Constitution Committee

The Legislative Process:
Preparing Legislation for Parliament

Oral and written evidence

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1. The Alliance for Useful Evidence champions the use of high quality evidence to inform decisions on policy and practice in the UK and beyond. We do this through research, training, advice and advocacy. With a growing network of 3,000 individuals, we work with allies in government, local authorities, and charities. Core funding comes from the Big Lottery Fund, the Economic and Social Research Council, and Nesta. Please note that we have also made a submission on the Evidence Transparency Framework with Sense about Science and the Institute for Government.

2. There are many factors that influence the creation of government policy and legislation. One factor is research evidence. We recommend that there is more use of trustworthy research evidence when preparing legislation for parliament. Research evidence can help diagnose the problem that needs to be addressed, and also look at what might be the most effective (and cost-effective) policy options. What is vital is that policymakers use the most appropriate evidence to answer their questions – rather than just following any type of study that looks credible.

3. It is no longer the case that research evidence is hard to locate and lost in academic journals. There are many sources of high quality research and social science – summarised in a way that is actionable by policymakers involved in pre-legislation. As well as the support of the House of Commons and House of Lords Libraries, there are other freely available resources open to all policymakers. Links to a range of sources of evidence can be found in our infographic of the UK evidence ecosystem.

4. When gathering research evidence to prepare legislation, it is essential not to rely on single studies. The single study could be a ‘flash in the pan’ and not replicated elsewhere. Policymakers should look for trusted bodies of evidence. A tried-and-tested approach, now commonplace in health, is the systematic review. When preparing legislation for parliament, policymakers should use more systematic reviews. Reviews are less well known outside of healthcare. But they can provide significant insights into social, environmental, transport and economic policy. They are NOT literature reviews, but something

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1 For more about the range of benefits evidence can have to policy making, see Section C of Using Research Evidence; A Practice Guide, Alliance for Useful Evidence, 2016. http://www.alliance4usefulevidence.org/assets/Using-Research-Evidence-for-Success-A-Practice-Guide-v6-web.pdf This guide informs our Evidence Masterclass training. We are also piloting this training with the Parliamentary Office for Science and Technology for Peers, MPs and staff, as part of the cross-Commons working group working on Members Professional Development.

2 See Appendix A on matching different types of evidence to policy needs. This model was adopted from DEFRA, but can be translated into the pre-introduction legislation for other policy areas.

3 https://www.alliance4usefulevidence.org/infographic/
more robust. The approach that is effectively described by Ben Goldacre, the scientist and writer:

‘Instead of just mooching through the research literature, consciously or unconsciously picking out papers here and there that support [our] pre-existing beliefs, [we] take a scientific, systematic approach to the very process of looking for scientific evidence, ensuring that [our] evidence is as complete and representative as possible of all the research that has ever been done.” Ben Goldacre (2012) *Bad Pharma: How Drug Companies Mislead Doctors and Harm Patients*, (London: Fourth Estate).

5. Such reviews tell us ‘what we know’ (and how we know it) but also help to clarify ‘what we do *not* know’ (and how we might know it) and where further research investment should be prioritized.4

6. Systematic reviews have grown outside of healthcare and are easily available on websites such as the Campbell Collaboration5 or EPPI Centre at University College London6. If there are no available Systematic Reviews suitable for the pre-introduction stage, we recommend using Rapid Evidence Assessments. They are more credible than literature reviews by summarising all the available evidence in a rigorous and transparent manner.7 While not as strong as a full Systematic Review, they are faster than reviews and thus more suitable for the tight timetables of much policymaking.

7. For actionable summaries of evidence and systematic reviews, Parliament should make more use of the seven Government-backed ‘What Works Centres’ covering over £200billion of public services, in areas such as education, crime reduction, wellbeing, early intervention, local economic growth, health and social care (there are also associated What Works Centres in Wales and Scotland).8 A good example is the Education Endowment Foundation. It has a toolkit that summarises the Systematic Reviews on interventions for improving pupil attainment in English schools. Not only is the toolkit useful to teachers and parents, it is a valuable for policymakers. Anybody can learn from their online summaries of high-quality international evidence reviews. The What Works Centres are now an integral part of Government. They should be a core part of the work of Parliament.9

5 https://www.campbellcollaboration.org/
6 https://eppi.ioe.ac.uk
7 http://www.alliance4usefulevidence.org/rapid-evidence-assessments-a-bright-idea-or-a-false-dawn/
8 https://www.gov.uk/guidance/what-works-network
9 We have not been able to find any examples of Parliamentary legislative processes using the evidence of the new What Works Centres (with the exception of NICE). For instance, a previous report of House of Commons Communities and Local Government Committee recommended more use of the What Works Centres by that Committee. But they have not followed up on that commitment (*House of Commons Communities and Local Government Committee The work of the Communities and Local Government Committee since 2010 Tenth Report of Session 2014–15)*
Appendix A: Rationales for evidence and types of evidence required for policymakers.

