

Select Committee on the Constitution

Uncorrected oral evidence: The Legislative Process

Wednesday 14 December 2016

10.25 am

Watch the meeting

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

Evidence Session No. 6

Heard in Public

Questions 89 - 101

Witnesses

I: Rt Hon David Lidington MP, Leader of the House of Commons; Elizabeth Gardiner, First Parliamentary Counsel; David Cook, Second Parliamentary Counsel.

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Examination of witnesses

Rt Hon David Lidington MP, Elizabeth Gardiner and David Cook.

Q89 The Chairman: We are very grateful to have the Leader of the House of Commons and the First and Second Parliamentary Counsel here today, which will be of much value as part of our fairly broad-ranging inquiry into the legislative process. We have quite a lot of questions to ask you, so all I would say at the outset is that brevity is not a crime but repetition perhaps is. Having said that, we do not want to stop you expanding on any subject you would like to expand on, and I hope that we will give you the chance to say anything you want to communicate to us.

Let us start with the first question that we have asked a number of witnesses by quoting the Office the Parliamentary Counsel, which described good law, in what I am sure is a very familiar quotation to you, as "law that is necessary, clear, coherent, effective and accessible". To what extent do you think that legislation, at the point at which it is introduced into Parliament, meets those criteria?

David Lidington: Probably any Government of any political stripe would argue that all their legislation is necessary. There is inevitably a strong element of political judgment in that, although I would throw in that one of the points that I and other business managers make to any Secretary of State who is pressing for a Bill is the question: is this absolutely necessary, or can you deliver your policy objectives through non-legislative means or through existing secondary legislative powers rather than resorting to a new statute? That is one of the elements of the internal government process of scrutiny, preparation and testing that goes on in the preparation of legislation before it is brought forward.

I would certainly hope that the other adjectives would apply. I can obviously only speak with direct experience of the last six months rather than of what has happened at other times in the past. It is certainly the intention of the current crop of business managers that we bring forward Bills in a state that means that their policy intent is clear and that they have been tested and examined internally by the departments to make sure that they deliver what they say on the tin.

Elizabeth Gardiner: They are our words, so I am committed to them. We are obviously trying to balance all those elements. They will not all necessarily pull in the same direction in creating a draft, but it is part of the professional expertise of the drafters in our office that they are working towards achieving, to the highest degree possible, each of those things in the draft that they are producing. Obviously, there are other elements at play; timeliness is a big factor. They are doing the best they can in the time available to produce legislation that meets all those requirements. The process that the Leader has described and the testing through the PBL process helps us to keep the Bills on track and to ensure that to the greatest degree they meet all those requirements.

The Chairman: You said "in the time available". Is that a big issue? I can see that it is after an election with a new manifesto and so on and a

new Government, but otherwise?

Elizabeth Gardiner: I think it varies from Bill to Bill. It is no secret that some Bills are being consulted on quite close to introduction, so that might play into the preparation. Other Bills are the result of a very long process. The current Prime Minister is committed to producing more Green and White Papers, which should also assist that process in clarifying the policy earlier. There is not one rule for everything, and resources are not unlimited in any world, so that is always a factor.

David Cook: I would just make the point that the good law project is about working together with all stakeholders involved in legislation. At the point of introduction, we do everything we can to meet these targets, and I think that generally we do. Incidentally, we make no apologies for having the ambition of achieving these targets. We know that we are stretching things to try to achieve them, but if we do not try we will not get anywhere, so that is very much our aim.

I would also make the point that good law goes beyond the Bill as introduced. Some elements of this, for example accessibility, are both about the clarity of the language we use and the way we present it and about the way users can access information through legislation.gov.uk, the National Archives' website for legislation. It is also about the structure of legislation more generally. Efficiency goes to the implementation of legislation as well as to the Bill as introduced. Coherence goes to our policy colleagues and the development of the policy, which obviously plays a key part in making a success of a Bill, so it is about a wider agenda as well as looking at the Bill as introduced.

The Chairman: Can I just follow that up with you? I gather you have been quite involved in immigration matters over the years. I can see your heart sinking slightly. We had a visit from three judges, including Sir Ernest Ryder, the Senior President of Tribunals, who said, "We have had eight Immigration Acts in 12 years, three EU directives and approximately 30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the period", and it goes on a bit like that. How do your criteria match up against that sort of record?

David Cook: I should perhaps make a disclaimer that, although I have been involved in a lot of Home Office legislation over the years, I have been involved in surprisingly little immigration legislation. Having said that, this is an interesting paradox, because there is a body of law with immigration, which has been regularly amended over the years for very good and pressing policy reasons, and each of those amending Bills could very well meet the criteria for good law in and of themselves. However, the cumulative effect is that the body of law as a whole—through consistent amendment and the inevitable layers of legislation that are therefore produced, and some inconsistencies that creep in between each layer of legislation, which is inevitable where you have a large body of legislation—might itself not meet that test, or fully meet that test, whereas each individual Bill in that process could do. That is one of the paradoxes, which is why, when one looks at the good law project and

legislation more generally, one needs to look at the bigger picture as well as the individual Bills.

The Chairman: Thank you. We will be exploring a number of issues that will touch on that as we advance.

Q90 **Baroness Taylor of Bolton:** Mr Lidington, being Leader of the House means that you are really wearing two hats: you have the government role of a Minister, a fully paid-up member of the Government, but you also represent the House. Do you see it in any way as your duty to have a responsibility to the House to champion the quality of the legislation that is brought forward? You said that you ask Ministers whether it was absolutely necessary and whether it could be done in a different way, but you also said that you ask them to test the quality internally. Do you think that you have any responsibility to try to make sure that that quality is up to standard?

David Lidington: Yes, and we are making a very conscious effort to apply rigorous standards. The Prime Minister is quite fond of saying that she regards PBL as the most difficult committee for any Cabinet Minister to appear before, and that is how it should be. My personal role in all this, and I do not know if it was exactly the same in Lady Taylor's time of doing the job, is that I chair the PBL, which meets regularly. It will meet for a number of purposes. It will meet to hear bids from Secretaries of State for the inclusion of provisional Bills in the next Queen's Speech and at the end of that process to make recommendations to the Cabinet and the Prime Minister about what should be included or not.

When it comes to a particular Bill within the session, the Committee will hear Ministers appearing without official support a little way ahead of the Bill's proposed introduction date. By that time, we would hope that we would have ironed out problems. There is a formal so-called gateway stage where the Minister directly responsible for the Bill, usually a Minister of State, will come before PBL to make the case and explain how far he or she has advanced on the Bill. I, the other business managers, the law officers, the territorial departments, and the Treasury, which are all represented at PBL, will ask any questions and mount any challenges that we think are appropriate both about the content of the Bill and about the degree to which the department has thought through the potential parliamentary risks in both Houses of taking that legislation forward.

In addition to those formal sessions, I will have a regular relationship with Elizabeth and her team and the legislation team in the Cabinet Office, who will brief me regularly on the progress of the preparation of Bills as they are going through the preparatory stage and of the Bills that are actually before Parliament. We will try to sort out any difficulties at the official working level, if possible, but sometimes we will conclude, "I need to speak to the Bill Minister or to the Secretary of State direct", to try to get a particular decision fixed. That is how I try to see that.

