



Select Committee on the Constitution

Corrected oral evidence:

The legislative process: the passage of legislation through Parliament

Wednesday 6 June 2018

10.30 am

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Members present: Baroness Taylor of Bolton (Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 1

Heard in Public

Questions 151 - 160

Witnesses

I: Professor Meg Russell; Director, UCL Constitution Unit, University College London; Dr Ruth Fox, Director and Head of Research, Hansard Society; Mr Daniel Gover, Research Fellow, Mile End Institute, Queen Mary University of London.

Examination of witnesses

Professor Meg Russell, Dr Ruth Fox and Mr Daniel Gover.

Q151 **The Chairman:** Good morning to all three of you. You are familiar faces, in some respects. The subject is pretty familiar as well; it is one of the areas that gets looked at from time to time both by academics and parliamentarians, who are concerned to do their job well and to scrutinise legislation as effectively as possible. That is always within the constraints of the parliamentary timetable and political realities, so it is sometimes quite difficult to get the balance between the theory of legislation getting through Parliament and the actual practice.

You have all done work on trying to improve the system. What is your current assessment of the effectiveness of parliamentary scrutiny and the impact that has on the quality of legislation? How easy is it to assess how effective Parliament is in the first place?

Mr Daniel Gover: The effectiveness of parliamentary scrutiny is greater than is often assumed, but it is hard to give a benchmark of how effective Parliament is, precisely for the reason you hinted at, which is that it is very difficult to assess. The effectiveness of scrutiny is multifaceted. Some of the dimensions of effectiveness are subtle and hidden and, by their very nature, difficult to measure, but they are nevertheless very important. It is important not to discount those forms of effectiveness.

It may be helpful if I briefly explain a bit about the research that Meg and I did. We looked at 12 Bills that were passed by Parliament during the period 2005 to 2012. We logged every amendment that was proposed to them, read all the debates, conducted about 120 interviews and did other data collection around that, looking at public records and other sorts of things. Crucially, we looked at both visible change on the record and more hidden forms of influence.

Obviously, one measure of the effectiveness of scrutiny is visible change on the record. Even that is more hidden than we might expect, partly because the vast majority of changes that respond to parliamentary influence are delivered in the form of government amendments. Nevertheless, that is a response. We put in the written evidence that 60% of substantive government amendments that were incorporated in the final Acts were traceable to parliamentary pressure.

To give you an idea of what that means, on the 12 Bills, there were about 150 distinct packages or issues that could be traced to some sort of parliamentary scrutiny. Some were relatively small procedural things, such as regulation control, but there were some very big examples: the fact that we have a comprehensive ban on smoking in public places in England and Wales, the extension of corporate manslaughter legislation to police custody, and similar things. There were lots of other things in between: significant policy changes that were not just matters of detail, but were not major things either.

That is one measure of effectiveness. It is important to say that it is not the whole picture, by any means. Obviously, the Government know that they have to get their legislation through Parliament. Therefore, they take into account how Parliament is likely to respond. That can result in things being left out of a Bill that might otherwise be put in it. It can also result in things being put into a Bill or in changes being made to the detail of how things are drafted. These are very difficult to measure. One example in the book was a proposal to cut housing benefit by 10% for those who had been long-term unemployed, which was not put into the Welfare Reform Bill. It had been announced previously, and it was dropped.

Professor Meg Russell: It was in the Budget.

Mr Daniel Gover: Yes, it was in the June Budget. So we can find some examples, but, by their very nature, things that are anticipated are very difficult to measure.

Finally, of course, scrutiny is not just about change, even change before a Bill reaches Parliament. Scrutiny is valuable for its own sake. It means that government rationales are on the public record, and that others are aware of what the Government are arguing and can feed into the process. It delivers accountability. So Parliament is effective, but measuring that is very difficult.

Dr Ruth Fox: I have a declaration of interest, for the purposes of the record. Three members of the Hansard Society's board of trustees are Members of this House: Lord Sharkey, Lord Lexden and Baroness Jay.

I come at it from a slightly different angle. We all look at aspects of the legislative and scrutiny process. We are all looking at different aspects of the jigsaw. One of the difficulties in really being able to assess effectiveness is that we do not have a systematic process of post-legislative scrutiny. In relation to the overall objective, we are not entirely sure what the impact is upstream of all the work that is being done, all the scrutiny effort and all the amendments. Has the legislation been improved? Has the remedy dealt with whatever deficiencies or mischief the Government had in mind at the start of the process?

We all concentrate on the architecture of scrutiny and how we can improve that to create the conditions in which scrutiny has a fair wind and an opportunity to make the kinds of changes Daniel referred to, so that Members who discover defects in legislation have an opportunity to attempt to introduce things to remedy them. Ultimately, once legislation leaves the House and Royal Assent is granted, we do not necessarily have a great assessment, in 18 months, two years or five years of whether scrutiny has made any real difference to how the legislation is implemented and operates on the ground. That is part of the problem in assessing the effectiveness and quality of legislation.

The Chairman: There has been more talk in recent months about the need for post-legislative scrutiny.

