



HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 25 January 2017

10.30 am

Watch the meeting

Members present: Lord Lang of Monkton (Chairman); Lord Beith; Lord Judge; Lord MacLennan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Baroness Taylor of Bolton.

Evidence Session No. 9

Heard in Public

Questions 122 - 133

Witness

I: Baroness Fookes, Chairman, Delegated Powers and Regulatory Reform Committee.

Examination of witness

Baroness Fookes.

Q122 **The Chairman:** I am delighted to welcome Lady Fookes to our deliberations and to say how grateful we are to you for coming to us, and for bringing your team. We are conscious of the time pressures that you are under today. We are grateful to you for managing to fit in a visit to us.

We have some questions that we have circulated to you, but before we get into those I thought it might be helpful if we could spend a minute or two trying to understand the fundamental differences between your committee and ours.

We all have the feeling that you are more detailed and specific, and we are broader and constitutional. Would you like to elaborate a little bit on that?

Baroness Fookes: Yes, Lord Chairman. That is, of course, right. We are looking at a particular part of the legislative process on a day-by-day basis, whereas of course you take an overarching view of the whole of the constitution. Your remit is very much broader than ours.

To detail it a little bit more, we look at the delegated powers in Bills as they come to us between the Second Reading and the Committee stage. We have the use of a memorandum prepared by the relevant department, which seeks to explain why it needs the delegated power and what the level of parliamentary scrutiny, or lack of parliamentary scrutiny on some occasions, is to be. We then make our judgments and pass those to the House, but the Government always respond. Whether that is to our satisfaction is another matter.

The Chairman: Thank you very much. That is very helpful.

Lord Judge: How does the system allow for the Secondary Legislation Scrutiny Committee to come into the work that you do, and the delegated powers and regulatory reform?

Baroness Fookes: I do not think they overlap because we are looking at a Bill, whereas the other committee is looking at what has been presented in the form of regulations.

Q123 **The Chairman:** Coming to our specific questions, the Government have described a rather flexible approach that they take to distinguish between the boundaries of primary and secondary legislation. What principles does your committee apply in deciding whether a delegation of a power is inappropriate? Do you have any red lines?

Baroness Fookes: We have never been able to make an absolute ruling as to what is or is not admissible, but we have developed various criteria along the way. We had a special report in July 2014, when I was not Chairman, and that set down that with Henry VIII powers there should be a presumption of the affirmative procedure for scrutiny and that, where

regulations prescribe penalties for criminal offences, then, on the face of the Bill, there should be the maximum penalty. The regulations could act only within that.

I would add one or two more that have been developed. One is that we dislike Henry VIII powers. Sometimes they are necessary, but there should always be a strong, cogent reason for their inclusion. The same goes for skeleton Bills where, effectively, all the policies are in regulations and there is nothing on the face of the Bill. We dislike those intensely and I think we should be given very good reasons why that should be the case.

Henry VIII powers should also have a cogent reason. It is not sufficient simply to have the affirmative procedure. "Why are they there at all?" is the question that should be asked.

The Chairman: I think you have struck a few chords with this Committee in those remarks. We will come on to those specifically later on.

Q124 **Lord Beith:** You clearly work to some criteria; you have just identified some. When Sir Stephen Laws was asked what the government approach to setting the boundary between secondary legislation and what is not appropriate for secondary legislation, his response was: "The overriding guiding principle is what Parliament wants ... If you think Parliament is going to be content for the detail to be dealt with in subordinate legislation, you are happy to do it".

Do you think that is an accurate description of how successive Governments decide this issue? If it is accurate, is it a sound basis for doing so?

Baroness Fookes: No, it is not. Frankly, I found that comment shocking. There was no attempt whatever to lay down any criteria or principle. I start from what I believe is the classic definition—that all policy objectives should be on the face of the Bill, with details only left to delegated legislation. I did not hear that from the gentleman.

Lord Beith: I commend that response. It is also, is it not, untrue in the sense that Parliament has often expressed its dissatisfaction with the amount of material in the secondary legislation? But that very rarely leads, does it not, to the Government deciding to put it on the face of the Bill?

Baroness Fookes: By the time Parliament sees it—either House, come to that—it is a bit late.

Q125 **Lord Judge:** That leads on to the problem that your committee produces a report on delegated powers that are in every single Bill—I cannot think of a Bill that does not have delegated powers.

Baroness Fookes: There are a few.

Lord Judge: There are a few, and they are not regarded as very

significant, except possibly the Brexit Bill. How effective are your reports in influencing the Government? Is it too late? Do they have a longer-term influence, so that they may not have had much impact this time, but the Government appear to rethink it next time round? How much is government listening to you?

