



Select Committee on the Constitution

Corrected oral evidence: The Legislative Process

Wednesday 8 February 2017

10.25 am

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

Evidence Session No. 11

Heard in Public

Questions 143 - 150

Witnesses

I: Rt Hon. Baroness Smith of Basildon, Shadow Leader of the House of Lords; Rt Hon. Lord Newby, Leader of the Liberal Democrats in the House of Lords.

Examination of witnesses

Rt Hon Baroness Smith of Basildon and Rt Hon Lord Newby.

Q143 The Chairman: Can I welcome Lady Smith, shadow Leader of the House, and Lord Newby, leader of the Liberal Democrats in this House, to contribute to our inquiry into the legislative process? As you can imagine, quite a lot of our attention is focused on delegated legislation, and that section of it is what we are really focusing on at the moment.

We have a range of questions for you, and we are happy for the conversation to roam freely, but we know how busy you are, so I will go straight into it. This is a general, broad question: what do you think are the appropriate reasons for having delegated legislation, for the Government having such powers, and do you believe there should be any red lines when it comes to delegated powers?

Baroness Smith of Basildon: Delegated legislation makes sense for normal uprating, for minor changes. Another committee took evidence previously from Chris Grayling, when he talked about it being for minor, technical, mundane matters. That is absolutely fair. It gets difficult with red lines. I would say grey lines, because, ideally, we would say that no policy matters would be dealt with by SI. That is clear-cut. We should be, ideally, using secondary legislation. However, when I was thinking about it over the last few days, two issues came to mind that were grey areas.

One was the higher education issue of tuition fees when, back in December 2010, we saw a substantial increase in tuition fees from £3,000 to £9,000. That was done by SI on the basis that it was uprating—it was an increase in the amount—but it was actually a significant policy change, because the amount of money made it a policy issue as well. That was a grey area. Tax credits was also a fairly grey area. The Government said that it was not a policy change, that it was a minor change, but it was not. It was a significant change that would have been better made by primary legislation.

It is easy to say that, yes, there should be red lines; there should be clear policy, but that has become a bit blurred. It is not quite as easy. If the Government think it would be easier to get through because it is unamendable, that should be a clear red line. I have to say, I think tax credits steps over that line.

The Chairman: I hope lessons were learned after that. You do not rely on some established principle to define what should and what should not be in delegated legislation. You talk about grey areas.

Baroness Smith of Basildon: I would like to be able to. I wish I could. I can glibly say to you, yes, policy matters should not be done by SI, but that moves into the grey area. I would still argue that tuition fees probably should not have been an SI, because although it was an uprating of financials, the scale of that uprating changed the policy. It

may be that something can be done in primary legislation to define the clause better or earlier, prior to that. It gets a little arbitrary sometimes.

Lord Newby: The concept of grey lines is probably right. One other area, which I was involved with as a Minister, where it was commonly accepted there was significant policy in a statutory instrument, was public sector pensions. All the details about pension provisions for the public sector are in statutory instruments. I took through the Public Service Pensions Bill and was rather amazed to find it was a very thin Bill, given that there are huge details covered by the pension schemes, but the pension schemes themselves are set out in statutory instruments. In one sense, there is some policy content in them, but the argument there is that the negotiation that leads to the SI is not between Parliament and Government; it is largely between government and the unions. That is where the main discussions take place. You end up with a very significant document as your SI, with quite a lot of substance in it. By common consent, it is accepted that that is the most appropriate way to do it. That example explains why it is so difficult to come up with a clear test that can be set down in black and white and would meet all requirements.

Lord Beith: When we asked the former First Parliamentary Counsel, Sir Stephen Laws, whether Governments work to any criteria, he said, "If you think Parliament will be content for the detail to be dealt with in subordinate legislation, you are happy to do it". Do you think that is the only criterion that Governments apply and is it a satisfactory one?

Baroness Smith of Basildon: I would be hesitant about that, because what Parliament wants might be what the Government can get through, but they could be two different things. I would be cautious that that should not be the only criteria. The fact that you can get something through on an SI should not be the criterion by which it is brought forward. Your example on pensions is slightly different from that.

Lord Newby: Mine is a different example. It may be that my example is slightly exceptional. When the Government are approaching a Bill, the attitude they take to whether they can get things through by SI or not, as opposed to whether it is a significant policy issue, should not be a principle we accept. The starting point should be: is this a significant policy issue? If so, it should go in the Bill.

