was that the Government's power to change the number of years you need for a pension was kept in primary and not in secondary legislation, which was a perfectly good and reasonable change. That was it. The rest of the recommendations were for more research, communications and analysis. That is all good worthy stuff, but there was nothing we had not thought of.

Martin Hoskins: My experience was slightly different. I found that the pre-legislative scrutiny was extremely useful in helping to flesh out a number of the provisions in the Bill, which was why the draft Bill started with 105 clauses, and by the time it was formally introduced in Parliament it had 233 clauses.

Steve Webb: Progress.

Martin Hoskins: A number of the witnesses were delighted to come along to the Joint Committee because they had been speaking to the Minister for a long time, and they thought that the Minister simply was not listening to their arguments. They were desperately keen to find

another audience to play out their arguments with. The pre-legislative Committee was extremely impressed with the quality of the evidence from an awful lot of people. One of the members of this Committee, Lord Judge, gave evidence. I found it an incredibly important and useful thing to do.

The Chairman: My experience, when I was in government and keen to get a Bill into the programme, was that the Home Office always took precedence. It always had a Bill on the stocks and would put into it whatever it thought appropriate once it had won the slot. It was a continuous conveyor belt. I do not want to be too rude about the Home Office, but that was my experience as a frustrated Minister.

Lord Norton of Louth: It was probably unusual for the Home Office to have a Bill that was subject to pre-legislative scrutiny. On Professor Burstow's point, in our 2004 report, our concern was to look at legislation holistically, so it was pre-legislative, legislative and post-legislative, rather than just taking one part. Focusing on the pre-legislative stage—to some extent, in different ways you have touched on the value of the exercise—what do you see as the principal benefits? Mr Webb, you said that from a Minister's point of view you were not sure it was adding much, but was there value in the fact that it was formally on the public record in a slightly different way than stakeholders had been using to put their message over previously?

Professor Paul Burstow: I had the opportunity to look at the drafting of the care legislation through two different lenses. One was the lens of being a Minister and being in a department, and the other was looking at it from the point of view of the evidence being presented to us, as Chair of a Joint Committee scrutinising the legislation. The way Steve answered perfectly exemplifies that. Those different lenses change the way you think about the legislation. The process works best in areas where there is not a very high level of political capital invested—where there is a need to do something and a need to put in place good, sensible legislation that will stand the test of time. The process puts that in place.

One of the points I want to make is that if you were to examine the process end to end, and you were to consider whether or not the outputs from pre-legislative scrutiny should necessarily materially affect the quantity of time that is taken for the remaining stages of the legislation, one of the important *quid pro quos*—it is always a frustration in scrutiny of legislation at the earlier stage—is to know what the regulations and guidance might in outline include. You could then contextualise your response to government in a way you cannot when you do not have that in advance.

Martin Hoskins: In setting out the business case for the legislation, that is incredibly helpful, not only for this Parliament but for other Parliaments as well. I am slightly involved in some work at the moment with the Telecommunications Regulatory Authority of Bahrain, looking at some of the issues that the draft Investigatory Powers Bill examined. It is

extremely useful to have a solid body of evidence from which not only this legislature but other legislatures can draw.

- Q78 **Lord MacGregor of Pulham Market:** Is there a distinction in pre-legislative scrutiny between Bills that are technical or embrace a whole load of issues that a department wants to deal with and Bills that have a political imperative?

Steve Webb: I am sure that is right. There were certainly aspects of legislation that we did that were so technical that the general public would not know anything about it. There was no great politics in it. If we changed it, nobody would scream on the front page of the tabloids that it was a U-turn, so you could be entirely relaxed about clever people saying, "Oh, you missed that" or whatever, whereas if it was a big flagship welfare reform—universal credit, for example—it had to be started early. It still is not finished, seven years on. Any change was a defeat. The Minister steering it through was absolutely high profile. I am sure it is right that both the willingness of government to engage and the added value of the process is probably greater on the less contentious stuff than the more detailed stuff. I am sure that is right.

- Q79 **Lord Beith:** Looking at the consequences of the multiple stages of scrutiny the Pensions Bill had, the impression I had from your response was that the wording of the Bill as to whether it was "good law" and "coherent; effective; and accessible" was not really affected, perhaps not even explored, and certainly not changed. Was that a miracle of parliamentary drafting or simply that so much had been done beforehand? Will it yet come back and bite us later?

Steve Webb: You are right. The Bill barely changed at all. I am not sure that the format of pre-legislative scrutiny lent itself to that kind of change. It is a bit like a Select Committee evidence session, with people in the industry or commentators giving general comments. There was very little of the "Clause 73, line 2 does not look right because" kind of thing. There was obviously written evidence that touched on that, but the format does not lend itself to that sort of thing. In our case, we had done a Green Paper and a White Paper. We had been through a lot of process and so on. What we were doing was no secret, so there was less scope for that sort of change.