Q152 **Lord Judge:** Professor Russell and Mr Gover, in your evidence, you speak about the “power of anticipated reactions” in the context of preparing legislation for introduction. We might be helped by knowing whose reactions you are considering. Is it Members of Parliament, Members on the government side, Members on both sides, the constituency parties or the country as a whole? Whose anticipated reactions have most power?

Professor Meg Russell: The anticipated reactions function, which is, frustratingly, probably the most important and the least measurable, is multifaceted. It operates at formal levels and at very informal and even, we argue, subconscious levels. It is now publicly documented, in government documents that you can download from the Cabinet Office website, that the Government prepare formal written so-called handling strategies to anticipate what difficulties are likely to occur on a Bill in Parliament, and that the written handling strategy is approved by the Cabinet Committee that approves the introduction of legislation.

This is documented in the *Guide to Making Legislation* from the Cabinet Office. Civil servants beaver away, working very much in conjunction with the Government Whips’ Offices in the two Chambers, to try to identify who the likely opponents of aspects of a Bill will be, what their opposition is likely to comprise, how the Government can respond and whether there are concessions that the Government can hold in reserve. They often know that there are concessions that they are likely to give later on.

Different Members have different levels of importance in that process. One of the things we argue in the book is that the two Chambers of Parliament operate quite effectively as a system. We might come on to talk about the differences and relationships between the two Chambers. Often you cannot tease apart the influence of different actors and groups. Ultimately, the people the Government are most concerned about are their own Back-Benchers in the House of Commons. If they cannot maintain the support of their Back-Benchers in the House of Commons, they risk losing their House of Commons majority and losing not only their Bill, but, potentially, their life.

We argue that the Opposition are very important, because, to a large extent, they control the agenda of what gets discussed on a Bill. The Opposition are responsible for the vast majority of amendments that get proposed and discussed. If the Opposition can put things on to the agenda that raise questions in the minds of government Back-Benchers, it creates a dangerous situation.

The same thing applies very much in the House of Lords, where there are large numbers of experts, such as yourselves. Some of you around this table are perhaps some of those who are most feared by government. That is particularly true of those on the Cross Benches, who can put forward proposals that might garner very widespread support across the House, and might result in a Bill going back to the House of Commons,

and government Back-Benchers having to examine their consciences as to whether they accept or reject an amendment from the House of Lords.

Select Committees are tremendously important. Connected to that is the work of pressure groups, which we might come on to. Obviously, pressure groups feed a lot of ideas to parliamentarians. It is not just people who have innate expertise; it is people who talk to outside groups. If you are afraid of what certain charities or professional organisations might say about a Bill, it will inform part of your parliamentary planning, because you know that they are going to be active.

Mr Daniel Gover: The Select Committees that routinely comment on legislation are particularly important. I jotted this down earlier from the Government's *Guide to Making Legislation*: "There is, therefore, benefit in departments anticipating the views of the DPRRC when drafting the bill to avoid the need for amendments". The same applies to this committee and other committees that routinely comment on legislation.

Dr Ruth Fox: I echo that point, using the example of the Delegated Powers and Regulatory Reform Committee. You will be aware of our work on delegated legislation. At one point, it was estimated that about 80% of the committee's recommendations were largely adopted by the Government. There was a sense—perhaps not in the course of the last year, since the election, as regards current legislation, but certainly previously—that upstream in Whitehall, as they are considering the Bill and the delegated powers memorandum that is being put together, they are very mindful of what the committee is likely to say. They are not as mindful as we argue they ought to be.

Lord Judge: How do you explain the huge number of provisions in every Bill we can think of that provide for delegated legislation and regulation-making? It does not sound as though they are terribly impressed.

Dr Ruth Fox: It is more about the allocation of the procedure to the power, as opposed to trying to get the powers through or the number of powers. That is what they are more mindful of.

Professor Meg Russell: I realise that I started off talking about formal processes. I was going to talk about informal processes and mentioned subconscious processes, at which point I think Baroness Corston looked a bit confused, so perhaps I should explain what I meant. If, ultimately, the most important people in Parliament are government Back-Benchers, a lot of anticipation goes on in the minds of Ministers before things even get into the hands of civil servants. Ministers spend their time socialising with and consulting Members from their party. After all, they grew up in their party and believe in its values. Some of this never actually comes to light in the formal process, because Ministers instinctively understand and, indeed, agree with the views of their own party. That has to be seen as a kind of anticipated reaction as well, but it is so suppressed and invisible that it is not documented anywhere.

The Chairman: Is that part of policy development internally, within the

party?

Professor Meg Russell: Yes. Of course, at a time of coalition, the dynamic is rather different, because the two parties do not necessarily understand each other so well, and things will become more formalised and, perhaps, more conflictual inside government. With the norm being single-party government, a lot of this is completely hidden.

The Chairman: I do not know when we are going to get to normal single-party government. We will not anticipate that area.

Q153 **Lord Dunlop:** Can I ask about the perception of the legislative process and the degree of Parliament's influence on that process? Professor Russell and Mr Gover, in your study, you found that those who were furthest away from the process were perhaps most sceptical about Parliament's influence, and that those closest to the process were most impressed by it. Who do you think is nearest the truth in that regard?

Mr Daniel Gover: To give a bit of background, we did about 120 interviews, as I said, and one of the questions we asked almost all the interviewees was, "How influential is Parliament on government legislation?" That allowed us to compare different types of interviewee, people in different sorts of positions.