Lord Beith: Do you think that is what happened? When you were involved in discussions, were you being advised, "We think we can get away with this on a statutory instrument basis", or were you being told, "We have placed the dividing line according to this or that criterion"?

Lord Newby: The legislation I was involved with related to financial services regulation and banking. The Civil Service lawyers were very proper about trying to meet the requirement that we have discussed. I never came across any suggestion of, "Let us see if we can slip this in as an SI, rather than as primary legislation".

Q144 **Baroness Dean of Thornton-le-Fylde:** You have both given examples

of really key issues that were covered in statutory instruments. It is probably true of a lot of Bills that come on the Floor of the House that such a debate takes place: "Why is it not in the Bill? Why do we have to wait until what is sometimes the end of the process?". Standing back, and taking an overall impression, do you think the Government leave too much policy implementation to secondary legislation, when it should be in the primary legislation, in the Bill?

Baroness Smith of Basildon: Most people dealing with legislation at the moment would say yes, in some cases. It is an impression. I had a look back, because one of the issues is that in first Session legislation the detail has often not been worked out yet. In the first Session—and I will use the Childcare Bill, but there were about four Bills—there were no real policy disputes. We were all signed up to there being more childcare. However, the detail had not been worked out, so when it came to the Lords we thought it was non-controversial. The reason it became very controversial was the lack of detail.

I recall, in that one, there was even provision for custodial sentence where the offence was not specified and the detail was not there. That was going to be done in secondary legislation. That is unacceptable. You can understand it in the first Session, because the Government coming in were the Conservative Government after the coalition and perhaps they had not done the work beforehand.

I looked back at other Bills, and one that I particularly picked out was the Children and Social Work Bill that we have just had. There were 55 references to the use of secondary legislation in that Bill. Now, that does not tell us how many different statutory instruments there will be, but we were not given drafts of those. Twenty clauses in the Bill deal with social workers. That is left entirely to regulations; it is about half the Bill. That is quite a significant amount being left to SI.

The other one was on the Bus Services Bill. There are 28 provisions for the Secretary of State to use regulations and I do not think we have had the draft regulations yet, or we certainly had them very late. There is an issue that a lot is being left. I am not saying that those would all be wrong, because there is a need, in many cases, to have regulations. However, that extent seems rather large, and they are not first Session Bills; they are later Bills.

Baroness Taylor of Bolton: To follow that up, the state of readiness affects things, and that is often when things get slipped through. Anecdotally—because I do not know that anybody has done a study—do you think the Bills that have been preceded by draft Bills, or by White Papers, lead to fewer problems of this kind?

Baroness Smith of Basildon: Probably, because that sort of draft legislation or pre-legislative scrutiny—that work beforehand—would iron some of them out. Certainly, these Bills did not have it.

Lord Newby: I would agree with that. If you have pre-legislative scrutiny, it gives people the chance to point out, at that stage, the very fact that too much is being left to the Secretary of State. It would be interesting to see where that had led to a change in the Bill to reduce it. I cannot give a specific example where that has happened, but one feels that it might.

Q145 **Lord MacGregor of Pulham Market:** This Committee has, on a number of occasions, expressed concern that, where a Bill leaves significant details to be implemented through secondary legislation—we have already slightly touched on this—sometimes including fairly important policy decisions, the House is hampered in its ability to scrutinise such legislation effectively. Do you think that is right?

Baroness Smith of Basildon: Undoubtedly. It depends if you are able to see the regulations alongside. The Government might say, “This needs to be done in regulation because this part of the Bill will need updating on a regular basis”, or “We need to take some consultation”. There may be good reasons for it, but you could have that alongside the Bill. The Housing Bill was another one where a lot of the provisions, again, were in regulations. It is hard to debate the whole Bill when a significant part is in regulations, because that may have an impact on other clauses. If you had the regulations—or draft regs, which could be changed—alongside, it would help the debate on the Bill enormously.

It would possibly make it easier for the Government later. We have had a number of cases—not hundreds, but probably tens—where you have seen the SI and it has occasionally been withdrawn. You could avoid all those problems if you had draft regs alongside the legislation.