Lord Beith: You talked about the same witnesses not wanting to give the same evidence to the same people. Was it the same people on the Public Bill Committee who had done the draft scrutiny?

Steve Webb: There was some overlap. Because nobody wants to be on pensions Bills, the people who were willing to serve on the Select Committee had some overlap with the Public Bill Committee. It was not complete, but there was some overlap. The heads of a couple of trade bodies came the first time, and when it was apparent that the Bill had not really changed they thought to themselves, "What is the point of me coming again? But I do not want to miss out so I will send my deputy". That is not very satisfactory.

Q80 Lord Beith: Do the three of you have experience of being able to compare scrutiny done by a Commons Select Committee and scrutiny done by a Joint Committee? On the whole, certainly when I was in the Commons, one of the objections to its being done by a Joint Committee was that it handed back power to the Whips to appoint members of the Committee, as opposed to a Commons Select Committee, to which members are elected. Was there any difference in the capacity to carry out effective scrutiny between the two types of Committee?

Martin Hoskins: I have no experience of the former, just the latter.

Professor Paul Burstow: Although I served on the Health Select Committee, at the time we did not do scrutiny in that way. The answer, I guess, is that one could reform the process so that members of those Committees are elected to those places as well. Certainly, of the two I served on, people were on the Committees primarily because of the expertise and knowledge they were going to put into the Committee. I think that was very important to the value of the process.

Where I would slightly differ from Steve—probably because of the legislation that I dealt with—is that the pre-legislative stage led to quite significant further change to the care legislation before it came to the parliamentary process after that. That is because it allowed a number of issues that had not been considered, even by the Law Commission, to be considered afresh. Again it is contingent on the motivation for legislation in the first place.

When you are taking on a reform that is not necessarily motivated by a manifesto commitment but is about improving the law, the process can be a very elegant way of improving legislation. The issue for me as a former Minister is the capacity of departments to service that process fully and then feel—I do not know whether you are seeing any officials who have been leaders of Bill teams—that they are sitting through the same thing being played out, maybe in a more dramatic way, at each of the subsequent stages. Why would they advise Ministers to consider pre-legislative scrutiny if, in the end, it is going to increase the overall volume of work without necessarily, as we heard from Steve, changing the outcome?

Lord Beith: Did either of you have moments, when taking Bills through, when you had to defend the wording as it stood and you thought, “Actually, they have a point, but we have looked at it and it really is time we got this Bill through so we will just have to wait and see whether they are right”?

Steve Webb: Very rarely. Certainly at the DWP, because pensions law is so technical and because, as part of the cuts, we were sacking lots of people, including lawyers—astonishingly, it got to the point where we did not have enough lawyers, which is a sentence I never thought I would say—we drew heavily on the profession. There is something called the Association of Pension Lawyers, and we often ran drafts by them and consulted them. Basically, we got freebies.

Your average opposition MP—of course both Paul and I have been opposition MPs as well as government MPs—does not have a clue about the wording of legislation; they literally do not have a clue. In our case, because we had embraced the people who understand the technical details, we had already had that input. There was nothing that a government or opposition MP could say to us about the wording of Clause 72 that we had not already run by a pensions barrister or somebody.

Martin Hoskins: There were a few occasions when giving evidence to the Draft Investigatory Powers Bill Committee that the Minister found it difficult to understand the wording that had been proposed. There was a definition of “data” which included data which was “not data”. That even confused the Home Secretary when she was giving evidence. It is fair to assume that the Bill is as good as it could possibly be at the time it is presented, but they are all works in progress. We are all incredibly grateful to the members of the Bill team, who normally sit somewhere in the room and take careful note of the criticisms that come up, because they themselves anticipate those issues, which will be presented in the report, and they draft the new version of the legislation accordingly.

Lord Beith: I have seen the same thing happen on Finance Bills when a Minister and an opposition Member exchange things based on notes they are receiving but which they have not fully absorbed. Would it be better if at that point you could say, “Mr So-and-So and Mr So-and-So between them can probably clarify the area of difficulty”? The process does not allow that.

Martin Hoskins: Yes, it would. In the end, there is only a limited amount of time and you want to get the best value out of that time. Sometimes the problem is that the people who are at the desk are not as equipped to answer some of the questions as the people supporting them behind.

Q81 **The Chairman:** Is it your view, setting aside Mr Webb’s experience with the Pensions Bill, which could have been an exceptional one, that pre-legislative scrutiny is less necessary when there has been a Green Paper and a White Paper?

Martin Hoskins: I think that would be the case, yes. Having said that, I remember in 1991 being involved with the Association of British Insurers on a very small seven-page Bill. The Association of British Insurers was given 24 hours to have a quick look before it was rushed through Parliament. That quick look was at the Dangerous Dogs Bill. I have to confess that I barely understood what was in those seven pages, and I am sure that lots of other people did not understand what was there. That is a reason why sometimes the more work done at the preparatory stage, the less time may need to be spent on the formal ones.