As you say, we noticed that those furthest from the legislative process were more sceptical about Parliament's influence than those closest to it. In this case, I would say that those closest to the process were closest to the truth. The reason for that is how they interpreted the question of parliamentary effectiveness. It comes back to the points that Meg was making a moment ago. Those who were furthest away, such as those who worked for pressure groups, and some Back-Benchers, tended to interpret the question as referring purely to visible change on the public record, and sometimes even to defeats in the Commons on the public record. In those cases, they came out with a very sceptical view. Those who were closer, such as Ministers and people who worked in government and were responsible for dealing with the Government's legislative programme, were very conscious of the fact that they had to tailor their proposals in order even to stand a chance of getting them through Parliament.

In the book, we give the example of one interviewee who was a Back-Bencher and built up quite close links with Gordon Brown's Administration. He was somebody who had gone from being further away to being quite close to how government deals with—

Professor Meg Russell: With the change of Prime Minister, essentially.

Mr Daniel Gover: Yes. He said to us, "the amount of attention paid to what happened in the Commons was quite staggering to me, who'd been in the Commons feeling I was completely impotent ... actually we were doing far more than we realised ... We hadn't understood the significance of what happens in the Commons". That is a good example of somebody

who changed position and became aware of all sorts of things he was not previously aware of. That accounts for the difference.

Lord Judge: That was somebody in the Commons.

Mr Daniel Gover: Yes.

Lord Dunlop: This is quite critical to the regard in which Parliament is held. How do we address the sceptics? Clearly, there is a lack of understanding and, perhaps, a lack of transparency. What can be done to address that? The drafting of legislation is very technical and, to some, very impenetrable. What specific measures do you think we could take to address the sceptics and improve understanding?

Professor Meg Russell: That is a terribly difficult question. It is one we come to at the end of our book. It preoccupies me quite a lot, actually, because in some respects there is an irony. Our project was originally titled, "An Elaborate Rubber Stamp? The Impact of Parliament on Government Legislation". I think the "elaborate rubber stamp" phrase came from a journalistic comment. I cannot remember who it was, but it was a quotation.

The fact is that a Parliament that is absolutely effective, which the Government take very seriously and go to enormous lengths to avoid conflict with, might appear from the outside to be identical to one that has no power. The nature of that is very difficult to communicate. We have tried to do it with our work, and I hope it will have some sort of academic ripple effect. Some journalists who are very close to Parliament understand it, but it is not the common line that we hear. It is a real challenge in democratic politics.

Things such as the establishment of the Select Committees in the House of Commons, the taking of evidence on Bills in the House of Commons and the change, which I have documented a lot, to the House of Lords in 1999, which meant that no Government had a majority and the House felt more confident, have stepped up the effectiveness of Parliament. The Government do not just collapse as a result; they up their game. Look at the House of Lords, for example. In the early Blair years, there were a lot of defeats in the Lords. The number of defeats continued to be relatively high, but it declined, because the Government became canny at predicting and seeing off those defeats at the early stages.

The Select Committees are the same. They are respected and, to an extent, feared. I have done work on Select Committees, although not as part of the legislative process. I have interviewed a lot of people about them. I remember talking to a former Cabinet Minister, who said, "Inside the department, we were always asking ourselves, 'How will this look if there is a Select Committee inquiry into it?'" Certain policy options would not be pursued for fear of the inability to defend the policy in that public forum. The more effective Parliament gets, the better government gets, but you cannot measure that through conflict, which risks public disengagement from the process. It is a very challenging question.

Lord Dunlop: Is there more basic information that could be provided? In the House of Lords, when a Bill is amended, there are statistics on amendments that have been passed. In the Commons, that is not the case. Are there more data that would help to inform the debate?

Mr Daniel Gover: I would like to see more data published on the number of amendments that are proposed and accepted, and where they came from, but there is a limit. Even providing the basic data that we presented in the book about the number of amendments traceable requires an enormous amount of work, because you have to compare amendments. That is leaving aside all the anticipated reactions and the subtler indicators. It is not a very satisfying answer. Improvements can be made, but there is a limit, unfortunately.

Lord Dunlop: I understand.

The Chairman: When it comes to publicity and people noticing what is happening, it goes back to the point that journalists are interested in the conflicts and the defeats in Parliament.

Professor Meg Russell: One of the key distinguishing features of Parliaments is that they are public environments, where statements must be made on the record. One of the things that is very effective about the British Parliament, which is not always the case in other places—certainly not in presidential systems, which are very different—is that the Government have to respond to everything. They have to respond to every question and every amendment. Every Adjournment debate brings Ministers to the House to explain their position and their actions. Ministers have to account to Select Committees. Select Committee reports have to get responses from the Government, and so on. One of the things we have drawn attention to is the importance of that exposure function for creating accountability and improving the process of policy-making before it ever gets to Parliament.

Lord Pannick: It seems obvious, but is it right to say that the larger the parliamentary majority, the weaker Parliament will be against the Government? It also depends, surely, on the personality of the Prime Minister. Some Prime Ministers are more arrogant. Some are paranoid, without naming names. Their personality will inevitably affect the extent to which they are concerned about defeats in Parliament.