Lord Newby: It is good practice and it is very reassuring to people taking a Bill through when they can see what the SIs say, because, very often, they are then reassured and there is not a problem. If they do not know quite how broad they will be, there can be a problem. We had this, again, with financial services regulation. We were under pressure, at every point, to bring forward the SIs in time for the Committee stage of the Bill, which we tried to do.

There has been more pressure to do that and, arguably, more willingness of government to bring forward draft SIs. If you go back a decade, I do not think bringing forward draft SIs was anywhere near as common as it is now. I am not saying that it is used as often as it should be, but there is now more of a presumption that draft SIs will be produced if they can at all, which is a good development.

Baroness Smith of Basildon: Except we have not had them alongside these two Bills, which have significant SIs. The danger is that it leads to a suspicion when the Bill is being debated that the policy area—to use the term “policy” loosely—that will be in the SIs has not been thought out yet, and that is the reason it is in the SI and not in the Bill.

Lord MacGregor of Pulham Market: Do you think that the problem we

have been discussing could be mitigated by the use of enhanced scrutiny procedure, such as the super-affirmative procedure?

Baroness Smith of Basildon: It could be. My preference would be to have draft SIs at the time, because if you have super-affirmative it is after the Bill has gone through, whereas, if you have them at the time you are debating the whole Bill, you can debate it in context. It would help, but my preference would certainly be for draft SIs, not necessarily at Second Reading, but as you are debating those clauses, so that you have a draft of the kind of regulations that will relate to them.

Lord Newby: There is a strong argument for greater use of super-affirmatives anyway. We spend a lot of time discussing statutory instruments here and people take them quite seriously, but these are almost entirely pointless debates because you know you cannot change them. Unless it is a big policy problem that the Government face where they might withdraw them, which happens very rarely, having been on both sides of the Dispatch Box in umpteen SI debates, it is a charade. If you are in opposition, you try desperately to think of something to say. If you are a Minister, you read out a long, tedious prepared speech. In my case, I used to try to do it at breakneck speed to spare everybody's time. Supposing that you spot half a dozen little things in it that either are clearly mistakes or could be improved, you cannot do anything about it.

Baroness Smith of Basildon: I am not quite signed up to that in the same way. I had an occasion when I was unhappy with the result of an SI and, on questioning in the Moses Room, the Minister agreed to take it away and not bring it before the House until I was satisfied that the issues were dealt with. I also have colleagues who deal directly with the civil servants who have drafted them when they are first published, and who talk to them before it gets on to the Floor of the House.

I appreciate that, once it gets to the Floor of the House, sometimes we have rather anodyne debates, but that does not take into account some of the discussions that go on beforehand. If we are to have good scrutiny of SIs, it is not just standing up and asking questions; it is more behind the scenes. It comes back to the point that if they are being used appropriately it should not need that kind of debate, because it is only when they are looking at wider issues than is really appropriate, or they are stretching the margins, that we should be looking at having Motions to Regret. We have spoken before in committees about whether we need different kinds of procedures, so that there is a halfway house between all and nothing. That might be something to look at in the future.

There is a bit more to the scrutiny than just Ministers rambling through. A bad Minister would, but, with most Ministers I know, I would discuss concerns beforehand, then raise them in Committee and expect answers. I would often say to the Minister, before I went into Committee for an SI, "These are the questions I am going to ask. I would like to have answers beforehand". I was not trying to spring a difficult question; I genuinely wanted an answer to the question.

The Chairman: Happily, the subject is a non-partisan one, because all parties have been in government and opposition. It is really Parliament versus the Executive, and it is an issue on which everybody around this table is pretty well united in the broad approach.

Q146 **Lord Norton of Louth:** Turning instead to skeleton Bills, the Government occasionally have recourse to such Bills and to skeleton clauses. What are the circumstances where you think that might be appropriate for Government to deploy? Do you have a view on whether the use of skeleton Bills is becoming more pronounced and, if so, why?

Baroness Smith of Basildon: It depends on the definition of skeleton Bills. Some Bills that I would describe as skeleton, the Government might not. I certainly thought, with the Children and Social Work Bill, the social work regulations were just a framework. There was no detail; there was no real policy direction there, which I thought was inappropriate. My impression is that they are being used more, but looking overall we have more legislation in some ways, so it is hard to say that they are proportionally being used more.