Lord MacGregor of Pulham Market: That Bill was in response to an immediate public outcry about dangerous dogs. I agree with you; I do not think the process was ideal, but it was rushed for that reason.

Martin Hoskins: It was rushed, but it was 23 years later that new legislation was put in to change it. That is an awful long time for legislation that we knew to be defective and it makes a mockery of the process.

The Chairman: I was on a plane to Japan when I was summoned back because the Lords were expected to amend the Bill in an undesirable way. I returned on the next flight to find that the Lords had changed their minds. I then got another plane back to Japan, but I digress. Can I put the question to the other two witnesses?

Professor Paul Burstow: As a principle, yes, if you have the process of Green Paper and White Paper first it helps, although some of the changes in mental health legislation in the 1990s that went through those processes still got stuck in quite lengthy parliamentary processes, and they still remain very contentious. Having pre-legislative scrutiny of them may well have helped. You have to look at it from the point of view of what additional value a pre-legislative process will add, and to what extent there is a clear political commitment to deliver the measure, where interaction in a pre-legislative scrutiny Committee will not help because there is not going to be much ability to shift the ground anyway. This is a matter for the Committee that lines up the legislation. It needs to be testing Ministers on it.

Steve Webb: Pre-legislative scrutiny has the advantage of being a break. In general, we all think that rushed legislation is a worrying thing. There was an example earlier this year. The DWP consulted on a potential change to the pensions law to try to save the Tata steel plant in south Wales. The intention was to pass a law within a few months that would apply to one pension fund in the land only. Whatever one thought of the substance of the issue, writing pensions law very quickly to fix an employment problem is never a good idea. In relation to the question about whether we have lived to regret pensions legislation, most pensions Bills have a little subsection correcting the errors of the previous ones.

Q82 **Lord Judge:** You give the overwhelming impression that you legislate in haste and repent at leisure. Is that a fair summary of what you have been trying to say to us? It appears that the most difficult times are when we have a new Government and when we have a Government who may or may not survive a general election, but in the middle it is better. Assuming for the moment that you could write the script, what requirements would you put in place so that parliamentary Committees are able to scrutinise draft legislation?

Steve Webb: Just a thought; the Select Committee that did pre-legislative scrutiny of the Pensions Bill asked for lots of analysis, which it felt it did not have. I sometimes think that asking Parliamentary Questions is a cat-and-mouse game. I asked one of our former colleagues, now an ex-MP and ex-Minister, "Is there anything you would do differently in opposition now that you have learned from having been on the other side of the fence?" The one thing he said was, "I would table

fewer parliamentary questions and more freedom of information requests”, because PQs were always a game: “Can we avoid telling the person anything, or as little as possible?”

I am just thinking off the top of my head, but one possibility might be if Select Committees, scrutiny Committees or whatever had some superior right to scrutinise, ask Questions and obtain data and analysis. They could have a quota of Questions—something that gives them a bit more teeth. There could be Answers by certain deadlines and all that kind of stuff. Parliament as a whole really struggles to get data and analysis. You go to the Table Office and they sometimes tell you, “You may not table that question”, or the department will say, “It costs more than £500 to do, so we will not do it”. It is that kind of stuff. If a serious all-party Select Committee or scrutiny Committee wants to scrutinise legislation, perhaps it should have the power to demand a quantity of analysis, data or whatever that is not readily available. That would be a big service to the whole process.

Martin Hoskins: Another suggestion is a requirement for there to be training for parliamentarians to ask probing questions. I understand that the Scottish Parliament provides a lot of assistance to MSPs so that they can ask the right questions, or so that they know what the point of a session like this is. Sometimes if witnesses are more forensically challenged, perhaps even by a QC asking questions on behalf of the Committee, you may get answers that are of far more value than what can be said by someone filling 30 seconds on this side of the Committee Room.

Lord MacGregor of Pulham Market: Have you done any assessment of the effect of that training? Does it make a difference to the way in which it is approached, or is it really a gesture?

Martin Hoskins: I have not, but I have had the privilege of seeing how well qualified so many Peers are and sometimes how less well qualified so many MPs are. Because sometimes they have only just joined the House, it is probably not fair to put them in a position where they have to fulfil a role for which they are not trained, so it would help if they had some training.

Lord Judge: What would be your wish list on an empty sheet of paper?

Professor Paul Burstow: First, Committees need more support. The Scrutiny Unit does a great job but it is underpowered relative to the government departments it engages with. The only exception to that is the Public Accounts Committee, which has a whole resource to deploy in its arguments. There is an issue about parity and the ability of Committees to do their job well as a result.