Baroness Fookes: We did some calculations as to how many of our recommendations were accepted by the Government. In the past, we think it has normally been about 80%, but in the most recent assessment we made it was 66%. Those are the bare statistics. We are, to some extent, effective.

Lord Judge: But what is the picture behind the statistics?

Baroness Fookes: My own feeling is that Governments go into Bills in too much of a rush, without adequate preparation. This is for two reasons, Governments like to have as much play as they can through the use of delegated legislation, and very often they have not worked out what they want in the regulations in the first place. But that is going back right to the beginning when Bills are in draft.

Q126 **Lord Norton of Louth:** As you mention, formally, your recommendation is to the House, but in practice it is the Government who decide how to respond. What courses of action are available to you if the Government do not actually accept your recommendation?

Baroness Fookes: Very little, because we make a report to the House, to which the Government respond by way of a report, but we have no powers over how our recommendations are dealt with. To that extent, we are powerless. We rely of course on the House itself looking at this and taking it up with Ministers. I hope it does have some effect on Ministers.

We have been thinking of something we have not yet tried. Where we are very unsatisfied with the way something has been dealt with, in terms of delegated legislation, we could ask for a Minister to come and give evidence to us. We have not done that, but it is in our minds.

Lord Norton of Louth: That would be my supplementary question. If you get a negative response, is there anything open to you? There is nothing formally you can do, but do you actually revisit government responses?

Baroness Fookes: Not in the sense that I think you mean, as a formal activity. What we pick up on is when we notice what I call a trend. We make sure that, each time, we put that in our report, so that if you were looking at the reports you would see that the same point comes up time and again.

The Chairman: Could the problem be lack of infrastructure in the House of Commons for coping with these matters? We can make as much collective fuss as we like about these things and the Government seem able to ignore us and get away with it. What you have been saying largely chimes in with the views that we have developed ourselves and

are hearing from other witnesses to our inquiry. If the Commons had the same capacity to stir up anxiety and concern about the standard and quality of legislation being presented to them, things might be different. Is that your view as well?

Baroness Fookes: It could certainly make a difference. The trouble is that as an MP—and you were one yourself—there are so many other things to occupy you, not least a constituency and constituents. One's priorities are always somewhat divided, which is probably why it is left to us, who do not have constituents, to look at this more closely. But even if the Commons were to take a greater interest in all this, the fact remains that, if a Government have a majority, they can usually push through what they want. That is the blunt political fact of life.

The Chairman: We are going back to the attitude of Stephen Laws.

Q127 **Baroness Taylor of Bolton:** You mentioned trends a moment ago. One trend that some of us think we have seen is an increase in the use of what have been called "skeleton Bills". Do you agree with that? Do you think there is a perception on the part of government, "We will keep it as vague as possible and sort out the detail later"? Do you think there are circumstances in which it is justified for the Government to bring a skeleton Bill? There are different shades.

Baroness Fookes: Yes; some are partial skeletons and others do have some clothing or just a little.

Baroness Taylor of Bolton: Very vague—see-through.

Baroness Fookes: I personally have not found any justification. If there is to be a justification, I think one should ask the Government on a specific Bill why they did it.

Baroness Taylor of Bolton: And so far as the trend is concerned?

Baroness Fookes: I am not sure whether there is an increasing trend. I am more worried, with Bills with some substance in them, about why delegations are attached than I am about the skeleton Bill, which I do not think we have quite so many of. I may be mistaken in that, and I could certainly check. Certainly we do not like them.

The Childcare Bill was a wonderful example of a skeleton Bill, where the Government actually said that they regarded the Bill as a kind of mission statement. I am not keen on mission statements at the best of times, and certainly not when they are supposed to be in hard, legislative form.

Baroness Taylor of Bolton: There is a twist to some of that because a lot of what the Government subsequently decide is done through codes of practice or guidance. I think that is another difficulty that is not formally within anybody's remit, but, again, it is something we are seeing more of.

Baroness Fookes: We are certainly seeing more in terms of codes of practice and in guidance. That is worrying us as a committee very much

indeed. We have a current example in the Digital Economy Bill, where we have at least four codes and it may be five. It is certainly a lot.

Baroness Taylor of Bolton: All to come later and no information at this stage.