It is about the intention. My worry is that we often see skeleton Bills that lead to lots of regulation because it has not been worked out yet. We have had Bills with significant clauses, where the consultation period does not end until after we have had the debate in Committee. If you are going to have a consultation on a particular policy area that is a clause in a Bill, you should at least have the Government's response to that back before you start debating. We have pressed to have some Bills taken out of sequence because of that, so we have the consultation results and the Government's response before the debate. There may be a case if the Government have to respond to something, but it is hard to imagine that there can be many cases where a skeleton Bill would be appropriate.

Lord Newby: In most cases, as Lady Smith said, the skeleton Bill is in that form because the Government have committed themselves to doing something and do not know quite what to do. If you look at the Cities and Local Government Devolution Bill, for example, at Second Reading the degree of confusion as to how that Bill was going to work was pretty broad. It appeared to be that the Bill had come forward too soon.

There is a narrow case, where sometimes, as part of a Bill, the Government want to change something and the change is subject to legal challenge, so they may be waiting on the outcome of a court case. You might want to put a placeholder clause in, because the court might be about to opine within in a few weeks of Second Reading. On issues such as social security, sometimes there have been court cases pending that deal with part of the Bill. That is not an argument for a whole skeleton Bill, because if the court proceedings dealt with the whole of the Bill you could just wait until they were finished before you brought the Bill forward.

Lord Norton of Louth: Taking what you were saying, particularly Lady Smith's point, do we rely on rigorous parliamentary scrutiny whenever

such a Bill comes forward, or are you suggesting there should be certain prior conditions that Parliament would expect to be met for a skeleton Bill?

Baroness Smith of Basildon: Prior conditions could be really helpful, because they would specify the criteria under which Parliament thinks it is satisfactory and it can still give effective scrutiny to the Bill. It is a problem if it is a skeleton Bill just because it is still being worked out, because you cannot have effective scrutiny; you are not going to have the consultation process or anything.

Lord Newby: In principle, that is right. Writing them down and applying them might be a bit more difficult. In principle, it must be right.

Q147 **Lord Pannick:** When opposition parties challenge inappropriate uses and inappropriate conferral of delegated powers in primary legislation, do you make your own independent assessment of these provisions, or do you wholly rely on what committees of the House have said?

Baroness Smith of Basildon: It is a mixture of both. The committees are really important to our assessments, but we also make our own judgements on that. The reports we get are invaluable and I wish I had known when I was a Member of Parliament that at the other end the House of Lords produced those reports on statutory instruments. Most MPs would find those invaluable. They are a really important resource. We look at the Cunningham report and the issues that he raised there about it. Tax credits was quite a difficult one, because it was an inappropriate use of a statutory instrument. We were very careful in how we approached it, and that is partly why I feel so aggrieved about the Strathclyde report because I thought the House of Lords behaved appropriately and carefully on that, within our conventions. It is difficult for Governments to accept that we take a different view on those kinds of issues.

Lord Newby: As Lady Smith said, spokesmen look at the Bills themselves. On the big political issues, they can often form a view without needing to look at a committee report but the great thing about the committee, I found, was that it has a consistency about it. If you are a spokesperson you do not get much legislation, only sometimes. So the question is: "That looks a bit iffy but is that the norm?". The Delegated Powers and Regulatory Reform Committee assesses things against a standard that it has in its own collective mind, as it were. It is very helpful because if you are slightly unsure about whether it is reasonable, you have that report in front of you. One thing that Lady Smith said, which you might want to consider—the House ought to consider it, although it may be very difficult logistically—is if we want to help our colleagues in the Commons understand some of the issues, and we are producing reports that no Commons committee even attempts to produce, whether the DPRRC should be producing its reports earlier, at an equivalent stage when a Bill is before the Commons. This would give MPs the benefit of that judgment. At the moment, it does not.

Baroness Smith of Basildon: They are often available, though, because there is often not much time lag between us and the Commons. There is no reason why the Commons has to consider an SI before we do. On some occasions, we have done SIs before them. We could make them available.

Lord Newby: If the Delegated Powers and Regulatory Reform Committee is saying, "We have just looked at the Bill", before it has come out—

Baroness Smith of Basildon: Is that on primary legislation?

Lord Newby: Yes, on primary legislation.