Source: *Investing in Evidence; Lessons from the UK Department for Environment, Food and Rural Affairs*, Louise Shaxson, 2014

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<th>Heading</th>
<th>‘Big questions’</th>
<th>Rationales for evidence needs</th>
<th>Types of evidence required</th>
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| A: **Understanding the context**; fundamental processes and phenomena, baselines and benchmarks | Where are we now? | • To gather and analyse available / new data  
• To evaluate risks, issues and uncertainties | • Reviews of existing knowledge  
• Surveys of social and environmental data  
• Research on causality  
• Risk assessment |
| B: **Development** of models, methodologies and tools | Where are we going? | • To understand current drivers and trends  
• To predict future drivers and trends  
• To assess implications for policy outcomes | • Sensitivity analysis  
• Horizon scanning  
• Forecasting and scenarios  
• Modelling impacts and outcomes |
| C: Developing and using the evidence base to help **set targets and formulate policy** | Where do we want to be over the next 5-10 years? | • To understand the economic/social value of change  
• To understand the feasibility / cost of change  
• To negotiate goals | • Economic and social research  
• Deliberative engagement processes  
• Feasibility and pilot studies  
• Market surveys |
| D: Development and appraisal of **options/solutions** | How do we get there? | • To identify / evaluate current options  
• To identify / develop new solutions  
• To evaluate new / old options | • Option / evaluation studies  
• Regulatory impact assessments  
• Interventions to promote innovation |
| E: Optimum decisions and effective implementation through communication, engagement and | | | |


| consultation to influence change | How well did we do? | • To monitor progress  
• To evaluate policies & programs  
• To learn lessons | • Interdisciplinary evaluations  
• Deliberative evaluation processes |
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Appendix B: Logic of using systematic reviews to inform policy and practice decision making


1. Steps for considering the use of research

   (i) What is the issue upon which you are considering making a decision?
   (ii) What different perspectives/viewpoints should be included in considering this issue?
   (iii) How might research (relevant to these issues and perspectives) inform such decisions?
   (iv) What relevant and trustworthy research has been undertaken on such issues and what do we know from that research?
   (v) What other research in future might be useful?

2. Systematic reviews

   When research is used to inform decision making, it is often used in a partial and selective way. Such ad hoc (or purposively selective) presentation and use of research can be reduced through a formal process of producing and presenting the relevant evidence. Systematic reviews are such a formal method for bringing together what is known on an issue. They have:
   - A methodology to ensure that the reviews are relevant and trustworthy
   - The methodology is explicit so that the methods can be checked and are thus accountable

   Systematic reviews include a ‘map’ (clarifying what has been studied and how) plus a ‘synthesis’ of the combined results of such studies (what our current knowledge is from all this research). There can also be further formal processes for producing guidance on how such evidence might inform policy or practice decision making. Systematic reviews can vary in the breadth and focus of question addressed and this should be taken into account in interpreting their findings.

3. Governance and infrastructure to enable the use of research in decision making

   For systematic reviews to inform decision making they need to be undertaken and to be made available. What Works Centres provide one existing form of infrastructure to support such provision. There are many other structures and processes that could also enable the production and use of systematic reviews to inform decision making in the UK.

   October 2016
Alliance for Useful Evidence—Oral evidence (QQ 16-28)

Jonathan Breckon, Alliance for Useful Evidence; Jill Rutter, Institute for Government; and David Halpern, Behavioural Insights Team, Cabinet Office.

Wednesday 9 November 2016

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Brennan; Baroness Dean of Thornton-le-Fylde; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Maclean of Rogart; Lord Norton of Louth; Lord Pannick.

Examination of witnesses

Q16 **The Chairman:** Ms Rutter, I am sorry that I did not greet you outside; I thought your assistant was you. I apologise. She did not contradict me—you had better watch out. Welcome to you, to Jonathan Breckon and David Halpern. You are three experts in precisely the area we want to talk about today. We are delighted to have people with so much experience, and such diverse experience, as you bring to bear.

We have a set of questions that you have seen. We will probably stick to them but may digress occasionally from time to time. The first one, as you will see, is rather broad ranging. Quite simply, how well do the Government use evidence to make policy and develop legislation? I do not want a one-word answer, “Badly”. It is an opportunity for you to open up and get off your chest one or two things that you are afraid you may not have the chance to say later. Shall we start with you, Ms Rutter?

**Jill Rutter:** The simple answer is that it is quite variable. There are some examples of evidence being used quite well. Most people regard the way in which the Government went about making their policy on pensions under the Labour Government—the Turner commission—as the gold standard, the rational policy-making model of spending a long time, partly for political reasons, gathering your evidence base, subjecting that to external criticism and then spending quite a long time developing policy proposals and building consensus around them. At the other end of the scale, there are clearly some decisions where the evidence base is difficult to find or, indeed, very thin. It was quite interesting that in the foreword to the Social Security Advisory Committee annual report, Paul Gray, who used to be chairman of HMRC and a second Permanent Secretary at the Department for Work and Pensions, drew particular attention to what the SSAC thought was the extremely poor—or at least ill-exposed—evidence base behind a lot of the Budget welfare decisions. So there is a big spectrum.