Lady Taylor's basic point was whether there is responsibility to Parliament. Yes, there is a responsibility to Parliament. There is also a

responsibility to the people who send us here to try to have legislation in as good shape as possible.

Baroness Taylor of Bolton: So might parliamentary counsel come to you and ask you to intervene with a Minister who had legislation that was not going to be ready in the way they thought it should be, or do you just do this informally? I am thinking in particular of some of the departments that will bring forward Christmas tree Bills and keep adding things, as the Home Office has a reputation for doing.

David Lidington: Yes, is the one-word answer, although not in the sense that Elizabeth will send me a minute about this. I will meet at least once a week with officials in the OPC and the Cabinet Office who are dealing with legislation, and quite often much more frequently than that, and we will take stock of where we are. Sometimes I will say to them, "Look, can you have another go at officials in that department? Do I need to speak to the Minister at this stage?", and we will try to address the problems that Lady Taylor identifies. Either a department, for reasons of its own or if it is under pressure from elsewhere in government or from public opinion, will want to add something to a planned Bill, or there might be a problem over timescale because, of course, the Whips will have in mind a date of introduction in whichever House the Bill is starting. Anything that might jeopardise that date needs to be flagged up early, and we need to remedy it, if we can.

Baroness Taylor of Bolton: Do you feel that it is your job to make sure that the Office of the Parliamentary Counsel has the resources and planning for the future that it really needs, and does it have them at the moment?

David Lidington: The OPC is part of the Cabinet Office, so Elizabeth and her team's line of reporting is to the Cabinet Secretary and through the Cabinet Secretary to the Prime Minister ultimately, as Head of the Cabinet Office. I see it as part of my responsibility both to flag any concerns I might have about the capacity of the OPC and to make clear to the Cabinet and to the Prime Minister if I believe there are any constraints in relation to the OPC, the mood and the size of majorities for the Government, or the lack of them, in Parliament, and what that implies for a particular proposal from a department. I will sometimes have to say to ministerial colleagues, "You need to constrain your ambition, because this is too big and too wide-ranging a piece of legislation to take forward all in one", or, "You are going to run into serious parliamentary difficulties with this or that proposal, and you need to think about it again".

Baroness Taylor of Bolton: Constraining ministerial ambition is probably the greatest difficulty that business managers have, is it not?

David Lidington: Yes, it is. I can hear the voice of experience there. That is why it was so important and so welcome that the Prime Minister, very early on in her premiership, made it plain that she would normally expect a Minister, before having legislation, to have gone through a

Green Paper stage for discussion and then a White Paper stage to set out policy. You can go through quite a lot of this work of testing in public and well in advance of committing yourself to legal language.

Baroness Taylor of Bolton: Thank you.

- Q91 **Lord Norton of Louth:** Coming on to the knowledge and skills of civil servants when it comes to developing legislation, in the paper that you submitted on looking at the preparation of legislation I was struck by a particular sentence: "The Cabinet Office is leading efforts to bolster parliamentary skills within government and to ensure that civil servants have the requisite skills to support Ministers in Parliament and again to Parliament when government legislation is being scrutinised". The implication of the sentence is that we are not quite there yet, that those skills need to be bolstered and reinforced. Given Section 3(6) of the Constitutional Reform and Governance Act 2010 and the Civil Service Code, we really ought to be there already, so why do we still need to bolster those skills? Is the problem one of numbers, one of the churn that there has been in civil servants, or is there not the background and knowledge to provide the skills that are necessary to produce good legislation?

David Lidington: In my experience—obviously my experience as Leader of the House only goes back six months—I am very well served by the Cabinet Office and the OPC team. The capacity in individual departments varies, and it depends on things like how much legislation they have. As the Committee knows, I was a Foreign Office Minister for more than six years. For the FCO, there can be very little legislation and career patterns that take officials away from the UK, sometimes for the duration of two Parliaments or more. Therefore, Parliament does not figure on the radar for the FCO as much as for a domestic department that is confronted with business every week of the year. I am sure Elizabeth will want to say more about this, but the Cabinet Secretary is personally very committed to trying to secure a qualitative improvement in the entire end-to-end legislative process.

My own view as a politician is that this Parliament differs from its predecessors in this fashion: for nearly 20 years, from 1997 to 2015, we had Governments of various political colours who could normally count on a comfortable majority in the House of Commons, and sometimes that may have led to legislation being introduced before the policy had been fully developed. The parliamentary arithmetic is definitely different now in both Houses. The PM's commitment to this rather old-fashioned idea of Green Papers and White Papers is not only, in my personal view, welcome and right in principle for making for good policy; it is actually essential for taking legislation successfully through a Parliament in which the Government cannot simply snap their fingers and assume that a majority will be there.

Lord Norton of Louth: So you can argue that the consultation is necessary but not sufficient when it comes to actually generating the legislation derived. Could you say a bit more about what the Cabinet

Office is doing in this respect? I mentioned your memo, and I take it from the comments you were just making that the effort, for the reasons you have touched upon, really ought to be government-wide?

David Lidington: Yes. I can do a certain amount at ministerial level, and I have made some very deliberate efforts to ensure that Cabinet colleagues and their ministerial teams are fully aware of what is expected of them in the preparation of legislation. Embedding best practice has to be something not that the Civil Service as a whole has to be told it has to raise its game on—that would be the wrong way to look at it—but that it is part of a mission, that it is a positive thing for the Civil Service in delivering the qualitative improvements in the service that it provides to the elected Government of the day and to the country. Liz will say a bit about parliamentary capability and the end-to-end process.

Elizabeth Gardiner: We are in the process of doing a bit of work on parliamentary capability, because it is recognised that the capacity is variable across departments, and not just with regard to legislation. In a way, the Bill team element of this has been addressed over the years, and continues to be addressed, but a lot of work has been done to ensure that Bill teams have all the information and training that they need in relation to all the interactions between the Government and Parliament and to improve the skills right across the Civil Service. We have a team of officials led by the Cabinet Office, and we are looking at a whole number of strands of work for this. We did an initial workshop with the Institute for Government and identified four key groups of civil servants on whom we wanted to focus our work, including the fast stream. We have been working on its induction programme to ensure that there is a parliamentary element to it. The new leadership academy, for the Civil Service generally, has a parliamentary element to it. We are also working closely with Civil Service Learning on the basic courses that it offers and on the working-level expertise that various different sorts of civil servants require.

Another group of officials we have been working with are the parliamentary clerks, who are key to all this. In some departments, for the reasons the Leader has explained, because of the nature of Parliament over the last 10 years, the parliamentary clerks' branch has sometimes been tucked away in departments. That is not universally the case, but it is a case of trying to bring all the branches up to the standards of the best. The clerks themselves have really embraced this and are sharing information and doing a lot of work together. They are relaunching their cross-government guidance and are making new connections with people in the House. The House service has been extremely helpful in putting resources at our disposal to try to improve the skills of civil servants.