Professor Meg Russell: The power shifts around. As Daniel said, in our book, we document the period 2005 to 2012, which you could break down into 2005 to 2010 and 2010 to 2012. One of the things that is said in the comparative politics literature is that Parliaments are stronger when Governments are coalitions. We moved from single-party government to coalition government, so you might expect a move from a weaker Parliament to a stronger Parliament. However, in that context, the Liberal Democrats and the Conservatives were largely voting together in the House of Lords, so, while perhaps the House of Commons got stronger, the House of Lords definitely got weaker during that period. It was easier for the Government to get things through the Lords. You are

right; it moves around all the time, but there are many interconnected, subtle factors.

Lord Morgan: You have presented quite an optimistic view of the way in which Parliament has been effective in making Ministers explain and defend themselves. Lord Pannick intervened with the admirable description “paranoiac”. There has been a great deal of criticism rather contrary to that, that Ministers do not even try to defend themselves in the Commons, but do it on the “Today” programme, and they use almost every kind of forum and medium there is to present an appearance of government, rather than actual government. Are those views too pessimistic or out of date?

Mr Daniel Gover: I will give a brief answer, and then one of the other panellists can take over. It may well be the case that Ministers are giving justifications in other forums, but there is something about the fact that Parliament can require Ministers to give explanations on the public record. There are various mechanisms in both Chambers, such as emergency debates, that require the Government to come and answer questions. I would not write it off completely.

Dr Ruth Fox: Ministers might go on the “Today” programme to deal with an issue and to explain either a new policy or a problem. If it is a sufficiently major issue for them to be on the “Today” programme, the chances are that, as a result of the Speaker’s reforms, they will face an Urgent Question in the House of Commons later that day. There is now an expectation among Ministers, and has been for some time, that the accountability moment in the day in Parliament will be that they are called for an Urgent Question.

Professor Meg Russell: My students did a study of Urgent Questions under John Bercow. I cannot give a definitive answer, but one of the things they detected was that a lot of those questions resulted from complaints from Members about something having been in the media. That may even be a criterion in the choice of Urgent Questions and whether the Speaker takes them seriously. Ministers do it at their own risk.

Lord Morgan: I agree with what you say. It is by no means a new phenomenon. The first Prime Minister I can think of who acted in that way was David Lloyd George, who preferred to announce policy to journalists, preferably ones he knew personally, or perhaps played golf with, rather than condescend even to turn up in Parliament. That tendency seems to have been notably reinforced under Tony Blair, for example, but it is a long-term process.

The Chairman: We will move on to wider questions.

Q154 **Lord Hunt of Wirral:** When I first got into Parliament over 40 years ago, the Opposition would generally utilise every possible opportunity to talk out Bills and amendments. As a result, the whole procedure of guillotining evolved. That has now moved into timetabling. Does timetabling, as it

has now become, of stages of Bills by the usual channels in each House affect the quality of scrutiny? Should the timing of Bills be a little more predictable, or the process of timetabling be made more transparent?

Dr Ruth Fox: When timetabling was first introduced, the idea was that it would be part of a package of reforms. Part of the problem with it is that it was cherry-picked. Going back to the Rippon commission, it was to be introduced alongside pre-legislative scrutiny and other reforms. In effect, it has come in on its own, because we do not see many draft Bills coming through. Part of the problem with it is that it was designed alongside those reforms and has not been as successful as a result of not being accompanied by them.

Does more time automatically lead to better-quality legislation, or at least better-quality scrutiny? Not necessarily. On the other hand, if you constrain the time available for consideration of a large number of amendments or a very big Bill, or, for example, you constrain consideration of amendments in the Commons on Report when a significant number of amendments have been made in the Public Bill Committee, you can see how and why Members, on both sides, get very frustrated about the time available. The problem in the Commons is that it means that a significant number of amendments, groups and even schedules sometimes go entirely unconsidered at the Commons stage. That is certainly problematic as regards the scrutiny process.

The Speaker in the Commons is a big supporter of the idea of a House Business Committee, to make the usual channels more transparent and accountable and to engage the smaller parties more actively in the process. Meg may want to say a bit more about that, because she has done some previous work on it. We have argued that there are some potential problems with a House Business Committee. One of the risks is that, in practice, the usual channels' negotiations will still go on behind the scenes. The committee will then sit. You will have transparency and accountability about what decisions it has made, but not necessarily about how and why it arrived at those decisions. I do not think that opening it up in that way will necessarily solve the problem.

We have argued for a more radical approach, in a sense. It goes back to the whole concept of trying to push the Government to do more upstream, by having a better culture of preparation of Bills and better provision of explanatory information, and by thinking about the procedural approach to Bills. This committee and other committees previously have endorsed a Legislative Standards Committee, of which we have been a big supporter. When that committee first gets the Bill, it can look at the nature of the legislation, its content and scope, the nature of the materials that have been presented by the Government and the quality of the business case that has been made. It will then be well placed to make decisions about the allocation of time at the various stages to consider the legislation. Arguably, in the whole business of anticipated reaction, the Government will know increasingly that they will face problems with the Legislative Standards Committee if they do not do the advance preparation and the work upstream, because, once the

legislation arrives in Parliament, the committee will be more inclined to allocate time for consideration than if it is a better-prepared Bill.