Baroness Fookes: No, and very often they are slipping off the legislative scrutiny table altogether. Very often, there is none attached. If I can just go into the detail, very often, on the face of the Bill or in the regulations, it will say that X is "to have regard to" X, Y or Z. Then they try to pass that off as guidance, but it is not. If that phrase is there, it is well known, I think, in legal circles that people have to follow it unless they have any cogent reasons for not following it. At the same time, they try to pass it off as a kind of guidance with no legislative force, so therefore you do not need parliamentary scrutiny. I think this is something that your Committee should look at very closely.

The Chairman: That is very helpful; thank you.

Lord Beith: This is a supplementary point. Bills can acquire a skeleton character because, in the course of their progress, perhaps under pressure from Back-Benchers in either House, the Government agree to add something to them and say, "But the amendment is defective so we will do this by regulations". You then put into the Bill a further power to make regulations. Those who are so keen to make this change say, "Well, do not make a fuss about it because at least we are going to get something done about this matter".

As a committee, do you look at that process, and what do you think about it?

Baroness Fookes: If amendments come forward, containing whatever it might be, we make ourselves aware of this and we will comment on the amendments. Let us say the amendments come between the Committee stage and Report stage. If we can get hold of them in time, we will certainly make comments on their suitability or otherwise.

Q128 **Lord MacGregor of Pulham Market:** Are there any circumstances in which Henry VIII powers are justified? What are the constraints that should exist on their inclusion in legislation? Are there any subject matters or purposes for which they should never be used?

Baroness Fookes: We regard Henry VIII clauses with great suspicion. We feel that if they are being introduced—and there may be some reasons why they are necessary—really good reasons should always be put forward. You could have an occasion, for example, where you want to change penalties that are on the face of a Bill, or an Act of Parliament in this case. You may want them to have the ability to alter that, and it becomes a Henry VIII power. I hope I am explaining myself correctly and clearly. There are occasions, yes, when it can be very useful.

Lord MacGregor of Pulham Market: Do you raise queries every time such a position comes up in Henry VIII clauses? What responses do you

get?

Baroness Fookes: Every single time we look at it, and we go by the memorandum that we receive, which may have good reasons for putting it in, but not always. The quality of the memorandums is another topic. The Government are expected on every delegated power, whether Henry VIII or not, to give a reason why they need it. Of course, if it is a Henry VIII power, we would automatically expect greater parliamentary scrutiny, and that will come through the affirmative procedure.

Lord Judge: We have frequently discussed the issue of Henry VIII powers being put into an Act of Parliament. Let us look at the other end of it, where the Government of the day decide to use the Henry VIII powers and produce a statutory instrument, affirmative resolution and so on. What level of scrutiny is there in the House of Commons of such provisions? What scrutiny can we have, in this House?

Baroness Fookes: If it is already there then our committee does not have any dealings with it. If it is already on the statute book, we cannot deal with that. That will be for another committee of the House, or the House as a whole. I am sorry if that seems an unattractive answer.

Lord Judge: It is the facts we are after. In other words, this is not an issue that comes within the ambit of your jurisdiction.

Baroness Fookes: No. We look only at the Bills as they come through. Once they have been acted upon, when they become Acts of Parliament, then regulations and statutory instruments are drawn up, that goes beyond our remit. We might have private views, but not as a committee.

Q129 **Lord MacLennan of Rogart:** The ability to scrutinise legislation effectively is sometimes hampered by secondary legislation. I wonder to what extent that difficulty is mitigated by providing draft regulations alongside the Bill.

Baroness Fookes: It is always helpful to have draft regulations at the time when our committee, and indeed the House, is looking at the Bill as a whole. It is helpful, but it is not a panacea because the draft regulations could still be altered by the Government at a later stage. If they are inappropriately wide, then that is not very helpful. But do not mistake me; it is much better to have something than nothing.

Lord MacLennan of Rogart: I wonder whether the use of enhanced scrutiny procedures such as a super-affirmative procedure is helpful.

Baroness Fookes: Not if the original delegated powers to be offered are themselves unacceptable. It is not to be used as a bargaining chip for getting away with something that is very unacceptable by saying, "Oh, but there will be an enhanced procedure".

The Chairman: Can one anticipate that the great repeal Bill might herald something of this sort, and would you regard that as a good thing or a bad thing? Have you any thoughts on how on earth we are going to deal

with what is likely to come with the great repeal Bill?

Baroness Fookes: Yes. I believe this is the subject of a later question, or have we got there already?

The Chairman: Yes, it is slightly. Let us leave it until then.

Baroness Fookes: I think there are other things to be said before that.