There is a lot of work going on in different strands. There will be no big bang overnight, but it is definitely a direction of travel, and there is huge enthusiasm within the Civil Service because there is a recognition that

they would like to be better at this and that they need to be better at this to best serve the Government. There is a lot of work going on.

The Chairman: Unless anyone wants to add anything, we will move on to the next question.

- Q92 **Lord Norton of Louth:** That leads me on to my next question on the material that is prepared to accompany Bills, not least in the form of the Explanatory Memoranda, which can be of variable quality. Part of the problem is that when you read the Explanatory Memorandum accompanying a Bill, it merely repeats what is in the Bill, such as, "Clause 24 says the following". You read Clause 24 and that is what it says. It does not add a great deal of knowledge, not only for the lay reader but from a parliamentary point of view when a Bill is going through. When you read the Explanatory Note you are looking for added value. I wonder what more could be done there to improve the quality of content fairly consistently.

Elizabeth Gardiner: I think we would accept that. There has been a lot of emphasis over the last couple of years on trying to get the notes into a more user-friendly form. We have addressed the format and the high-level areas and subject areas that they are to cover. I think we, too, would acknowledge that they are not always explanatory. Indeed, from our point of view, we would say, "Why don't you read the Bill? You might actually understand it". People should try to read the legislation, because it is often more accessible than people assume it will be. We are very much also of the view that there is absolutely no point in notes that just go through subsection by subsection paraphrasing the Bill, and perhaps doing so inaccurately. The encouragement is to take the notes up a level and for them to be truly explanatory.

The next area of work that we are looking at is trying to work with departments that are responsible for the notes—because they come from the Bill team, the policy officials—on how they might improve the standard of their content. They could be really good, and sometimes they are really good, but they are not consistently really good.

Lord Norton of Louth: When you come to what is being explained, there are really two elements. One, if you like, is the introductory material explaining the purpose of the Bill, which you can argue is crucial. The other is the specifics of the Bill with the different parts.

Elizabeth Gardiner: Yes, but often it would be more helpful to take a group of sections together and explain what they do rather than go through them line by line.

David Cook: I would just add that we have to wrestle a bit with the Explanatory Notes because we are dealing with different audiences. The courts could ultimately look at the Explanatory Notes through *Pepper v Hart*, so there is a natural nervousness about sweeping generalisations that could, if it came to a case, be read in a way that was unintended. That is something we have to get over as far as we can, because there is

a lot more that we can do with the notes to make them more explanatory for the main audience, which is the parliamentary audience and the public who want to understand the Bill.

Lord Pannick: Ms Gardiner mentioned a “level up”. What is the level up? Is it a statement of the purpose behind these provisions?

Elizabeth Gardiner: This is another balance that we have to make. These documents have to be politically neutral, because they are produced and printed by the House. They are not there to sell the Government’s policy; they are there just to explain it. I suppose an example of a level up would be that if you have a licensing regime in a part that is 20 clauses, it would be better to explain that you have a licensing regime rather than to say, “Clause 1 tells you when you have to apply. Clause 2 says how much it is to cost”. It would be better to take it up a level and explain the overall scheme of the licence. That is likely to be more helpful to people.

Q93 **Lord MacGregor of Pulham Market:** Some witnesses have noted that legislation arising from manifesto commitments in particular can be rushed, and there is an obvious reason why: these are commitments that the political party that comes into government has made itself. This results in rather rushed legislation, particularly the earlier bits of legislation, or legislation that is unsupported by a proper evidence base. Do you consider that there is a problem, and, if so, what can be done about it?

David Lidington: It does take one into political territory, very clearly. There are, of course, policy development grants available from the Electoral Commission to help opposition parties to develop their policies and to try to ensure that they are of good quality and are evidence-based. Obviously, it is the responsibility of each party to decide how it assesses evidence and comes to conclusions.

The Civil Service has a long-established practice of having direct contact with opposition parties in the months leading up to a general election—something that it is rather easier to do since the Fixed-term Parliaments Act became law, as the date is now predictable. The Permanent Secretary and other members of his or her team will sit down with the shadow Secretary of State, and perhaps other members of the opposition team, and discuss what their priorities will be if they win office and explain some of the financial and other constraints on the department that they hope to inherit.

I remember in the run-up to the 2010 election how the then Permanent Secretary at the Foreign Office explained to William Hague and me what the FCO’s budget was, where there were areas of flexibility, where the risks lay, and so on, so that we could prepare ourselves and think about what we might want to do if we were in office in a few months’ time, and there were the famous colour-coded folders that the Civil Service prepares in advance of a general election.

Speaking from my experience as having come in as a Minister of State in 2010 with responsibility for what the Prime Minister wanted as a very early piece of legislation, which was what turned into the European Union Act 2011, I was impressed. Within a few weeks of my taking office as a Minister, I had some of my senior officials coming to me and saying, "Minister, we have this commitment in your manifesto for a referendum lock. These are our initial thoughts on how that might be taken into law. These are the two decisions that we need you to take to give us instructions as to which path we now go down". That was fine. It was explained very carefully, we discussed it, I decided what I wanted to do and a couple of weeks later, and they were back with the next stage of development. It was an iterative process. I felt, particularly as the FCO is not a department that has much legislation, as I said, that I was very well served by a high-quality Bill team. The Bill team had been pulled together very rapidly after the election when the Queen's Speech had made it clear that this Bill was going to be a priority. There were complications with the coalition Government in negotiating internally, at a political level, over the content of the Bill, but I did feel that the civil servants who were working to me on that team provided a very good service indeed.

Lord MacGregor of Pulham Market: That partly answered the next point I wanted to come to, which is: should opposition parties be given access in advance of an election to civil service resources so that there is a better understanding of what the opposition party wants and that the early Bills can be better drafted than they otherwise would be?

David Lidington: I think my answer to that is that the current arrangements are capable, if approached by both sides in the right spirit, of providing what both the opposition party and the Civil Service need. I would be wary of going further, because ultimately the duty of the Civil Service is to support the elected Government of the day. If we got into a situation, let us say, where you attached a career civil servant for six months to an opposition party to help with policy development, it would raise questions as to how much those officials, fairly or unfairly, were then trusted by Ministers from the other political party that is in government. Do you start to get, as in Germany, a cadre of officials who are known to be partisans of one or other of the main political parties? That would be a big shift in the way in which we do business in this country. There is perhaps a debate to be had about the extent to which there should be state funding of political parties to improve their policy-making capacity, but I am not going to venture an opinion on that. It seems to me that if the Committee felt that opposition parties needed more resource, that would be the cleaner way to do it rather than trying to blur the role of the Civil Service at the moment.

Lord MacGregor of Pulham Market: Without blurring the role of the Civil Service, in advance of elections, three to four months ahead when they can see what the shape of the manifestos is going to be and the likely first Bills, does the Civil Service start internally preparing for those Bills and making them effective, without necessarily having to talk in

detail to the party, but because they know what they are going to propose?

Elizabeth Gardiner: I think it would be fair to say that thinking goes on within the Civil Service, although whether anybody would actually put pen to paper in more than a kind of back-of-the-envelope way I cannot say. I can certainly think of examples over the last 20 years when it has been quite clear what major commitments one or other party wants to bring forward, and there has been thinking and possibly discussion between officials about how that might be approached. If it is a particularly novel thing, there is thinking about what sort of structure might achieve that result, because usually the manifestos are at quite a high level, so we try to think about how that might be enacted on the ground. That certainly does happen.