I want Committees to be able to look in much more granular detail at the assumptions that sit behind impact assessments that Ministers sign. They ought to form a much more forensic part of the examination of the deliverability of legislation than they do currently. I certainly agree that

there is some merit in occasionally having expert questioners to challenge. That can be a useful piece of the puzzle. When it comes to Select Committees and their ability to scrutinise legislation, another point is that if it is to be meaningful, with so much of our legislation being skeletons on which regulations are subsequently hung, it is important to have some idea at least of what the outline of the regulations is likely to be. Without that, the discussion can often be quite misdirected because you do not know what the final intention will be.

Steve Webb: Could I just add a PS to the point about impact assessments, prompted by what Paul said? It always used to astonish me that the impact assessment was the afterthought. You do your Bill and then, "Oh, we have to do an impact assessment". The impact assessment was often where the bones were buried. Perhaps there needs to be a draft impact assessment. The department does not want to do it twice, but if the scrutiny Committee does not have an impact assessment, which is often where all the interesting stuff is, perhaps it should come earlier in the process.

Q83 **Lord Brennan:** What is your experience of the extent to which evidence-based data is given to parliamentary Committees in the pre-legislative stage, not every Bill but the big picture ones, health, education, infrastructure, pensions, or whatever it might be? If you are going to give it to them to a significant extent, do they have the capacity to deal with it in an expert and intelligent way?

Professor Paul Burstow: As a Minister I was involved in the drafting of one Bill, and for another I was on the Bill team that took it through its parliamentary stages. That was the health and social care legislation, if I dare mention it. It did not have pre-legislative scrutiny. There may be an interesting question as to whether it should have done and what that might have entailed. What it did have was a short evidence-taking session at the beginning of the Standing Committee in the Commons. I am not terribly certain that that process was anywhere near the standard and quality of the exchanges and the depth that one can go into with the same people presenting before a Select Committee or in a pre-legislative scrutiny process. In a way, bolting that couple of days on to the beginning of the process adds little value relative to the value you can get from well-managed pre-legislative scrutiny.

Martin Hoskins: For the Investigatory Powers Bill, the Committee gave the public four weeks to supply any evidence they wanted. We managed to pick up 2,634 pages of evidence after giving people four weeks, which was certainly enough to be getting on with. I do not think the problem is the volume of evidence. The problem is trying to sift the evidence and work out what is useful, what is copied and what is missing, and therefore what the Committee needs to get in addition.

Steve Webb: There is the concept of an evidence base—things we know. When you are doing social reform there is the "What if" question. Committees, at best, might know the impact of what the Government have chosen to do, but Committees do not have the potential to model

alternatives, and that might well be a value added. It is not that there is a sitting evidence base and they just need to be told what it is. If there are three different things the Government could have done, and all the information is about the thing the Government have decided to do, you cannot really see how different options would have worked because the Government have all the models and data and so on. Looking at the alternatives is an area where Committees might be able to gain more insight.

Lord Brennan: You all have business experience, post-Parliament in two cases. Is there an analogy of any utility between how a company would operate and how pre-legislative scrutiny can operate? For example, "Here is the plan, here is the objective, here is the cost-benefit analysis and here is the evidence base. Will you approve it?" It is typical in business, so why not in Parliament?

Martin Hoskins: It ought to be typical of well-run businesses. I do not think that is necessarily the case. What is significant is that the Committees can, as the Draft Investigatory Powers Bill Committee did, require a future Parliament formally to review the legislation. That is a provision that does not normally happen within the corporate setting, where a project team is created and a service is supplied. It is a very rare occurrence for the project team to programme in, four or five years hence, a rigorous analysis of the effects of a programme. I am all for making sure that future Parliaments get an opportunity to test the assumptions that were operating when the original legislation was being drafted, in order that they can confirm whether the legislation is still truly fit for purpose at a future stage.

Steve Webb: On the business question, the one thing that strikes me as different in business, if I think of my colleagues at Royal London where I now work, is that if they take a business plan to the board they know that by and large they will probably still be there when it is implemented and when the impacts are seen, whereas we knew we would be long gone. I do not mean to be unduly flippant about that, but certainly post-implementation reviews of legislation are a complete box-ticking exercise in my experience. At some point in the last Parliament we had to do a post-implementation review of the 2008 Pensions Act, or whatever it was. It was, "Oh, we have to do this so we will write ourselves a report saying we did a good job". It was an utter waste of time.

Martin Hoskins: That is a missed opportunity. It would have been possible for Parliament to have done something right. As it was, the logistics meant that it decided not to take advantage of the power it had.

Lord Beith: The Select Committee gets that governmental review, but that in no way limits it in the kind of assessment that it makes when it does the post-legislative review.

Steve Webb: But in our case a different Government legislated. The Select Committee was not interested because there was no politics in having a go at the last Government.

The Chairman: But it was a totally internal exercise. It did not take outside evidence from anywhere. Would you have liked to see that happen?