The Chairman: In fairness to the DPRRC, we know it has constant problems getting the information it needs to carry out its study within the time open to it before it is keen to publish. Let us not be too hard on it.

Q148 **Lord Morgan:** The House of Lords, as you will know, has latterly considered itself particularly more assertive and more focused on constitutional issues and civil rights matters. The delegated powers issue bears on aspects of this. Do you think that fits into this category of constitutional civil rights issues?

Baroness Smith of Basildon: I am not sure it is always civil rights issues. I am not sure how much more assertive the House is. We keep hearing that the House is more assertive. I am not convinced the House is being more assertive. The Government react differently to the House of Lords making a decision on something, hence the Strathclyde report. The way the Government respond to the House of Lords has changed as well. I would say the House is being responsible rather than assertive. On those kinds of constitutional issues, the House of Lords takes a more proactive role, perhaps, than the House of Commons, as a whole. That is something the House of Lords has always been more concerned about. How we deal with SIs is a reflection of our concern for how legislation is dealt with, how the constitution is dealt with and our respect for those. I do not know if that entirely answers your question.

Lord Newby: It may be that the House treats constitutional issues—dealing with the rights of citizens—more carefully than the Commons because it has a view that it should in some kind of undefined way. Now, on other areas, because we have a lot of people in the House with local government experience, for example, and people with a lot of experience on benefits issues, those are scrutinised very, very seriously as well.

Lord Beith: The mechanism that the House of Lords uses to deal with concerns of the kind you have just described is normally in non-fatal Motions. Do you think that any useful outcome emerges from the passing of non-fatal Motions and, if not, is not the House obliged then to make more frequent use of the rejection of statutory instruments, on the basis that the instrument would then have to be brought back in revised form?

Baroness Smith of Basildon: It depends on the reasons for objection to the statutory instrument. There are statutory instruments that go through that, frankly, I do not like: I do not like the policy intent, but I did not like the original legislation either. As a House, the fact that we do not like the policy intent is not, I think, significant. If we look back to Cunningham, for many years, our role has not been to overturn an SI because we do not like the original legislation. Having said that, you are absolutely right: because they are non-fatal Motions or Motions of Regret, how much notice do the Government take? It depends on the majority and where it comes from in the House, as to whether the Government will take any notice of it. The fact that you can sometimes get a large majority can put pressure on the Government because they know, "Hang on, it is not a fatal Motion, but it is quite a strong signal of intent from across the House, from all sides, so it is important".

As I have alluded to before, there may be some other process we can use that is not just the all-or-nothing approach. One of the most valuable things this House can do is get the Government to think again and just take a step back and reconsider. This is what, in effect, we did on tax credits. If we can do that more often—we have spoken about delays or something like that to feed into our processes—so that we are not necessarily putting ourselves on a collision course of opposition but we are given another opportunity to reconsider in the light of information that has come forward from this House, that could be a valuable tool, not just to us. It could be valuable to the Government as well.

The Chairman: Do your parties see it as part of their role to see that the Government are held to account with regard to recommendations that have emerged from a Select Committee—whether this one, DPRRC or any other committee—or do you rely on the committees making their own case and Back-Benchers just raising them if they want to?

Lord Newby: You almost wave the Committee's report at the Minister, do you not?

The Chairman: Yes, we noticed that, but I wondered whether it was ad hoc or whether you have a general approach to it.

Lord Newby: As a general approach, we would expect our spokespeople to have read and taken the report seriously. That does not mean we would slavishly follow it, but there would be a strong prejudice to do so. The interesting thing, again, on the other side, is that now—or certainly when I was a Minister—if we were up against a DPRRC recommendation that we were going to resist, we tended to feel on pretty shaky grounds in terms of persuading the House. Indeed, one of the commonest government amendments made as a result of pressure in the House, on the legislation with which I was involved, was to move from negative to affirmative procedure on SIs, because that is what the DPRRC had recommended. There is quite a pattern now of the Government doing that.

Baroness Smith of Basildon: We would circulate the reports to all our Front Bench. We would notify them of particular issues that have come up and we would have to regard them quite seriously.

Q149 **Baroness Taylor of Bolton:** Moving on, and looking forward, given the very extensive experience that you both have on very complicated legislation, I wonder what you feel about legislation that will be coming down the track at us, following the Article 50 votes that we anticipate will go through shortly, in terms of the so-called great repeal Bill. We have had some indications as to how the Government intend—or would like—to deal with this. It is going to be quite challenging for Parliament. I wonder if you have observations on what those challenges are.