Q94 **Baroness Dean of Thornton-le-Fylde:** Minister, we hear in general election periods that the non-government party need not necessarily be just the Government's opposition but can be any of the parties coming out with stuff to which the Minister or the Government of the day will say, "You've not costed that. It's just not possible now". The Government appointed the Office for Budget Responsibility, which I use as one example, to give independent advice. I am not talking about policy development, but in policy development someone saying, "We will do this or that", and it obviously has a cost factor to it. Could there be access? Would it be helpful for the electorate, not necessarily for the parties, to have access to resources that would help the political party to say whether this has been costed or not, and whether the figures are reasonable or not?

David Lidington: I can understand the argument. The OBR was created to provide independent forecasts to government, and through the Government to Parliament and the wider public. Again, very much in line with my response to Lord MacGregor, my feeling is that opposition parties, certainly the official opposition party, will normally carry out costings, but the costings themselves depend on various assumptions about the mechanisms, including legislative change, by which you might introduce a particular policy, and about rates of economic growth and tax revenue, which you hope will derive from a policy that you introduce. They will take into account assumptions of savings that the opposition party believes can be made in other areas of government expenditure. I do not think it is simply a straightforward matter of saying, "Look, let the OBR look at this", and that everybody would then know that there is this crock of gold called "the facts" that will suddenly appear. I have never yet been persuaded that any debate will be settled by an appeal to the facts in that way, although there is often public demand for it.

Ultimately, it is for political parties to carry out an assessment of their own policies and to commission experts to provide external validation, which takes us back to the question of whether political parties need access to more state funds to do that, which is a legitimate argument to have. Then it is for parties to make that case and for the public to decide

which party, in the end, they trust to deliver on the policy proposals they put forward.

Baroness Dean of Thornton-le-Fylde: From that, I interpret that you have absolutely no appetite for going for that.

David Lidington: No, not much. I think that is a given.

Q95 **Lord Pannick:** As the Leader of the House has already mentioned, it is the wish of the Prime Minister to see more Green Papers and White Papers. Do you also see an important role for pre-legislative scrutiny, and would you agree with the comments of the Commons Liaison Committee of March 2015 that, "Pre-legislative scrutiny is one of the best ways of improving legislation and ensuring it meets the quality standards that Parliament and the public are entitled to expect"?

David Lidington: I think, as a rule of thumb, that it is a good thing, but there is a trade-off between sometimes the time available for policy consultation and the time for formal pre-legislative scrutiny on draft legislation. There are the constraints of a parliamentary year and the pattern that both Houses follow in legislating, and sometimes there will have been quite detailed consultation between the Government and interest groups such as business groups or professions that are particularly affected by a proposal to change the law, without a formal PLS process. There are cases, such as the Pensions Bill 2013-14, which was a very technical Bill, where pre-legislative scrutiny did allow the industry to comment on the specifics of the drafting and it helped tease out and dispel misunderstandings about the policy. More recently, the Investigatory Powers Bill was an incredibly controversial subject, but actually the process of pre-legislative scrutiny allowed a consensus to emerge on that matter.

PLS does not always work brilliantly. The draft Care and Support Bill used an interactive website so that people could comment on each provision. I am afraid that the public appetite to comment on Schedule 1, paragraph 8(b) was somewhat limited. What you got was a very large number of comments about the merits, or usually the demerits, of the Bill overall, sometimes expressed in rather vehement terms. To bring it closer to home, with the House of Lords' reform proposals the Government published draft legislation alongside a White Paper and it went to pre-legislative scrutiny, but the political reality was that there were no majorities in the House of Commons in particular for a particular version of Lords' reform, so the then Government withdrew that proposal.

Lord Beith: I am sorry to correct you. It was said that there was no majority for the procedure necessary to enact it, but there had been a large majority for the proposals.

David Lidington: That was at that particular stage. In the previous effort at House of Lords' reform, the House of Commons delivered very clear majorities against all three of the options that had been brought

forward, so pre-legislative scrutiny is no guarantee of a consensual process at the end of the day.

Lord Pannick: In that process for that particular Bill, the pre-legislative scrutiny did identify the issues and did enable Parliament generally to express its views. Would you accept that there should be a presumption of pre-legislative scrutiny for any Bill and, if there is not to be pre-legislative scrutiny, there should be a good reason? The reasons may be urgency or that it may be unnecessary because of the consultation that has already taken place or it may be—a point made to me by Lord Beith in the first session. You have to have some Bills that are on track and Parliament cannot sit idly by. Would you accept a presumption of pre-legislative scrutiny?

David Lidington: I do not think I would go quite as far as to say that there should be a presumption. I am sympathetic to the idea that we should look for additional opportunities for pre-legislative scrutiny. There is not always the appetite amongst parliamentarians to serve on those committees, but we should not forget that there are other forms available for Parliament to test proposals for legislation well in advance. Every departmental Select Committee in the House of Commons can mount a brief inquiry into a legislative proposal, can summon witnesses and can produce a report, which, particularly given the current arithmetic in the Commons, is likely to have quite an important influence on opinion there, so that is something that is open. Again, I think the PM's commitment to making a habit of Green and White Papers means that you inevitably build into the policy-making process opportunities for public examination and comment that are not there if the Government has moved straight from internal consideration to introducing a Bill.

The Chairman: Do either of your colleagues wish to add anything?

David Cook: From a technical point of view, pre-legislative scrutiny is resource-intensive. Certainly, from a drafting point of view, when you are drafting a Bill you will draft it for pre-legislative scrutiny and, in the light of the representations and comments, you will revise it. You might not quite draft it for a second time, but it may be one and a half times the work involved. Now, that is no reason not to have pre-legislative scrutiny, but both for that and for the Bill teams involved there is quite a lot of resource, as well as parliamentary resource, involved. That is why, when you look at examples of Bills that have gone through pre-legislative scrutiny, it is about looking at the benefits that have been derived from that extra effort. Clearly, the Investigatory Powers Bill is a good example—the Leader gave others—of a Bill where a lot of benefit was derived from the pre-legislative scrutiny not just by the Joint Committee and the Intelligence and Security Committee but by the Science and Technology Committee in the House of Commons, which looked at that Bill, and the Government accepted the vast majority of their recommendations.

The Chairman: Does that redrafting process involve a change of policy, or is it simply a change of drafting procedure?

David Cook: I think it is both. With pre-legislative scrutiny, you will get comments on the policy, and certainly, when you are in technical areas and you have stakeholders commenting with technical knowledge, you will get some very useful input into the details.

The Chairman: So the Ministers are engaged with you in that redrafting process?

David Cook: We will be engaged with the department and, through them, with Ministers, and some of the recommendations are quite detailed.

Baroness Taylor of Bolton: Surely the point is that if you do that at the point of pre-legislative scrutiny it might not be quite as intensive in terms of time if you have to take similar amendments during the normal Committee or Report stage, and the stakes are not as high for a Minister tweaking a policy as they might be during the formal Committee stage or even later?