Steve Webb: I told myself not to be honest when I came here today, because there is a danger I will be quoted. Sorry, I do not quite mean that. You are busy trying to do the next thing. Post-implementation review has to be late enough for there to be time to see if the Bill has worked and what it has done. It is the last Government at least who did it. It might be a different party and different Ministers. You are so focused on the next thing that you do not trawl through what happened five years ago and spend time on it. Yes, in theory you should learn and all the rest of it, but to be honest you have the day job to do.

Professor Paul Burstow: I agree. Your days are diced up into so many small pieces that the ability to do that review and the value of it, from your point of view, is not necessarily very high. Having said that, again it depends on the piece of legislation. The mental capacity legislation was the subject of a post-legislative review. It made a number of quite important findings about the adequacy of implementation, which in turn had an impact on government policy and action. There are examples that can be brought to bear to demonstrate where it can be useful.

On the transferability of insight from business, the bit that is underscrutinised at almost any stage of the parliamentary process—of course it is, because we are focusing on the law—is the bit that makes the difference between its being a law that has an effect or not; in other words, its implementation. Business would spend a good deal of time working through how to implement effectively. That is the bit we do not test rigorously enough, it seems to me. That is often where we find the biggest failings.

Baroness Dean of Thornton-le-Fylde: Mr Webb has spurred me into action by making that sweeping statement about post-legislative scrutiny being a waste of time. It depends on the legislation. For instance, take the building of new houses or getting people off unemployment. The best people to do the scrutiny would be the department, because it has the facts and figures. All too often what happens is that one of the single interest groups, external to Parliament, does its own review, perhaps with limited information. It is not necessarily the correct response. Do you still stick to your point that any post-legislative scrutiny is a waste of time?

Steve Webb: I take the adjective “sweeping”; that is a fair point. Parliament is always doing post-legislative scrutiny. If a law is not working, we raise it and challenge it. We have constituents coming to see us and telling us it is not working. I do not even know what the rules are; a five-year point, or whatever it is, is a bit of a prod, but to be honest, if it is a law that is not working, what has Parliament been doing for five years? If it is working, which the 2008 Pensions Act was, it is just a complete waste of time.

Baroness Dean of Thornton-le-Fylde: That presupposes that

Parliament takes an interest in a piece of legislation it has passed. Is it not the case all too often that it is job done and they move on to something else?

Steve Webb: If it is important legislation, it will have an impact on people. As you say, it might be failing to get people off unemployment benefit or failing to get affordable houses built. Parliament does not need to wait five years for a formal review. If there are not enough affordable houses, it should be raised every day. That would be my sense of it.

The Chairman: We will be having a look at post-legislative scrutiny later in our inquiry.

Baroness Dean of Thornton-le-Fylde: We might invite you back.

Steve Webb: I think I am busy that day.

The Chairman: Well, we have your evidence already. It will be held against you.

Q84 **Lord MacGregor of Pulham Market:** We have partly looked at this question, which is about the different types of legislation—the legislation that can be carefully prepared and the legislation that is politically driven or is in response to some immediate public outcry. Do you think that pre-legislative scrutiny should be the norm for all legislation? If not, why not? Could you say a bit about the capacity and resources required for pre-legislative scrutiny, and in particular whether cost-benefit analyses are made of the different consequences of having pre-legislative scrutiny for all?

Professor Paul Burstow: As you say, we have been developing some of those points. No, I do not think it should be used for all legislation. It still has to be a process of judgment by government as to when to use it, but there also needs to be more debate with Parliament about which legislation would benefit from pre-legislative scrutiny. Why do I think that? It is partly because the areas that benefit most from pre-legislative scrutiny are those where government does not have a vested interest in a particular given outcome to which it is absolutely wedded. The ability to be flexible and genuinely moved by the evidence and opinion of other experts is very important. That is often the case in areas of legislation that are not likely to be revisited very often by Parliament. To get it right and make sure that the legislation is going to stand the test of time, it is worth going the extra mile and having that additional stage.

If you are going to use it more—there is still scope for it to be used more than it has been so far—you have to look at some of the other stages of the process. If you have had pre-legislative scrutiny, do you still need to have the evidence-taking session in the Commons at the beginning of the Standing Committee? I do not think you do. If you had pre-legislative scrutiny and you have had the Government's response, and for the sake of the argument they have taken on board some of the recommendations, that is a material consideration in the negotiation that takes place between Whips about the amount of time that is to be

allocated for the Committee stage. Of course, the Government want to have it as short as possible and the Opposition want it to be as long as possible. I understand that, but it is a legitimate part of the debate, and Whips setting the business timeline ought to be a part of it. Currently we cannot underestimate the extent to which government departments, which are downsizing significantly—Steve has already referred to using external resources to get legal advice—have less capacity to manage this sort of process from end to end. That is more likely to make them advise Ministers not to have pre-legislative scrutiny, because it adds to the burden of doing the piece and getting legislation through.