Professor Meg Russell: On the House Business Committee, Ruth is quite right. I have always been a sceptic about a House Business Committee. I was the specialist adviser to the Wright Committee, which proposed the Backbench Business Committee, which has been a really worthwhile reform. I studied business committees around the world when deciding what to recommend before the Wright Committee was established. I attended the business committee in New Zealand, for example, which met for about five minutes. I mentioned rubber stamps. These committees are largely rubber stamps.

There is one thing that it would bring. When it comes to arcane parliamentary language, it does not get much more arcane than "the usual channels". It does not sound very open and welcoming. It is not transparent. There would at least be a page on the website that told you who the decision-makers were, but I am not sure that the advantages would go much beyond that, because the decisions would continue to be taken behind the scenes.

The way Lord Hunt put the timetabling issue makes me think of a piece that I wrote with Philip Cowley, which was published very recently. It revisits a classic piece of work by Anthony King, who was writing about Parliament in the 1970s. I cannot bring the words to mind exactly, but he said that, essentially, the Opposition have only two weapons: power of delay and good reason. The power of delay has largely been removed. If that pushes the Opposition towards good reason, it is not necessarily a bad thing. This House does not have programming, but is generally pretty well behaved, because it realises that it would face the wrath of the Commons, the Government and the British people if it filibustered important government Bills. If you look at where filibustering gets you, for example on the Grocott Bill, as a Private Member's Bill, you see that it does not necessarily get you anywhere very rational.

The Chairman: I am tempted to follow up on that, but we will move on. There are quite a few other issues that we want to raise, so we will have to be a little briefer.

Q155 **Baroness Corston:** Can we turn to what happens to legislation that hits the buffers at the end of a parliamentary Session, which we call wash-up? The Hansard Society evidence says: "The process restricts parliamentary scrutiny and marginalises backbenchers, minor parties and crossbench peers". What are the alternatives?

Dr Ruth Fox: I am not sure that is our evidence, because I do not think that we submitted any on that section of the inquiry. It might be something we said previously.

Baroness Corston: It is.

Dr Ruth Fox: Okay. I am going back to some work that I did nearly 10 years ago, with the Clerk of this committee, for our work on *Making*

Better Law. We were looking particularly at wash-up at the end of a Parliament, but it applies at the end of Sessions as well. Essentially, two approaches were possible. One has been proposed in similar form by Lord Rooker in recent years. If a significant number of Bills were being dealt with in the final stages of the Session, and the normal procedures and time were not in place, those Bills, once they became Acts, could be subject to post-legislative scrutiny within six to 18 months of the end of the Session and could be reviewed. You would have that backstop provision.

Another option we looked at was the idea that, rather than legislative Sessions that are simply built around the parliamentary calendar, a legislative Session is built around the Bill. The time provisions kick in from the start date of the Bill, and its out-date, whether it is 12, 15 or 18 months, is dependent on the start date of the Bill, not the start date of the parliamentary Session. There are some difficulties with that and how it would play out as regards the parliamentary calendar. I am conscious that there might be implications for this House, in particular, under the Parliament Act, and that those would have to be looked at. It would enable better planning, particularly in the context of a fixed-term Parliament, and there would not be the effect of all the Bills hitting the buffers right at the end of the Session. You could plan scrutiny around each individual Bill much more effectively.

Baroness Corston: At present, we have a two-year Session. Would two-year Sessions be preferable for carryover?

Dr Ruth Fox: It depends on how you do it. You might say that the legislative cycle for a Bill was two years. In an ideal scenario, a Bill would have pre-legislative scrutiny. It would then come back and start its parliamentary stages. That could be done within a two-year cycle. Potentially, that could work, but there might be an issue of how to manage two years within the five-year Parliament. As far as I am aware, there is no plan to move towards making two-year Sessions the norm. It plays havoc with the data. As regards trends, it is a nightmare.

Professor Meg Russell: Years ago, I spent some time working as a special adviser to Robin Cook, when he was Leader of the House of Commons. He was very keen on the idea of what he called ending the sessional cut-off. But it is quite procedurally complex, not least because you probably need to amend the Parliament Acts, which talk in terms of Sessions.

The Chairman: You could just have one Session for the whole of a five-year Parliament, but that would have implications for the Parliament Acts. Lots of people say that, unless there are some deadlines in the system, everything tends to get slowed down and progress is not made where it should be.

Professor Meg Russell: In my first book, I studied bicameralism—second Chambers around the world. One of the cases was Italy, which has no cut-offs at all. There is a famous case of a Bill that shuttled back

and forth between the Houses for something like two decades. There is a risk of lack of discipline.

Lord Beith: We still have the Select Vestries Bill and the Outlawries Bill.

The Chairman: We will not say what is going to happen to the EU Withdrawal Bill, however many decades it takes—but never mind. Lord Morgan, do you want to move us on?

Q156 **Lord Morgan:** Yes. Both Houses, the Lords and the Commons, scrutinise and examine legislation at length. To what extent do you think that the processes in each House complement or duplicate each other?