David Cook: Yes. I suppose what is interesting, though, is that, when it has had pre-legislative scrutiny and goes through the parliamentary process, it is still the full parliamentary process—so there is no sort of reduction in that process to compensate for the fact that there has been pre-legislative scrutiny.

Lord Norton of Louth: As a follow-up to that, I was on the Joint Committee on the Draft House of Lords Reform Bill and I thought it was quite a useful process because what you get on the public record is the engagement with those who appear, for which you might not have time when the Bill is going through and you have that rushed draft public Bill stage in the Commons. You are actually clarifying matters, getting them on the record beforehand and giving parliamentarians the chance to reflect before the Bill comes forward.

On the earlier point and what Mr Lidington was saying about Bills and whether they should be subject to pre-legislative scrutiny, I wonder whether there is a case for changing the onus so that a Minister bringing a measure forward would have to make a case for why a Bill should not be subject to pre-legislative scrutiny?

David Lidington: I can see that you could have a statement accompanying the Bill in some way about that. Would it add very much? I am not totally sure. I would be agnostic on that point as an initial response to Lord Norton.

Q96 **Lord Brennan:** Looking at the good law principles, “necessary” and “accessible” are at the beginning and the end, with “clear”, “coherent” and “effective” as the day-to-day consequences. I would like you all to give your opinions about the state of affairs where a body of law has reached the stage where it does not fulfil those requirements. As the Lord Chairman pointed out, we heard from Sir Ernest Ryder and several immigration judges a few weeks ago about how deeply concerned they

are—my word, not theirs—about the implosion of legislation and rules in the immigration field. Knowing that you favour consolidation where possible, Minister, and that you have worked on it, Ms Gardiner, what are the plans for consolidation or clarification, call it what you will, and, if there are not any, why are there not?

David Lidington: I think we acknowledge that immigration law has become very complex and spread between many different statutes and regulations. I would argue that, nevertheless, each of those individual pieces of legislation was justified by the Government who brought them in as necessary in the light of new challenges. One of the features of the way in which immigration patterns have altered in the years that I have been in the House of Commons is, for example, in the growth of organised people-trafficking and what amounts to modern slavery. We have had, again at different times, a surge in reports of sham marriages, and Governments have brought in changes to the law in response to efforts by people or by their representatives wanting to move and find ways through or around the existing immigration system.

I served on the Joint Committee on Consolidation in my earlier years in Parliament. It certainly has its place, of course it does. As Lord Brennan knows, it can only be used to consolidate on a very strict basis and not make substantive changes to law. There are drawbacks to the process and it does not always last. One of the things I worked on in that Committee was what became the Education Act 1996. That took about three years of work by the Consolidation Committee, let alone OPC drafters and Civil Service resources. It brought together in a single statute what remained of the Butler Act 1944 and every piece of legislation affecting schools since then. Within two years, more than half of its 580 clauses and 39 schedules had been replaced by legislation brought in by a different Government. The Blair Government, elected in 1997, was perfectly entitled to make those changes and had the majority to enact them, but it just shows that you can commit a lot of resource to consolidation and, if the politics changes, you question whether it really got you anywhere at all—so it is not a panacea.

I remember having discussions with Lord Howard, when he was Home Secretary, looking at the various Law Commission proposals for the consolidation of criminal law. What Lord Howard said was that the trouble is that you could take something through a consolidation process, but, in a sense, it is also denying Parliament the opportunity to debate and to consider amendments, rather than just consolidation, on areas of policy that are of acute political interest to parliamentarians and of acute interest to the people they represent as well. Sometimes there is discomfort, particularly I think among Commons politicians with their voters in mind, in resorting to consolidation on areas which are intrinsically areas of political controversy.

Elizabeth Gardiner: I agree with everything that the Leader has said about consolidation. It is incredibly resource-intensive, so they are always looking to prioritise that resource. Something that is likely to be subject to continual amendment or to vary a lot from Government to

Government is not necessarily going to be natural as a first choice for consolidation. The Law Commission is currently working on a project on sentencing law, which has also been subject to a massive amount of amendment over the years, and the judgment has been made that now is the point to try to consolidate that, so there is a lot of resource going into that. That is also a very lengthy project, with a view to bringing one statute forward that will contain all consolidated sentencing law, which will be a huge improvement.

There are a couple of things that we try to do to mitigate this. One is textual amendment. Now, I know that, from a parliamentarian's point of view, Bills that have textual amendment can often seem very inaccessible. We have to do more to help parliamentarians access that legislation by providing as-amended texts of existing law. As the Bill will become an Act and, hopefully, will remain on the statute book for some time, for the end user of that legislation, if we textually amend the existing legislation, almost consolidating as we go, at least all the material is in one place and they are not trying to fit together various different Acts.

Also, as drafters, if we thought an area had got particularly messy, and it was contained and we were making amendments in that area, we might decide that we could repeal a run of sections and restate them in a better way, which would be a mini-consolidation "as we go". We are alive to looking for things like that when we are legislating in new areas.

Lord Brennan: So is immigration on or off the agenda?

Elizabeth Gardiner: I am not aware that it is on the agenda just now. The Law Commission has a consolidation programme, but I am not aware it is on the agenda.

The Chairman: We must move on to the delegation of powers, because this is a particularly sensitive issue at the present time and particularly perhaps in this House.

Q97 **Lord Judge:** On the delegation of powers with primary and secondary legislation, what are the principles applied by the Executive—and I suppose we have been talking about the Executive over the last six years but maybe we can go further—when deciding whether to proceed by primary legislation or leave proposals to secondary legislation?

David Lidington: Again, I can only speak with any authority for the most recent period when I have held this particular office. The principle that I and my PBL colleagues impress upon Ministers is that they should not seek, in a new piece of legislation, to have additional regulation-making powers unless those are essential and can be fully justified to Parliament. Certainly business managers and, increasingly, departmental Ministers are acutely aware of the views of the relevant committees on delegated legislation and how in the House of Lords, in particular, the views of the DPRRC can have a very powerful impact upon debates and Divisions at this end of the Palace. There will, I believe, always be the

need for some secondary legislation to cover areas of policy that will require very frequent updating. An obvious example is the regular uprating of benefit rates, where you really do not want to have a statute every year to index them with inflation.

Similarly, the Pension Schemes Bill that is before Parliament at the moment does include a number of proposed powers for new secondary legislation to set out in detail the regulations as they will apply to pension schemes. The content of those regulations will need to be varied from time to time and will need to be debated in detail with the pensions providers themselves, which is what Ministers in DWP are intending to do. They are, therefore, seeking the enabling power by statute and they are producing either detailed policy notes, draft statements or draft regulations, particularly for Members of the House of Lords when the Bill comes here. Then, assuming the Bill becomes an Act, they will engage in detailed conversations with the providers about the content of the regulations themselves, which will be very technical and formal.

Lord Judge: Is it just exhortation by the Leader, or do we find the principles anywhere written down so that everybody can have a copy and see what principles are applied?

David Lidington: No, it is not written down is the straight answer.

Lord Judge: Is it exhortation?