Baroness Smith of Basildon: I have lots. I meant to bring two documents with me, which are about this high on my desk and have very small print. They tell you the nature of all the things that have to follow into UK law from EU regulation laws at present. As to the things that worry me the most, the volume of what we are going to see is going to be enormous. The complexity of it worries me. It is not going to be that straightforward. There will be time constraints, because we are talking about the negotiations starting within two years. I worry about the capacity of the House as a whole to do the work we need to do. I have concerns.

There is also the wider, less focused concern that, every time we want to challenge, question or raise something that needs to be looked at, there seems to be a constitutional outrage about how dare we question the Government, which worries me. If we are going to get this right and do it properly, we are going to have to ask those questions, suggest amendments and ask the Government to look at things again.

I have some thoughts on how we could approach it. Take environmental regulations to start with. We cannot just transpose EU regulations into UK law. There is going to be a whole regulatory infrastructure around that. That will have to be set up; it will have to be updated. If you start to look at how that links with other bodies in other countries and take that across the board, it is enormously vast and complex. It is also going to be very precise and technical.

I do not want to take up too much time with this answer, but I have a number of thoughts and I have been thinking a lot about how we can do our job effectively and be of assistance. Once we have got past the Article 50 process, what comes next is far, far bigger and more worrying will take a lot of time. The expertise of this House will be absolutely vital in dealing with it. I am worried; I am concerned. I have thoughts as to how we could approach it, but it will need support from across the House, and from the Government, to say, "Look, we have to work on this very seriously and have the right processes and resources in place".

The Chairman: Do you have in mind any sort of structural change that you feel able to tell us about?

Baroness Smith of Basildon: I have some thoughts about structural changes and the information we get. We should have early publication of any statutory instruments as a draft, rather than being told, "Here is this. You need to vote in a month's time, a week's time". We need probably a three-month period where that can be looked at, not on policy issues but on whether it is accurate and does what it says it will do. Perhaps, at the start, have better, more detailed Explanatory Notes so that there is clarity. This gives people an opportunity to check. We may need—I already raised this with the Leader, the Lord Speaker and the Chairman of Committees—another SI committee because the volume will be so vast. It would be impossible for the current SI committee to take on that responsibility, in addition to what it is doing at present.

The Chairman: That would that be a sifting and farming out process, would it?

Baroness Smith of Basildon: No, it would have to do more than a sifting process. There will be an initial sifting process, because there will be some that should be clear-cut. They will need to be tested for accuracy. The Government can perhaps work with the House and have officials from departments working with our officials, so Members, both Front Bench and Back Bench, have a resource and can say, "What does this mean? Does that do what it is meant to do? Is that what was in the legislation?". We have seen the use of the old Keeling schedules. That might be something that is useful to see, in terms of how it affects existing legislation as well.

If you start to think it through in sections and take one department at a time, you realise what a vast area of work this is. I am nervous about our capacity to do this properly. It could seem a very minor thing we get wrong in an SI that goes through, or in the primary legislation, but getting it wrong could have enormous consequences, both social and financial, further down the road. It is going to be very difficult for the Government to manage and I would hope they would see Parliament as a resource to help manage that. Once we have got past the decision process and Article 50, we know where we are and we have a very short time for this work to be done. I am nervous about it.

Lord Newby: The main thought in my mind is just the amount of time, because we will not get the great repeal Bill until the start of the new Session at the earliest. It will then be about 18 months for Parliament to consider it before the end of the Article 50 process. It will clearly be a very long and complicated Bill. You transpose EU legislation, but, as Lady Smith says, you then have gaps—"How are we going to deal with this issue?"—because some things you will have left behind with the EU. You will need not just the great repeal Bill but another tranche of legislation to fill in the gaps, which you will not be able to start during the Article 50 period.

There is much talk of a transition period, but you are probably going to need several years' worth of transition period, just to have a whole raft of legislation covering each subject area currently covered by EU legislation,

to fill in those gaps. The complexity of this is such that there will clearly need to be more resources than normal in dealing with legislation.