Martin Hoskins: What you are after is some independent assurance that Bills are technically fit for purpose. The beauty of pre-legislative scrutiny is that at least there is a draft Bill; at least there are words within which we can work. That is incredibly important. When I was working for trade bodies, we would see some form of vague drafts and parts of Bills. We never saw the Bill in its totality and therefore it was extremely difficult to offer constructive comments. A lot of the time, even if you did not agree with what was happening, you wanted to make sure that the will of Parliament could be effectively enforced. I often used to complain bitterly to Home Office colleagues about difficult bits of the Regulation of Investigatory Powers Act, explaining how I could not comply with it because I did not know what it meant. The phrase that came back to me was, "But it was the will of Parliament". Well, if it is to be the will of Parliament, I want to make sure that Parliament knows what its will actually is. That is where I think it is necessary to get some form of independent assurance that this stuff will work.

Steve Webb: I have two observations. First, Government and Opposition should each be able to nominate Bills for pre-legislative scrutiny. Government might wish to actively engage, get consultation, feedback and so on. The Opposition, whether or not they have many shots in their locker, could say "Look, this is legislation that really needs a good going over". That is a kind of brake mechanism so you would have to be careful. There are different reasons why things might get into pre-legislative scrutiny.

My other thought goes back to Lord Beith's question about the membership of these Committees. I would strongly want Lords on the Committee, from a purely selfish point of view. I remember my friend David Freud used to say that when he stood up in the Lords he was faced with a phalanx of expertise on pensions—members of the Pensions Commission, former Secretaries of State and all the rest of it. At our end, it was a niche subject and there were not many people interested in it. Because I could get any old rubbish through the House of Commons with a majority—sometimes—but we knew we could not in the House of Lords, a foretaste of what the Lords' experts were going to be saying about my Bill would have been really useful.

Lord MacGregor of Pulham Market: That is a very interesting point. Are there circumstances in which pre-legislative scrutiny would be

unhelpful?

Steve Webb: Only timing. Sometimes you just have to get on and do stuff, but apart from that not much.

Martin Hoskins: I cannot think of anything.

Q85 **Baroness Dean of Thornton-le-Fylde:** Clearly in this age of transparency, accessibility and all the rest of it, the issue of new technology or existing technology has come up. We have received written evidence from the Bingham commission, which says that this would be a very interesting way of involving the public and external stakeholders in pre-legislative scrutiny. The Law Commission has very interestingly said that it is currently in active discussions with the National Archives regarding ways in which legislation.gov.uk could be used to involve public and external stakeholders in looking in different ways at draft versions of legislation. What is your view? Two of you have been at both ends of the pipe, as it were. Could we use new or existing technologies better to promote it, if you think the public and external stakeholders should be involved in pre-legislative scrutiny? If they should be involved, what do you think are the barriers, apart from capacity, for organisations helping to scrutinise draft legislation?

Professor Paul Burstow: First, yes, we should be looking to adopt a range of digital and other channels, both to get information out, so that people can see what is being proposed, and to give the opportunity for people to comment. The thing I would be concerned about, as someone who chaired one of those Committees, is the funnel that enables you to synthesise what you get into something you can make meaningful decisions on: in other words, how you turn the welter of opinion, insight and expertise that you will get from people with different experience of a situation, or expertise through their profession, into a form that can then be used to make judgments about what is of value, what is not of value, what is significant and what is not. That is the piece that for me comes back to my point about the resourcing of Committees in the first place. Their ability to process the very large number of written submissions that they have is already challenging, so to open the door to all the digital channels that are possible would magnify that problem many, many fold.

There is an issue about how you manage that. Part of it can be a challenge to government departments themselves and the extent to which they are using digital routes to engage a wider public. For some of the bigger stakeholders that present their perspective to Committees, it is a perfectly legitimate challenge for them as to how they gather the view of their beneficiaries. For example, if they are charities, how are they articulating that point of view and to what extent are they using digital channels to maximise the number of people bringing their views forward? It is valuable, but there is a real problem of how you then process all the voluminous data into something that is meaningful and gives you genuine insight and information.

Martin Hoskins: There were two technologies that were extremely useful to the Committee as we went through the draft Investigatory Powers Bill. The first technology was that of videoconferencing. It was not convenient for Sir Bruce Robertson, the New Zealand Commissioner of Security Warrants, to come to Westminster to give evidence. He was happy to get up at five o'clock in the morning and provide evidence on a videoconference link. It is extremely helpful to know that people do not physically have to come to the building for their evidence to be heard and tested. Secondly, because so many of the proceedings were broadcast, a great many of the usual suspects, who might otherwise have been in the room, were tweeting about the events, making comments and passing emails back to the secretariat or other members of the Committee with their impressions of what had just gone on. I think that influenced further Committee sessions. Those two technologies were extremely helpful.