David Lidington: Well, it is not exhortation because this is an approach which all of the business managers, myself, the Leader of the Lords and the two Chief Whips, are applying in our dealings with departmental Ministers. The Lord Privy Seal, in particular, is very aware of the difficulties that too great a use of delegated powers or an attempt to have delegated powers with too broad a scope can cause down this end.

Lord Judge: May I ask whether the parliamentary counsel take the same view about whether there are any principles—and, if so, what they are?

Elizabeth Gardiner: There is not a set of one to 10 to see if we can tick one of these boxes, but it is very much a case of testing with the departments, as the Leader says, "How are you going to justify taking this power to Parliament? How, as a Minister, are you going to explain that you need to do this in delegated legislation?" There can be a whole raft of reasons that may, in a particular context, justify it or where, in a different context, it may not be justified. In addition to the sorts of things the Leader has mentioned, you may want to build a little bit of flexibility into your policy so that you do not enact something that is completely rigid. In the light of experience, you might be able to tweak the policy slightly to make it work better on the ground; you might want to give yourself the flexibility to do that. You might genuinely have to accommodate future unknown things which you cannot possibly know at the point at which you are legislating, and it may be a better use of everybody's time to enable you to do that in delegated legislation with the appropriate parliamentary control. It is not a case of delegating this

to a Minister where the Minister is then just left to do it; he has to bring his proposals back for parliamentary scrutiny when he exercises those powers.

With the recent example of city devolution legislation, these were bespoke deals for different parts of the country which had to reflect the particular arrangements made in different areas. Really, the only feasible way to do that was with a framework under which you had delegated powers so that you could make bespoke provision for each deal. So there can be a variety of reasons; it is about testing those reasons and thinking about whether you can justify the powers in any particular case.

We are also acutely aware that there are certain things that the courts will expect to be expressly enabled if you are going to do them. If you wanted to sub-delegate within your secondary legislation, the court would be looking for express power to be able to do that. There are other things which might be unexpected uses of the power if they were not flagged in the primary legislation—so that is a constraint when we are thinking about how we are drafting and how the power might be used.

Lord Judge: Thank you.

Lord Beith: In so far as there are principles, at least in your mind, about the delegated powers—and they seem a bit limited—will they apply to the same extent and in the same way to what you refer to in your evidence, which is the Bill to transpose current EU law into domestic law, while allowing for amendments to take account of the future negotiated UK-EU relationship, or do you take the view that this process necessitates a very widespread use of secondary legislation and, therefore, that the principles will not apply?

David Lidington: I know that Lord Beith will not be surprised if I cannot give a complete answer to that question when the Government are still considering what exactly should be contained within the repeal Bill, but it is clearly necessary, to ensure some predictability for British business, that we are able to provide a UK legal basis for the *acquis*. That is particularly the case when it comes to those items of European legislation that do not have specific transposing legislation here—most obviously EU regulations that have direct effect by virtue of the 1972 Act. It will then be necessary for the repeal Bill to include delegated powers of some kind. The most obvious need will be that where a piece of European legislation refers to an EU-level regulator or arbitrator of some kind, we will need to substitute a UK regulator or arbitrator instead. In order to keep that law coherent and operable on a new UK legal basis, we will need to have that power—but I can promise the Committee that Ministers, in considering how to approach the content of the Bill, are acutely aware of the fact that the Bill has to go through Parliament and that, inevitably, very close attention will be paid to the definition and scope of any secondary legislative powers.

Lord Beith: The risk is, is it not, if you use secondary legislation widely, that you will have a situation which has already been described to us by

witnesses, writ large, which is that, because of the absence of an amendment process, errors, mis-descriptions and things like that will arise in the resultant law which would have been avoided if it had been in primary legislation and subject to a proper amendment process?

David Lidington: I think that the sheer volume of EU directives and regulations is such that it will simply not be feasible to include everything on the face of the Bill itself. It is equally possible, if we went down that path, with the best will in the world, to come forward with a Bill that we thought was completely comprehensive and, I am willing to bet, somewhere along the line somebody will find that an error or omission has been made—that is human nature. So we would not have solved the problem that Lord Beith identifies. Having that overall approach in primary legislation is what will repeal the 1972 Act and provide a UK legal basis for the *acquis*. The secondary legislative powers will be intended to ensure that the *acquis* remains operable in the UK unless and until such time as Parliament in the future wants to make amendments.

Lord Beith: That latter process, the amending process of the future—would you assume that it will be by primary legislation?

David Lidington: My assumption is yes, that would be by primary legislation. One of the things that we are exploring with departments at the moment is the extent to which we might need to have additional primary legislation to the repeal Bill itself in order to establish certain powers on a national basis that are currently exercised at a European Union level.

Lord Pannick: I am interested in whether, as parliamentary counsel, you see it as part of your role to advise the Government on whether the legislation, as drafted, is constitutionally appropriate, whether it relates to the delegation of powers, retrospectivity or legal certainty. Do you have that role or not?

David Cook: Yes, we do. We would very much see it as part of our role to advise a department on issues like that and to have discussions with them and, working together with them, to find a way of resolving the issues as they arise. There is always the long-stop option of being able to consult the Attorney General who has responsibility in this area as well, but, in working together in a team, it is very often and usually the case that these issues can be resolved at an early stage. It is something that we are very conscious of.

Q98 **Lord Judge:** You have helpfully told us what the principles are—or at least the way in which you seek to apply the principles. Can we look at the question now of what Commons scrutiny actually amounts to? I am told from my reading that there is something like 13,000 pages of delegated legislation every year and that there are sittings of the Committee in the House of Commons of, on average, 90 minutes in which six to 10 statutory instruments are decided. How carefully is secondary legislation actually scrutinised in the Commons?

David Lidington: There are several points there. First, I think what the figures show is that the number of statutory instruments presented has not changed all that much.

Lord Judge: That is right, but you have made them longer and longer.

David Lidington: To that, I would say, as I explained earlier, that we have a consciously more conservative approach to secondary legislation at the moment. I would disagree with Lord Judge over the implication that Commons scrutiny is not taken seriously. Again, I think the political reality is that this often does reflect the relative party strengths in the House of Commons. I can certainly remember under the Major Government that government whips used to be on tenterhooks before certain Delegated Legislation Committee meetings because, for quite a lot of that period, there was a one-vote government majority on committees and, for a time when the Major Government lost its majority completely, there were equal numbers of Government and opposition Members on the Committee. So where the party arithmetic is finely balanced, it is actually quite tricky for a Government to ensure that they get their way on those committees. Lady Taylor is looking sceptically at me, I can see.

Baroness Taylor of Bolton: To ask a follow-up then, there is a difference between getting your people there in order to get the vote and the actual SI being looked at in any detail. If you look at the average length of time that an SI committee takes in the Commons, it is about 23 minutes or something—which is about time enough for the whips to make sure that everybody is there and to do the formalities. It is not exactly scrutiny; it is more just making sure you have bums on seats.