Baroness Smith of Basildon: The Government are nervous about the resourcing of this, because we are very keen that throughout the process there should be impact assessments of negotiations. That is one of the things that, as a House, we have always relied on quite significantly. Certainly, when I have been looking at a Bill from the Government or the Opposition, an impact assessment is key. The Government are saying, "The amendment has been voted down". It was raised with the Minister in this House earlier this week. They are adamant that there will not be impact assessments. Impact assessments should be provided and perhaps we need to look at whether the House can provide impact assessments as well. The great repeal Bill—it is rather pompously named, is it not?

The Chairman: Yes, we think so.

Baroness Smith of Basildon: The Reform Act was not great for a very long time. I do not know if that will be a large Bill. Again, it could be framework-enabling, and the legislation that has to follow from that will be the bulk. The scale of it frightens me.

Baroness Taylor of Bolton: I was going to ask the same question about the mechanisms. The time constraint will be really difficult and, as a Parliament, we have been promised a vote, but we may be faced with accepting and taking on trust lots of things that the Government say at the end. We may have to look at new ways of developing more sophisticated sunset clauses, conditional commencement dates or something of the kind.

Baroness Smith of Basildon: I went over to Brussels and met various people there, talking about some of the implications for us. I met with Guy Verhofstadt. One of the things he talked about was the implementation phase. The Government do not like using the word transition—they do not want to talk about a transition phase—but there will have to be an implementation phase to set up all these organisations and infrastructure if we expect them to be up and running from day one.

The medicines agency is based in London. We have a significant pharmaceuticals business in this country. It is also important for the standard, the quality and the monitoring. That is hugely significant in the UK and across Europe. They will have to set up something separate. They will just move that over, but setting up such organisations does not happen overnight. You need the expertise. There are many factors involved: what kind of board it will have, what kind of structure it will have, what the budget will be and who will monitor the standards.

Lord Newby: You will not be able to reach any decision on that until you have the final deal, because you do not know what your relationship with the European Medicines Agency will be. The Government talk a lot about having the closest possible relationship in many things, with the

assumption being that we would almost be associate members. That is the implication given. Other people say that it will not be possible to achieve. Until you know whether you can achieve it or not, you do not know quite what structure you are going to need here to replace it.

Lord Pannick: May I suggest to you that the problem is worse than that, because there are many areas where a transition period after exit day is simply not practicable? One needs to know what the law is on exit day, and there are many areas in which it is the inevitable consequence of our leaving that the law changes—not just on immigration; there may be other aspects and the medicines agency is a good example. Therefore, in the two-year period, not the 18-month period, decisions of substance will need to be made, perhaps through delegated legislation and, as Lord Newby says, one will not know until very close to the end of that period what provisions are made.

Baroness Smith of Basildon: Changing the immigration law will have to be done by primary legislation. That may lead to new secondary legislation.

Lord Newby: That raises an interesting question about whether, during the transition period or whatever you call it, the UK will need to be subject to the European court, because we will not have set up bodies here to be regulators and to perform that function.

Q150 **Lord Hunt of Wirral:** All that we are now discussing leads us to believe that the Government will not have the detailed provisions in the primary legislation. They will be arguing, will they not, for wide-ranging Henry VIII powers to effect the conversion of EU law to UK law? What is the best way to mitigate the constitutional risks of that happening?

Baroness Smith of Basildon: It is hard. It is really difficult. I am not sure I have the exact answer for you. I wish I had. Early sight and early publication of draft legislation will be important. The House will find the widespread use of Henry VIII powers unacceptable. I am not saying that in no circumstances ever could it be appropriate, if the detail accompanies it—and there are lots of ifs, buts and Sir Humphrey speak: “in the fullness of time” and everything else—but I suspect that it will be very difficult for the Government to avoid trying to use Henry VIII powers. Unless they can provide information to Parliament, we are not able to say if the powers they are taking are merely to replicate what is in EU law, or if something else is being slipped in or taken out. It is extraordinarily difficult.

Lord Newby: It is just very difficult, particularly at this point when you see a huge challenge and there is so much fog around it. One or two things will help. The first is if you can have more pre-vote scrutiny of secondary legislation, whether formally, by the super-affirmative proposal, or through some system of debating or discussing SIs before they come for a formal decision.