Professor Meg Russell: To a large extent, they complement each other. Of course, there is a risk that Daniel and I sound like absolute defenders of the system, as if everything works perfectly and nothing should be changed. I do not think that is what we say, but there are elements of the system that work very well.

As we say in our written evidence, the two Chambers are procedurally different in some respects; for example, on where the Committee stage is taken and on whether there is selection of amendments. Their memberships are extremely different, and that is a huge complementarity. The lack of a government majority in the House of Lords and the presence of the Cross-Benchers are both enormously important factors. Of course, the fact that the House is not elected means that it is less assertive than it might be; the House of Commons sees itself as very much the senior Chamber and the place that deserves to have the last word.

The Select Committee systems in the two Chambers are different and very complementary. This Committee does not exist in the House of Commons. It and the DPRRC play enormously important roles in the process, whereas the role of Select Committees in the House of Commons is relatively less important. As we say in the written evidence, the clichéd presentation is that, essentially, the big political lines are drawn in the House of Commons. That is where the adversarial debate on the issues of principle happens. Then, in the House of Lords, there is focus on the detail, the more technical aspects. There is some truth in that, but it is a bit of a simplification.

The two Chambers have very different cultures, because of the unelected nature of the Lords and the Government not being able to rely on their majority. Again, it would be a cliché to say that the Government can rely on their majority in the House of Commons. They do not necessarily even have one at the moment, so we are not in one of those periods. Famously, party cohesion in the House of Commons has been declining since the 1950s. MPs are much less biddable than they used to be, so the Government cannot wholly rely on their majority. They cannot just put through any old rubbish and expect MPs to support them in the House of Commons.

In the House of Lords, they absolutely cannot rely on their majority, because they do not have one. They have to get by through reason; they have to be able to defend their policy on its merits. That is good for scrutiny in the House of Lords, but it is also good for scrutiny in the House of Commons. Going back to the anticipated reactions point, the Government will not put in front of the House of Commons a Bill that they know they will not get through the House of Lords, unless, of course, they feel that they are on very firm ground and can see off the House of Lords, but then they need solid support from their own Back-Benchers.

As I said before, we present the two Chambers as very much an interconnected system. Frequently, amendments that start in the Commons, maybe in Committee, do not even get voted on at Report stage, because there is no time. They then come to the House of Lords, where they get picked up and some of the issues get resolved. Then there is a feedback loop to the House of Commons, where the Commons decides in the end whether a change should happen.

In some respects, the EU withdrawal Bill illustrates that dynamic quite nicely. In some respects, it is a highly atypical Bill. Clearly, it is huge and controversial, it is on an unprecedented subject, it was taken on the Floor of the House of Commons, it is a constitutional Bill, et cetera. What is quite interesting is that it illustrates in a very public way how some of the dynamics happen, even on low-level Bills. A lot of issues are first raised in the House of Commons and not really resolved there. They then come to the Lords and are examined in enormous detail. Ministers are pushed. They give in on some things, but not on others; they stand their ground and get defeated. Then those defeats go back to the House of Commons, where MPs must decide. That is always the way it works, but it is usually much more out of the limelight than it is on that Bill.

Dr Ruth Fox: In respect of the EU withdrawal Bill and the complementarity element, quite an interesting development, which we have advocated for a number of years, was that the Delegated Powers Committee published its report on the Bill when the Bill arrived in the Commons, as opposed to the normal practice, which is to do so when a Bill arrives in the Lords. We have argued that, given the lack of understanding of delegated powers in the Commons and the fact that there is no similar committee there to support legislative scrutiny of delegated powers, that ought to become the norm, not the exception. In fact, the committee has now done it twice, because it also did it for the customs Bill.

The response and the reaction in the Commons have been very favourable. Members have found it incredibly useful and have utilised it to a very great degree. That kind of model, where we utilise the resources and value of the different committee systems to inform the scrutiny of legislation in both Houses, is something that we should encourage.

Lord Morgan: That is very helpful. One area where complementarity is not evident, and perhaps not possible, relates to the numerous cases

where parts of a Bill have not been discussed at all in the House of Commons, which, of course, has the guillotine. That has led to disputes. I well remember the parliamentary boundaries Bill, where large chunks of voting provision in different parts of Britain had not been considered. Do you think that the House of Lords should treat its role rather differently in such cases?

Professor Meg Russell: I suspect that it does. There is a recommendation in one of Ruth's reports that there should be documentation, through something like a Legislative Standards Committee, of which bits of a Bill did not receive scrutiny. That would help the Lords to navigate that process. I suspect it happens informally already.

Dr Ruth Fox: I think something is already done to that effect.

The Chairman: The fact that something has not been discussed in the Commons is often used in the Lords as a reason for pursuing it a little further.

Q157 **Lord Beith:** In your evidence, you both identify some of the many ways in which Commons Select Committees influence legislation, from anticipated reactions right through to pre-legislative scrutiny, the publication of reports in the course of a Bill and, of course, post-legislative scrutiny. Do you share my view, which I will be quite explicit about, that committees are able to do that because they can pick and choose things on which they can have a committee view that does not cut across the party loyalties of the members of the committee, and that that would not operate if committees had a formal role in taking legislation through Committee stage? In my view, if they did, party managers would want to deploy the Government's majority in the committee. At the moment, there is a collective effort to keep Whips out of Select Committees, but in those circumstances, they would feel that they had to be there, to run things as a Standing Committee or Public Bill Committee is run.