David Lidington: I think there is, to some extent, a constant division of labour happening. I have noticed that, because the Lords has been focusing very much, through the Delegated Powers Committee, on looking at the necessity for the principles behind the scope of secondary legislation, the tendency in the Commons has been to look at the policy contained within the instrument rather than at the legal constitutional significance of it, which is dealt with by the Lords. Certainly, when we are in PBL and talking about prospective legislation, it is, in particular, the Lords that we, as business managers, have in mind when we are thinking about Ministers' degree of preparedness. Where the content of a statutory instrument is politically controversial and where Members have had representations from constituents about it, you do find Members coming along and taking a close interest in it.

Lord Judge: When was the last time there was a public debate in the Commons about secondary legislation?

David Lidington: I do not know off the top of my head.

Lord Judge: It is quite a long time ago, is it not? As the Leader of the House, you would be very well aware of somebody wanting to debate secondary legislation because it eats up the rather limited time that you have.

David Lidington: It is perfectly open to Members, if they are interested and they want a debate on the principles of secondary legislation and the place that it has in our Constitution rather than a particular SI. The Government do not control the entire timetable in the House of Commons. The Backbench Business Committee has a regular number of days assigned to it. If sufficient Members of the House of Commons make their case to the Backbench Business Committee, there is a slot that would be made available to them, so it is open to Members to take that course if they want to.

Lord MacGregor of Pulham Market: Is there a need for secondary legislation to be amendable in certain circumstances or for a greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval?

David Lidington: There is a case for it, but it is one that I do not feel persuaded by. It would be a very big change in the way Parliament works. To make secondary legislation amendable starts to blur the distinction between the primary and secondary legislative processes as well. I think that, if we went down that course, we certainly could not continue in the House of Commons with the notion of 90-minute debates on a specific SI, whether in committee or on the Floor of the House. It would make a mockery of the whole process if you tried to constrain perhaps numerous amendments into that.

I think that the better approach remains for the Government to think very carefully before having secondary legislative powers and to think very carefully about how they define the purpose, scope and duration of those powers and to have that all tested in Parliament. The use of the super-affirmative procedure—yes, that has been done in certain circumstances. One could argue that there are other secondary legislative powers, where you get some tweak to plant or animal health regulations, for example, where you really question whether there is a need for a 90-minute debate slot at all, even in committee, and why one cannot just have a fast-track process for this. Again, I am conscious that, in even floating that idea, I could be open to the charge of entertaining the thought that Parliament should be denied the opportunity to say “Wait a bit” to the Government of the day. So I am not saying that the system we have is perfect and I am not saying that my mind is closed to ideas for improvement, but I do not yet see some sort of panacea that will remedy all discontents.

Q99 **Lord Judge:** If you maintain the position that you have in relation to amending secondary legislation, and I quite understand the position you are taking, is it not then absolutely essential that the secondary legislation only deals with material which is truly secondary and that it does not include policy, which goes back to the question of why we have skeleton Bills which will be amplified in secondary legislation? In other words, the principle that it is not amendable depends upon a number of other principles and it is not free-standing.

David Lidington: As I said earlier, I think that the process of policy-making, to which the Prime Minister has committed herself, would, I hope, avoid anything that Lord Judge could describe as a skeleton Bill because the policy would have been worked out in advance. There are cases, as Liz Gardiner mentioned, such as the Cities and Local Government Devolution Bill, where a lot of the content depends upon subsequent negotiations. I do not think that Parliament would have thanked us if we had sought to bring in separate Bills to cover each and every devolution deal. I think it was a more sensible approach to have a cities Bill that established the framework within which negotiations would take place and looked to delegated legislative powers to fill in those details, which will vary from one part of the country to another. Parliament agreed to that in the knowledge that those devolution deals would only involve those local authorities that had taken the democratic decision to opt in to the devolved deal. There have been cases where local authorities have withdrawn from the process and have played no further part in the devolution arrangements.

Lord Judge: We are talking about the use of Henry VIII powers. What are the circumstances in which anyone other than a Minister should be vested with Henry VIII powers?

David Lidington: I am not quite sure who it would be other than a Minister.

Lord Judge: For example, the Childcare Act enables secondary legislation to give Henry VIII powers to “any person”—those are the words in the Act—to amend, repeal and so on. I cannot think of any circumstances myself, but I wonder if you can? The Higher Education and Research Bill gives powers—or will if it is enacted—to a quango to repeal and amend primary legislation, which is why I asked the question.

David Lidington: I would like to take advice on those detailed points. My recollection on the Higher Education and Research Bill is that the power was for Ministers to change the powers of the non-departmental public body, the quango, but not for the body itself to change the law retrospectively. As I say, I would like to go back and take detailed advice and perhaps write to the Committee on that detailed point.

Lord Judge: What are the circumstances in which such a piece of legislation can be justified?

David Lidington: On the use of the so-called Henry VIII powers, I rather agreed with Lord Judge’s defence of the Statute of Proclamations, though I would argue that my mentor, Sir Geoffrey Elton, perhaps got there even earlier.

Lord Judge: I think that Sir Geoffrey Elton was the person who was responsible for creating the fallacy that Parliament gave these powers to Henry VIII.

David Lidington: We could perhaps argue Tudor historiography on another occasion.

Lord Judge: In what circumstances should anybody, other than a Minister, be given Henry VIII powers?

David Lidington: I am genuinely puzzled and looking to Elizabeth, because I cannot think of an example. Normally, on PPL, the law officers take a particular interest in any question of retrospectivity, including Henry VIII powers, to change primary legislation through delegated legislation. I would expect the Attorney or the Advocate General to challenge a department to demonstrate the necessity certainly for any Henry VIII power, and I will take advice on whether we agree that there have been cases where powers have been granted other than to Ministers. Elizabeth, do you want to come in on that?

Elizabeth Gardiner: Similarly on childcare, I would be surprised if that is the case—but I will go back and check.

Lord Judge: The Childcare Act last year—I cannot remember whether it was in Section 4 or Section 5—had 11.

Elizabeth Gardiner: Limbs of a power, yes.

Lord Judge: No, 11 additional regulatory powers, including creating offences, but then we have the sort of super-daddy of them all which gives any person—the Minister can appoint anybody he or she likes—these powers.

Elizabeth Gardiner: I will go back and check that because I think they can appoint people to exercise functions in relation to the childcare scheme, but I do not think that that extends to making statutory instruments with Henry VIII powers. I will go back and give you chapter and verse on that.

Lord Judge: Assuming that I am completely wrong about it, are there any circumstances in which this should happen?

Elizabeth Gardiner: We cannot think of any example where it has, and we think it would be extremely unusual. It is pretty unusual for anybody other than a government Minister to be making a statutory instrument, but there are some very unusual cases. I am wondering if the financial services area is one where there are non-ministerial powers, but it is quite rare. If we were ever conferring power to make a statutory instrument on somebody other than a Minister, it would be subject to a great deal of discussion, so I think it would be very unusual.

Lord Norton of Louth: Certainly the Higher Education and Research Bill gives students the power to make an order as if made by a Minister.

Elizabeth Gardiner: I will go back and have a look at that.

Lord Judge: That leads on to the question of who should be given the

powers. Help me to understand why a Minister should be given powers to repeal a statute: in other words, secondary legislation repealing primary legislation.