Steve Webb: An elephant in the room is what the scrutiny is trying to do. There are two completely different things. One is the big picture—the policy and what they are trying to achieve. Then there is the nitty-gritty of legislation. The public absolutely engage on the first, but they are no more qualified than most MPs on the second, which is how you write a law to do what you want to achieve. Pre-legislative scrutiny is a bit of a hybrid. A bit of it is the big picture, the vision and the plan for what you are trying to achieve; but you have a Bill in front of you, so surely it must be a bit like, “Clause 72, line 3 does not work”. Maybe the point where we really need public engagement is earlier than pre-legislative scrutiny, when you have a draft Bill in front of you. It may be at the Green Paper or White Paper stage when you have the Select Committees, and they get the public in while it is still big picture stuff. Interestingly, we had the general public come in, not at the pre-legislative scrutiny stage but at the Bill Committee stage for the Pensions Bill. Of course, what they had to say was big picture stuff. It was a really interesting session, but it was much too late for the big picture stuff, which had come a lot earlier.

Q86 **Lord Norton of Louth:** Picking up on that, you say the public only come in occasionally when it is the big picture stuff, but on pre-legislative scrutiny what about the stakeholders and those who have a particular interest? I take it from what you were just saying that they are the ones you would expect to come in on the provisions and the actual detail. It is something Mr Hoskins touched on a little earlier. I wondered how stakeholders view the process of pre-legislative scrutiny. Do they see it as effective or is it a way of just making sure that their view is heard at an early stage to try to influence the actual detail of the Bill?

Martin Hoskins: I think they found it incredibly useful to be able to get their arguments out in the air and have them tested by a wide range of parliamentary authorities. What they found more challenging was the fact that often the pre-legislative scrutiny was carried out by a range of Committees, and many of them asked almost the same questions. It is a pity that there cannot be a process whereby each Committee can recognise the validity of the evidence that has been given by another Committee, so that we can move on a bit further.

Lord Norton of Louth: Is one of the values of the exercise at that stage that not only do the Government hear what stakeholders are saying, but stakeholders hear what other stakeholders are saying?

Martin Hoskins: They normally know what other stakeholders say. The NGOs are very well co-ordinated. The difficulty can sometimes be making sure the right levels of government have heard the views of the stakeholders.

Steve Webb: A lot depends on whether you have an accessible Minister. If you are an open Minister with an open door, you know what stakeholders think. In the industry, they all talk to each other. They all go to the same events and everybody knows what everybody thinks. It is useful for them. If I am a trade body and I can say in my annual report that I was in Parliament giving evidence to MPs on important legislation, there is a tick in the box. They are not the people whose voices are not heard; their voices are heard all the time.

Lord Norton of Louth: How do you know that those sorts of stakeholders are speaking for their members?

Martin Hoskins: To a large extent, one of the roles of the specialist adviser is to make sure that the Committee is able to adduce evidence from the right group of people. That is where that art works.

Steve Webb: A lot of our stakeholders were membership organisations, so frankly if they were not speaking for them they would lose their membership.

Professor Paul Burstow: With many NGOs it is an area—the point I was making just now about digital channels—where the stakeholders themselves are beneficiaries. Steve’s point is absolutely right. When you come to the actual detail of the drafting of the legislation, they too are reliant on legal expertise to know whether or not the stated purpose is being given effect by the legislation. It is still an expert process at that stage.

Q87 **Lord MacGregor of Pulham Market:** Are there any lessons from your experience of pre-legislative scrutiny that you would apply to improve the quality of legislation introduced in Parliament more generally? We have touched on that quite considerably.

The Chairman: Is there anything you would like to add? If not, we will move on to Brexit.

Lord Judge: I invited all three of you to have an empty screen and say, “This is what we would like to do”, but I have a follow-up question. Assuming that everything you wished for came to pass, which bit of the parliamentary process would suffer? We do not have delegated legislation examined more than profoundly superficially, so where would the time come from? There are no more days in the week than there were.

Martin Hoskins: There are rather long parliamentary holidays. Certainly for the Investigatory Powers Bill, which was given two months to carry out its scrutiny of some 200 clauses, the secretariat worked through their holidays. One sometimes wonders, when a Bill is sufficiently important, whether the parliamentary calendar should be put aside and parliamentarians should consider it as something that has to be done within a particular time.

Steve Webb: I have a couple of thoughts. First, a lot of it is done in parallel. We will still be doing a lot of stuff in the main Chamber. Secondly, there is a tendency for some Select Committees, who will remain nameless, to churn out inquiries. I have noticed on the evening news a slight tendency for the Chair of the relevant Select Committee to be hauled in after some outrage at some factory somewhere to say that they are going to have an inquiry. Actually, if those Committees were doing more of this kind of stuff, we might get better legislation. In a sense I am saying that in a perfect world there would be fewer quick and dirty inquiries to get on the news headlines because there is some high-profile witness, and more actual scrutiny. We can but hope.