Professor Meg Russell: That is another real conundrum. This is something that separates the UK Parliament from Parliaments in most other developed democracies. On the European continent and in the US, specialist committees take the Committee stage of Bills. We are often criticised for the fact that we do not do that. Hence, sometimes people suggest that responsibility for the Committee stage should be handed to the specialist committees in the House of Commons. I very much agree with your analysis: that could be damaging to those committees.

It would require a lot of careful study to back up this statement, but, having studied the Select Committees in the House of Commons, I suspect that they may be among the most effective scrutineers and investigators in Parliaments in the developed democracies. In most Parliaments, where such committees are taking legislation, not only are they likely to be more politicised, but the ability of the committee to set its own agenda can be crowded out by constantly having to respond to

proposals coming from the Government. One of the strengths of our Select Committee system is that the committees absolutely control their own agendas and can choose what topics to investigate.

As you say, we document in the book various ways in which Select Committees influence the process. Perhaps one of the most surprising statistics in the book is that, when we analysed debates on the 12 Bills, we found 1,700 substantive references to Select Committees. That is around 140, on average, per Bill. Often, Members of both Houses, from both the Opposition and the Government, including Ministers, use the positions of Select Committees to legitimise their position. That happens with this Committee; it certainly happens with the DPRRC. People stand up and say, "Support my amendment to change this Bill. The DPRRC said that this was inadequate". The Minister will stand up and say, "I am not going to accept your amendment"—a different amendment—"because the DPRRC said it was fine". You also get that with this committee and with Commons Committees. One of the interesting examples in the book was the setting-up of the Office for Budget Responsibility, under the Budget Responsibility and National Audit Bill. It was frequently mentioned in debate that the Treasury Committee wanted that change.

The fact that the committees can look ahead and do some sort of blue-sky thinking means that often they are feeding ideas not to government directly, but into the debate. They get picked up by pressure groups and parliamentarians. The pressure on government increases, and often government will legislate on those things, ultimately. That is another reason why it would be very silly to measure Parliament's impact by looking at the extent to which it knocks back or changes government legislation. Sometimes, the Government offer Parliament what it asked for.

At the same time, it is a weakness of the system that in the House of Commons Bills go to non-specialist, temporary committees. A few years ago, we did a report where we suggested that we might try to enhance the degree of specialism and permanence of the committees that look at legislation in the Commons, but we should definitely not give that responsibility to the Select Committees.

Lord Beith: Does the Hansard Society have a view on the latter point, or, indeed, on the earlier one?

Dr Ruth Fox: On your earlier point, I largely share your analysis and Meg's. We too had a recommendation previously that, at least on a trial basis, it would be worth looking at having a legislative committee where the members of what would now be the Public Bill Committee were supplemented by members of a relevant Select Committee or Committees, to bring a level of expertise to the Bill. Often the feeling in the Commons with Public Bill Committee membership selection is that, if you know anything about the issue, you will not get on to the committee. It is not just that there is a lack of expertise; in many respects, that is a deliberate decision by the Whips. It is not just a committee structure problem.

You could trial it on some Bills. The problem with trials is that, inevitably, the Government would support doing them for the smallest, most anodyne Bills possible, but it would be worth looking at just how that might work, on a trial basis.

Lord Beith: The exclusion of people with knowledge of the subject is not total, however. In a sense, it has been trialled, to some extent.

Mr Daniel Gover: One of the Bills that we studied was the Energy Bill in 2009-10. Quite a number of the members of the Public Bill Committee for that were drawn from—

Dr Ruth Fox: There are some cases—

Professor Meg Russell: That may fall into Ruth's anodyne category.

Mr Daniel Gover: Possibly.

Another thing I would add is an example we put in our written evidence, of the Health Bill in 2005-06, where members of the committee signed and tabled a joint amendment. There has been a proposal by the Commons Procedure Committee to formalise that. How much difference would it actually make? I suspect that an amendment tabled by a Select Committee would be given priority by the Speaker anyway. But there may be something to think about in that, because it was clearly very influential in the debate about smoking in public places.

Q158 **Lord Norton of Louth:** The way Bills are drafted can make them fairly impenetrable, both to Members and to members of the public. Over the years, the explanatory material that accompanies Bills has improved massively, but where are we at the moment? How useful is that material? Could more be done to make it clear to Members, and indeed the public, what the purpose of a Bill is and what the provisions are designed to achieve, so that they can have more impact on the measure?

Dr Ruth Fox: I am going to sound a bit like a stuck record. I go back to the earlier suggestion for a Legislative Standards Committee. You are right to say that there have been significant improvements, but there are still weaknesses. It goes to the question of what the scrutiny is trying to achieve, and what quality of legislation looks like. What is the output that we desire from improvements in the scrutiny process? Ideally, both Houses would do this jointly, but I recognise that there is not the appetite in the Commons that there is, perhaps, in this House. Therefore, if it cannot be done jointly, it should be done by the House of Lords only. A Legislative Standards Committee could lay down more explicitly the criteria it wants to see in a business case for the legislation, and that there would be difficulties for the Government in the management of that business if they did not provide the information in the ways that were required.