Elizabeth Gardiner: Obviously, secondary legislation itself is also subject to parliamentary control, so it is not the Minister doing it without any parliamentary control. I also think that it is better really to focus on what the power is doing. There is a range of situations where it might be entirely sensible to take a Henry VIII power where it is not sensible to come back and expect Parliament to spend time on the sorts of amendments that you might want to make. Often, we have a consequential amendment power at the back of a Bill where some tidying up might be required. So these are not substantive new policies but powers that are just needed to tidy up. Say you are changing the name of a body, and there are references to that body across the statute book, it might be more expedient to take a power and to tidy those up afterwards in an instrument, particularly if you do not know what the name of that body is at the time that you are doing it. There can be a whole variety of reasons why you might do it.

The other thing is that sometimes you can achieve the same result either by amending the primary legislation or by having free-standing secondary legislation, but it might be better for the end-user to do the former. Going back to the consolidation point, say you are creating another thing in your secondary legislation that is quite akin to something that is already in the primary, it might be better for the end user if you amended the primary and put it in beside the existing provision so that, when the reader comes, they pick up the Act and the whole story is there. That is a case of form over substance, and it might be better for everybody in the end if you amend the statute rather than create yet another instrument that somebody has to consult and fit together. There is a variety of reasons why you might end up wanting to amend the primary legislation.

David Cook: Also, just on that, the question assumes that there is a logical, consistent divide between primary and secondary legislation on the statute book at the moment. I think, in fact, that there is some inconsistency across the statute book and you will find, in primary legislation, procedural provisions that, in other areas of law, might well be contained in secondary legislation. I think that context is everything and you have to look at what it is you are doing. If you are in an area, for example, where that procedural detail is in primary legislation, a power to amend that by secondary legislation is, in substance, a power to amend secondary legislation.

Lord Judge: But then the whole process runs into the question which Lord MacGregor was asking, which is whether the secondary legislation, which includes the power to dispose of primary legislation, should be amendable. You may have 76 clauses, of which 75 are absolutely fine, but the 76th does amend primary legislation and, as things stand at the moment, we have to take 76 or leave it.

David Cook: One aspect of secondary legislation is that the power can be re-exercised rather more easily than primary legislation can be re-enacted. I appreciate that is not a complete answer, but it is true that, if mistakes are made in the making of secondary legislation, it is a lot easier to correct them by a re-exercise of the power.

The Chairman: We will move on to the next question from Lord Brennan.

Q100 **Lord Brennan:** Where a Bill proposes secondary legislation, should drafts of that secondary legislation be routinely made available to Parliament when it is considering the Bill in question? So that we do not misunderstand this, perhaps you could explain to us in dealing with that point the division of labour and responsibility between a ministry and the Office of the Parliamentary Counsel on the content of secondary legislation?

David Lidington: Dealing with the first point, yes, but there are exceptions. The exceptions would include where, most obviously, the secondary legislation is for powers to be exercised with respect to future changes in circumstances, which may be unknowable in detail and, therefore, you cannot produce draft instruments. The other exception I have in mind is the Pension Schemes Bill, the example I drew on earlier, where the content will require some very detailed technical discussion with stakeholders. In those circumstances, our practice now is to say to departments that if they cannot, for whatever reason, produce a draft regulation, they need to produce a detailed policy statement to explain what it is that they are planning to do and the purpose behind it.

Elizabeth Gardiner: On the division of labour, the Office of the Parliamentary Counsel is responsible for the primary legislative programme, so we primarily draft the Bills. We occasionally agree with the Government Legal Department that we will take the lead on a statutory instrument if it is particularly far-reaching (and perhaps particularly if it is amending primary legislation), although that is fairly rare. Government departments have lawyers embedded in them and they take responsibility for drafting the secondary legislation. That said, the Government Legal Department has, in recent years, established what it calls its "statutory instrument hub", which is a group of drafting lawyers. We have one quite senior parliamentary counsel allocated to that team of lawyers to act as a consultant, and the idea is that they come together, a bit like the Office of the Parliamentary Counsel, and share knowledge, skills and training and, in due course, those lawyers will go back into their departments and take those skills with them. That is one of the steps we have been taking to try to ensure the high quality of legislation, be it primary or secondary.

Lord Brennan: Referring to the Minister's point about the sheer volume of European material that might affect the great repeal Bill, is there a plan as to how to deal with that?

David Lidington: Work in progress.

Q101 Baroness Dean of Thornton-le-Fylde: Could I pick up on something, as we have a few minutes, which came up earlier in our questioning? The Minister says in written evidence to us that, "The Government is committed to engaging and consulting with Parliament as much as possible", talking about the Brexit legislation, the great repeal Bill. The current framework provides for "effective legislation scrutiny mechanisms that should continue as far as possible". Now, we all understand what the mechanisms are and what the scrutiny process is. Are you able to tell us why you would say "as far as possible" and not give a commitment that the normal procedures will be carried out?

David Lidington: Simply because there is going to be a negotiation that would start with the triggering of Article 50. The Government have made very clear that they are not going to publish details of their negotiating plans any more than any of the other 27 Governments or the institutions intend to do. We will need to have a confidential space within which Ministers can discuss collectively what the approach to negotiations should be, how they are going and to take advice from our officials without having red lines, fall-back positions or the like discussed in public. I genuinely do not think that Baroness Dean should have too many fears because, if I look at what is happening at the moment, we will have had, by Monday next week, three debates in government time on different aspects of EU exit. There have been, I think, about 14 appearances by the Secretary of State for Exiting the European Union or his Ministers in front of various committees of both Houses. There are in progress at the moment, at my last count, 31 different select committee inquiries into the EU exit process in this House and in the House of Commons. The Government, of course, have to give evidence to each, often oral as well as written, and to provide a formal response to every Select Committee report. So there is going to be lots of parliamentary engagement and scrutiny.

Baroness Dean of Thornton-le-Fylde: With respect, there have already been, certainly in this House, many hours devoted to the consequences of Brexit. I am talking about the great repeal Bill, which will deal with the legislative requirements, and you are saying "as far as possible"—you used that twice in your written evidence. Are you implying that, in the discussions that Lord Beith raised earlier about the Brexit great repeal Bill, in fact there may be a possibility that Parliament will not follow its normal procedure? I am not talking about the details of the negotiating stance. I am not asking about that but about the legislation.

David Lidington: I apologise, I missed the point. The legislation will have to go through the normal legislative process for any Bill. What we may have to look at, given the volume of possible secondary legislation, is whether we need to ask Parliament to have some bespoke arrangement for handling those things, given that, in order for business to have certainty, we will need to make sure we have a workable statute book on day one after exit. Now, at the moment, we do not know precisely when exit day will fall, but we have a duty to British business

and other interests in this country to ensure that we have an operable statute book on day one.

Lord Beith: We will need space before the conclusion of negotiations and day one and, I feel, a late-night deal of some kind which has implications for what goes into the legislation.

The Chairman: Lord Beith is straying into politics. Leader, you and your counsel have been extremely informative and extremely helpful to us, and the authority with which you appear as witnesses also greatly advances our Committee's deliberations, so we are very grateful indeed. Thank you very much for giving us so much time.

David Lidington: Thank you, Lord Chairman.