Q130 **Lord Morgan:** In addition to draft regulations and their value, or assistance, it has been noticeable to me that in some important legislation lately, particularly as it has come to the House of Lords, it has been accompanied not by draft regulations but by extensive ministerial correspondence. Very often, that is extremely helpful in adding detail. It can also lead to a rather piecemeal effect in how one understands the point of a Bill. On the Wales Bill, there was a very important intervention by Lord Judge, which was dealt with in correspondence. The Minister was trying to be helpful. Do you have any general thoughts on that way of communicating the import of a Bill?

Baroness Fookes: I think any additional information, whether by ministerial letter or otherwise, can certainly be helpful, but it should not deflect one from what is in the Bill itself.

Lord Morgan: The trouble is that sometimes these letters are quite brief and succinct, and the very important point that Lord Judge raised in the Committee on the Wales Bill was, in a sense, half dealt with. There was a rather succinct response and yet it actually got to the core of the Bill about relations between this place and the Welsh Assembly.

Baroness Fookes: You will be aware that our committee was not terribly happy with the Wales Bill and made several somewhat trenchant criticisms of its delegated powers.

The Chairman: We had some robust views of our own as well.

Lord Morgan: Did you comment on the point I have raised here?

Baroness Fookes: The point about the ministerial letters being helpful or otherwise?

Lord Morgan: Yes.

Baroness Fookes: We were not looking at ministerial letters. We had the memorandum before us. As I say, it is the quality of the ministerial letter that counts. If they give a poor response, then it is no help at all. It could, I suppose, be useful in the future if it gives an idea of intentions; so to that extent, yes.

Lord Norton of Louth: You have already mentioned the quality of memorandums that come from government. Your committee has previously expressed concern at the perception of a falling quality of the memorandums. What is the position now with them, and is there a need to improve the quality generally? I know there is quite a variation, but is

the quality overall now at an acceptable level?

Baroness Fookes: It is still variable. They are apt to rely on formulaic expressions. One that immediately caught my eye was “quasi-technical”. That was a most extraordinary one. Another one that irritates us is about the “need for flexibility”, without actually explaining why they need to be flexible. They just present that as a reason in itself, and it is not a reason at all.

Occasionally they go in for the most extraordinary expressions. Let me give you one. They need the power delegated as a result of “a likely shifting matrix of considerations”. I think that takes the crown for impenetrable jargon.

Lord Norton of Louth: Are you taking any further steps to try to improve the situation so that the memorandums are informative but also justify the reason?

Baroness Fookes: We certainly make comments where we feel that the memorandum—and we deliberately make comments on the memorandum—has given an inadequate explanation, a misleading explanation or even the use of a precedent that turns out on further examination not to be a proper precedent at all. Very recently, they even cited as a precedent an Act that had already been abolished.

Lord Norton of Louth: One obviously tries to improve quality in that specific department, but is there anything more government-wide; for example, through the Leader of the House reminding Ministers of the need to ensure that there is proper justification?

Baroness Fookes: I do have a very strong view that the cure for this lies further back than either House. It really does lie with the way that Bills are prepared. One sometimes gets the impression that the memorandum has been bolted on afterwards, when of course the information in the memorandum that is explaining why delegated powers are needed should be part and parcel of the preparation of the Bill.

I am not very happy with the Cabinet Office, which apparently allows a Bill to go through or not as the case may be. It is not nearly severe enough in its examination and is allowing things to go through. It is supposed to be a gateway. One sometimes feels that the gate is either half open or broken down completely.

Lord Norton of Louth: It is really more a matter of the culture generally. The starting point is a recognition that there needs to be full detail and proper justification. Your point is that the Cabinet Office should be policing that.

Baroness Fookes: Yes. I would even go further back than that. I think, in recent years, Governments have departed from the well-established practice of a Green Paper to set out possible alternatives to a problem; or the White Paper, which is the Government’s official policy. All those things allow for a great deal of information to be given publicity and for

people to comment on it at a point when the Bill is still formless, as it were.

The other route, which I also approve of, is the draft Bill, which then goes through a Committee and can be tested. If the Government were more inclined to any of those methods, I think we would not have quite the same problem with badly drafted legislation and too many delegated powers.

Lord Norton of Louth: Particularly in terms of delegated powers, it would be the draft Bill that would be important because that would signal where they planned to do that?

Baroness Fookes: Yes, precisely, and it could be tested by examining Ministers.

Q131 **Lord Morgan:** The Chairman has already raised the issue of Brexit. That is an unavoidable concept, I am afraid. This will obviously involve a great deal of complicated primary and secondary legislation. As yet we do not know what this legislation will look like or consist of, but do you have a general sense, as it were in advance, of the kind of challenges that Parliament might confront in scrutinising this legislation?