I will not go through them here, but we have set out the criteria that a Legislative Standards Committee would want to look at and, therefore, what would need to be in the business case, not just the Explanatory

Notes and the delegated powers memorandum, but the range of impact assessments and the legislative account. For example, why there has not been pre-legislative scrutiny? What was the nature of the consultation? If there was no consultation, why not? Has there been legislation in the area before? When was it? Why do you need to legislate? It would look at all those kinds of issues, as well as quite technical things, such as whether we are utilising things such as Keeling schedules. If those are not included, why not? Potentially, there is a great range of information. Ideally, parliamentarians, and certainly the public, would benefit from access to that information. The Government will not do that voluntarily, so we think it could best be achieved through a legislative standards mechanism.

Lord Norton of Louth: The Goodlad committee here, on working practices, came up with pretty much the same list of criteria that were designed to achieve that.

Q159 **Lord Pannick:** The Hansard Society has suggested that, when a Bill starts in the House of Lords, we ought to have a public evidence process, similar to the Commons, at Committee stage. Would that really provide us with any information that we do not already receive from the briefings, or is the purpose transparency and giving people a say?

Dr Ruth Fox: Potentially, it could. It varies from Member to Member, depending on who is receiving what briefings from which organisations. It would certainly add to the transparency. Arguably, there is a democratic deficit between the Houses, in that simply where a Bill starts governs whether or not the public have an opportunity to contribute to the process. I say the public, but let us manage expectations. We are really talking about key stakeholder groups: civil society organisations and stakeholders with some degree of expertise. That seems to be an anomaly that ought to be rectified.

There is an argument about whether public evidence sessions are needed for every Bill. We take a one-size-fits-all approach, generally speaking. Again, that is something I would want a Legislative Standards Committee to look at. There may be certain Bills that do not need that type of evidence session, but it should not simply be a question of which House the Government happen to put the Bill into. Arguably, that builds in a potential incentive for the Government to put into the Lords certain Bills where they do not want public evidence to be taken early. I cannot think of an obvious example, but arguably the incentive is there.

If the Lords were to adopt evidence sessions to address that, I hope that they would look quite carefully at the flaws in the Commons approach to those sessions, to ensure that they are not replicated in this House. There are some significant problems with the amount of time that you get in advance to give the evidence, the amount of time between the evidence sessions and the scrutiny by Members directly, so that it can have a real impact.

Q160 **Lord Pannick:** Professor Russell and Mr Gover, is the disparity between

the resources available to the Government and the resources available to the Opposition, and indeed Cross-Benchers, such that it damages the effective scrutiny of legislation? If so, can anything be done about it?

Professor Meg Russell: Can I add something to what Ruth said on the previous point and pass that question to Daniel? With respect to taking evidence on Lords-starting Bills, I totally agree with Ruth. I come back to the point that I made about the importance of Parliament's public exposure function. It may well be that you have received briefings from groups, but the hearings are not just about passing you information. They are about hearing that information on the public record, with the cameras running and with a transcript. They are not only about hearing from groups. They may also be about hearing from the Minister, in an environment that is rather more conversational than on the Floor of the House.

Louise Thompson, who is coming on next, has looked at whether there has been a reduction in the number of probing amendments as a result of evidence-taking at the beginning of Bills. You might reconfigure the culture a little by taking evidence from the Minister before the Bill starts. I would even say something I said to the Liaison Committee a few weeks ago. It is slightly naughty perhaps. There is definitely a scrutiny gap with respect to Lords-starting Bills, but this committee itself showed that there could be merit in taking evidence between a Bill coming from the Commons and its arriving in the Lords. You did that on the EU withdrawal Bill, previously mentioned, with Ministers. That was quite an interesting process, to tease out where discussions had got to in the Commons and what the outstanding issues on the Bill were before it arrived in the Lords. That could be built into the process, at least on some Bills.

Mr Daniel Gover: It is definitely the case that there is a huge disparity in resources. For that reason, the Opposition, in particular, are highly dependent on outside pressure groups. Opposition and other actors have some other resources. They actually have some of government's resources (via such things as Written Questions), and also from Select Committees and the Libraries in the two Houses. If we wanted to bolster the resources of non-government parliamentarians, one area would be the staffing of key groups in the different Chambers. There is a question to be answered about whether the Opposition in the House of Lords need more resources for scrutiny. Beyond that, the Libraries in the two Houses are used enormously by parliamentarians in their scrutiny work.

Professor Meg Russell: And, indeed, by the public. They also have a public exposure function, which is terrific.

Mr Daniel Gover: Yes. We mentioned how Select Committees feed into the process. Maybe greater use could be made of committee specialists. That could have some sort of feed-in to the process as well.

Lord Norton of Louth: This is a follow-up to Dr Fox's answer. In its 2004 report on Parliament and the legislative process, this Committee recommended that every Bill should be subject to scrutiny by an

evidence-taking committee during its passage. Given your answer, I presume that you would endorse that.

Dr Ruth Fox: Yes.

The Chairman: That is some time ago, but some of the problems remain with us. Thank you very much for your evidence. We are at the start of our reporting sessions. We still have a long way to go, but thank you for the information you have given us today.