The other issue—I do not know how possible this will be—is the extent to which the use of sunset clauses in some areas, as Baroness Taylor said, will give people reassurance. If, say, we have to make 1,000 decisions and we have 1,000 hours in which to make them, we have to do things really quickly. How do we make sure that we have not set something in stone that we will want to change? Sunset clauses give you an easy mechanism to review things.

Baroness Smith of Basildon: It could also be that, if the Government are trying to take a Henry VIII power, you put very strict limits on that. That may be a way forward. I suspect it will be a bit messy as it goes along.

The Chairman: It will not be easy.

Lord Judge: This is an interesting discussion. Do you think we should address the question of how we deal with statutory instruments, whether they are Henry VIII or whatever sort of statutory instruments they may be? Do you, for example, think we should reconsider whether—to the point you made, Lady Smith—you cannot change a statutory instrument? If we have gazillions of clauses in a statutory instrument, one or two of which are really very odd, peculiar or unacceptable, do we have to lose the whole instrument? Do we then find ourselves in a Strathclyde situation that we have diverted the will of the Commons? This has to be addressed. Our whole structure has to be addressed.

Baroness Smith of Basildon: I have always rejected the notion that we challenge the will of the Commons through SIs because, coming from the Government, not from the Commons, that is a red herring that was thrown to Strathclyde and was completely inaccurate. I am reluctant to get into changing SIs, because there are times when they are helpful. If you make them amendable, you are getting into making them primary legislation again and you open up other areas. I entirely take the point that there might be one minor thing that is not right, or two or three points. Particularly with this, given the volume, the accuracy is going to be an issue as well. I would suggest something like a three-month period of consultation, not to change the intent, which will be clearly specified, but to look at those kinds of issues before it comes to the House. That creates an extended informal process beforehand.

The Government may worry that that makes it a longer period, but when you look at it at the end it may, in fact, be quicker because you will be avoiding issues. If we have 1,000 SIs and we discover that in 500 there are serious inaccuracies, that is a quite serious constitutional issue we face. If, on the other hand, the Government take the time to say, "Right, there is this three-month or two-month period"—or a one-month period or whatever—in which they open a consultation or send them out, people within and outside Parliament can look at the accuracy and compare them with the intent of what they are supposed to do. Then, when it comes before the House, we have that final part to do, but we could do some of the hard work beforehand. That might be a better way than changing the whole basis on which SIs are formed.

Lord Newby: I am rather keener on making it easier to amend SIs formally, because if—particularly in the context of Brexit—we have a whole stream of them, a lot of them will be done at great pace by the Civil Service. It is not that there will necessarily be anything suspicious about it, but it will not work.

We have sometimes seen this with legislation. The best example of that was on something called, of all things, the Statistics and Registration Service Bill, where the Labour Government brought forward amendments to completely change the way we managed statistics. The whole Bill had to be rewritten, because it fell under critical scrutiny from people like Sir Claus Moser. I can see exactly the same thing happening with the sort of substantive SIs that we will have in this case.

One question on how we manage this, if there is a huge volume—and there will be an acceptance by the House that this is a priority—is whether we need to have more than one subsidiary chamber considering SIs. If the number of SIs doubles, trebles or quadruples, the Moses Room will not do, unless people come in at the weekend. We may need to think about having, just as we have a number of committees sitting at the same time, a number of committees considering SIs at the same time.

Baroness Smith of Basildon: There may need to be a willingness from the Government to say, “I am going to take this away and bring it back”, because that would cover off the same point. My worry about amendment is that it could then apply across the board to SIs, so we will deal with them in the same way we deal with primary legislation, and we will go through the same arguments again. The Government should say when they have got something clearly wrong, as once Lord Henley did with an amendment I had: he took it away and then brought it back.

Baroness Taylor of Bolton: If things are in draft, or you have a Minister who is willing to co-operate, the Government do not lose face by that. If these are potential technical mistakes, having something in draft means it is not devastating to the Government to have to reconsider.

Baroness Smith of Basildon: Drafts could avoid a lot of the problems, but I certainly take the point that, if we have been presented with 1,000 or 2,000—40,000 was one number I heard on the radio this morning—SIs, just to slide those through would be irresponsible.

The Chairman: On that note, we must draw to an end. It has been enormously helpful, because you are distinguished practitioners of the legislative process, both in government and in opposition, and that makes your insights all the more valuable. Thank you very much for coming to see us.