Baroness Fookes: Yes. I can certainly see problems. One is a very practical one. Once we leave the European Union and we have to bring in our own legislation to fill the void, you cannot have a legislative void. You have to have something there in place. It will be very difficult to argue that we need extensive consultation and extensive consideration in the face of that very important fact. I think that is the greatest challenge of all.

My guess is that it will impact more on some departments than others. My guess is that, when it comes to health and safety, the safety of explosives, standards for trading and so on, we could probably lift, more or less intact, those matters. When it comes to immigration—if you are going to have control of it—you have to have some scheme to deal with it. It is the same with agriculture and indeed horticulture—I am very interested in that, both personally and publicly. Major changes may be made in the way that agriculture is supported. But, again, we cannot have a gap. We have to have something there. That is where I see a very great challenge.

My own feeling is that we might well have to swallow more than we would normally wish to swallow, but I see a possibility of using sunset clauses far more extensively. That would be in the sense that you would say, “Right, we will give you—the Government—the power you need to do X, Y and Z, but, at the end of a certain period of time, that will come to an end and you will have to produce something fresh”. Then it could be considered in the more measured way that I would hope would be in the best interests of the country. That is just one possibility that I put before you.

The Chairman: That is very interesting.

Q132 Baroness Taylor of Bolton: In terms of what you are saying, the actual timescale is going to be desperately important because we could end up with a situation where we have almost got to stop the clock, but you cannot stop the clock in these circumstances. Therefore, Parliament might be faced with creating a void or agreeing very rapidly to a whole raft of measures, which it then has to revisit quite quickly.

Baroness Fookes: Yes. I suspect it will be the latter case. I think it is bound to be. That is why I am suggesting the sunset clause or some form of it, whereby you put a time limitation on all these extensive powers that we presume the Government will have taken and just say, "Now, when we have more time, let us think about this more carefully and go back to a more normal way of doing things". I hope that the departments, as I am sure they are, are all busily looking at all these implications so that they will have something ready at the end of the two years.

Lord Beith: But what if the Government decided to make a fundamental policy change as part of this process? Let us take the example of agriculture. What if the Government said, "We have to do something but we have decided to switch entirely to environmental support, or to switch the other way, entirely into production support"? Either way, that would be a policy change that, once initially embedded, might be difficult to change subsequently. If they did that by unamendable statutory instrument, what would your approach be in those circumstances?

Baroness Fookes: Probably horrified. Again, we come up against the practical difficulties of "you must have something". I would hope that the relevant department would, at the very least, have the sense to do a lot of soundings informally to try to ensure that there is some general consensus as to the general play of objectives. They might even consider that, for the time being, they would stick with what is broadly the case now and allow themselves time to make the changes subsequently. That might be more sensible.

Lord MacLennan of Rogart: Have you given this advice to the Government already?

Baroness Fookes: No, I have not. It has not even been discussed with my committee. I am giving a personal view and you are the first to receive it.

Q133 The Chairman: Thank you very much. It was the phrase "enhanced scrutiny procedures" that tempted me to pre-empt Lord MacLennan's question. Do you have any thought about how the existing procedures could be improved? The phrase "enhanced scrutiny procedures" probably comes into the same category as some of the others that you quoted to us as being full of rather devious phrasing that enables Governments to do what they want and minimise scrutiny. Do you have any thoughts on that?

Baroness Fookes: The enhanced form of scrutiny is subject to many variations. Again, it is something that your committee might like to look at. Each Bill that has it seems to do it in a slightly different way. We

actually have a chart here, which you will not be able to see, but it looks at a number of Bills where these enhanced scrutiny procedures are in place. Most of them are a bit different from one another. I believe that, in the past, affirmative and negative resolutions were a bit more varied than they are now, and they did make an attempt soon after the war, if I am correct, to standardise them. I think we need to standardise these enhanced procedures. It is well worth taking a look at, but, as I said before, if the delegation is wholly inappropriate, it should not be saved by an enhanced procedure.

The Chairman: Thank you very much. That is a strong note to finish on. You have struck a lot of chords with which we agree today, Lady Fookes. I am extremely grateful to you and on behalf of the Committee I would like to thank you and your colleagues very much indeed. I am delighted to say that we have brought this aircraft in to land 10 minutes early.

Baroness Fookes: Thank you very much. I was hoping to avoid a crash landing. Thank you for inviting the views of the committee that I represent, plus my own personal views as I have made clear.

The Chairman: We are very grateful.