Professor Paul Burstow: I was very tempted to comment, as a former Member of Parliament, on the point about our very generous holidays but I will resist that temptation. I will reflect on the point you made about delegated legislation. Very often in Commons Bill Committees, one is waiting to see the Lords Committee's review of delegated legislation because it will be relevant to what the Bill would mean for delegated legislation. That would be a very important input to the Commons process.

The thing that suffers most if you beef up the pre-legislative process is that you then have the subsequent stages where it feels as though you are going through the motions. You elongate those processes, or you do not consider the amount of time that is being invested, and—the point Martin has just made—Committees are not prepared to accept the evidence of other Committees. If it is a genuine starting place for the legislative process, its output should genuinely influence every other stage and have a bearing on the length of time for those other stages. At the moment it does not, and that is probably why pre-legislative scrutiny is not used as much as it could be.

Q88 **Lord Morgan:** Brexit has been mentioned. The one thing that we know will happen is that there is going to be a great repeal Bill which the Government will introduce early next year to deal with existing EU legislation. Should the great repeal Bill be subject to legislative scrutiny? If the answer to that is yes, how well do you think Parliament would be equipped, as regards both its resources and frankly its knowledge, to cope with it?

Steve Webb: I think it would be madness—utter madness. Why do I say that? This is an issue on which there are absolute ultras on both sides—obsessives—and you will just give them two goes. They will say exactly the same thing. The Government will be entrenched. This is utter high

octane political stuff. Every tweak will be a victory for one side, so the willingness to listen will be minimal. You will have to go through it all again. I imagine that the legislation will be a telephone directory, and you could get absolutely sunk in it.

If Mr Barnier is correct and we have to get all this done six months quicker than we think, we do not have time. I do not think it would add value. It would add time, which would reduce the time potentially for negotiation, and it seems to me that we need the maximum time for negotiation. If all the Bill actually does is to take all the existing European law and stick it into British law, deciding what we want to keep or not, we can come back to all this. That is my other point. If we just put it all in and say "Tick" and then get on with negotiating our new terms, we can repeal any of it subsequently anyway.

The crucial thing for me for Britain's interest is to get on with the negotiations. If the legislation has to come first, slowing down the legislation is not in our national interest and will add nothing; you will just get obsessives on both sides.

Professor Paul Burstow: I think I agree with the analysis and the conclusion. My one point of hesitation is that, because of the sheer breadth and scope of EU legislation and how it impacts on our legislation, the potential for things either wilfully or not wilfully to be missed in that process has to be significant. Steve says we can come back to it. That is true. Once you have spotted that there is a flaw or a gap, you can fill it later on with other legislation, assuming that at that point it is a government priority and there is time made available for it. There are those considerations as well.

I agree that it has the risk of discrediting the value of pre-legislative scrutiny because it will become so deeply political, between ultras on either side, that it devalues the process. In many decision-makers' eyes it would make it something they would not feel willing to touch in the future. It would teach a bad lesson to Parliament and those in Parliament who aspire to be Ministers and may be making decisions as to whether they should subject themselves to the process in the future.

Martin Hoskins: I am going to disagree with what has been said. Yes, there may be ultras on either side but this row is going to be had, and I think it is extremely important that a series of Joint Committees are established and they carve out the Bill between them. There should be very close strategic liaison between the Chairs of all those Committees to make sure that what finally appears is fit for purpose. That is an incredibly important thing. It is probably also very important for those Select Committees to specify or make it very clear which bits of the legislation they are looking at, so that a view can be taken, and which bits they are not looking at, so that possibly those issues can be dealt with elsewhere. I am a great believer in pre-legislative scrutiny and it will be a great shame if one of the largest Bills for many years is involved in a process that does not involve pre-legislative scrutiny.

Lord Beith: Do you think it is possible to translate European data protection law and European freedom of information law, in so far as it already applies to the UK, fully into the corpus of UK law by a simple clause that is unlikely to require amendment?

Martin Hoskins: No. I am sure it will require amendment, but it can be amended further down the line. It does not need to be amended now. That is the critical thing. If we want a cut-off, let us get it all in and then let us take our time as to which bits we throw out. My preference would be for an extremely short Bill, just bringing the entire corpus of European law into the body of English law and then at leisure the Joint Committees can look at it and decide the extent to which that should remain.

The Chairman: Thank you very much, all of you. It has been an extremely interesting and useful session. We have benefited greatly from your differing experiences and from the variations in your perspectives. It is very helpful to have disagreement from time to time, as long as it is contained and constructive, and it has been in this case. Thank you so much. We now conclude the session.