Since 2010, with the coalition, there has been quite a concerted attempt to produce more evidence. I am sure that David will talk about the What Works initiative and things like that. He will probably disagree with me on this, but there has been more willingness in slightly second-order, more technocratic, less politically contested areas to engage in bits of experimentation, trialling and things like that. Those are all very welcome developments.
There are some things where government just has to act in the absence of an evidence base. Where the Government are working in a bit of a blind area, what is really interesting is the provision that they put in place for capturing information as the policy develops, so that they can tweak as they get feedback on what is working and bearing out their underlying hypothesis and what is not.

David Halpern: Thank you for inviting us. The basic point is that there are lots of good ideas that do not work, but seem very plausible, through legislation and other government practice. We have to embrace a fundamental humility to acknowledge that. That is the point. Often we are overconfident about what will and will not work, whether it be that passing a law will affect people’s behaviour in some significant way or that using a tax instrument will have a given impact. Broadly, that is what lies behind the What Works idea—to embrace and run into that question by saying, “Actually, we often do not know what will be effective or not”.

In principle, that applies absolutely to legislation. The point that Jill made as an aside is right; perhaps we will get on to it in more detail. The What Works stuff pointed in a direction away from legislation. It is about all the many choices that are made by head teachers and others about the best way to teach maths, the best way to spend a budget if you are a local economic partnership, or the discretionary judgments that apply in the criminal justice system, such as whether the police should wear a body-worn camera. You do not need to go to legislation. There are many questions where you can say, “What is the most effective thing to do?”

It is a really good question to ask about legislation itself, as well as the role that legislation can play in making something possible. The discussion about social work is a good, topical one; maybe we will get on to it. How do you reconcile the basic issue—the really deep thing—that very often we do not know what is most effective? The only way we will find out is by testing variations in practice. That is not really how laws are generally thought of. They apply for everyone, all the time. How do you square that paradigm with, essentially, a scientific one that, in order to find out what is effective, we have to vary our practice?

We are definitely making some progress. Has it really come to bear in a deep way in relation to legislation? I do not think so. My own work, much of the time, has been as head of the Behavioural Insights Team, as well as national adviser on What Works. We spend a lot of time avoiding legislation. The point is that there are so many other things that you can do. Indeed, a prior question is, “Are you sure that we need legislation at all? We could probably get this effect more effectively in some other way”.

The Chairman: You said that there are a lot of good ideas that do not work. Can you define areas, sectors or particular types of problems of that kind?

David Halpern: Yes. We can take them from almost any domain, although the back story will be that the more frightening ones are those where we do not know whether they work at all. One of the most notorious examples, often rehearsed, is Scared Straight in the criminal justice system. In fact, when I was writing up the book ‘Inside the Nudge Unit’ a little while ago, I was struck by the fact that the London Evening Standard had a big piece saying that we were going to pick up kids who might be getting a bit more troubled, put them in handcuffs in the back of a police van and show them prison. The idea was that obviously that will scare them straight. The programme is run on a massive
scale across the world. In the US, it is done in huge volumes, for a few dollars a time. Two systematic reviews showed that not only does it not work but it makes kids significantly more likely to offend—in fact, by some estimates, 60% more likely to offend. It is a beautiful idea. You can see why it is a lovely idea; it just turns out empirically to be disastrous.

That is probably true of a lot of things that we do. Even in medicine, which is normally held up as the great example, with a strongly empirical base—not least since the work of Archie Cochrane—we still get examples of it. A term that is sometimes used, even in medicine, is the so-called parachute test. You should not do something because it would be unethical to run a trial on parachutes—to have half of the Committee jump out of a plane with a parachute and half without one, to see how it works—but the ‘parachute’ defence is often used, because it is seen as self-evident that a practice is more effective.

There are now some very famous examples of things that were once considered self-evident. Ben Goldacre has given an example to do with head injuries. Until recently, if you had a head injury you would be given a steroid injection. There is a very good case for that, because swelling on the brain is very dangerous and steroids should reduce swelling. As it turns out, two randomised controlled trials done in recent years show that you are more likely to die if you are given a steroid injection after a head injury. Do you see what I mean? The basic point is that there are many such areas. The frightening thing is, what are all the areas that we have not tested and where we are probably doing harm?

Jonathan Breckon: The use of evidence by government in policy and legislation is not good enough. I want to bring up a few examples. It is not good enough at using the social science that is out there. The UK is blessed with having a world-class social science base and a phenomenal supply, not just the What Works centres and the Behavioural Insights Team, but many others—including, from here, people such as the Parliamentary Office of Science and Technology. It is just not used enough. It can be cherry picked and distorted. We are keen to recommend that we be a little more suspicious of single studies and that we look for wider bodies of trustworthy evidence. That is why the What Works centres David heads up are so crucial: they can do what are called systematic reviews—a technical phrase—bringing together large bodies of trusted evidence. Critically, such reviews also show you where there are gaps—the things that we do not know. Going back to the humility question, we need to be up front about what we do not know. We need to use more of those bodies of evidence.

We also fall down when we commission new evaluations and evidence as we go along with new pieces of legislation or policy. They can be of poor quality. The National Audit Office looked more deeply at some government evaluations. Half the evaluations it looked at were poor quality. It was particularly worrying that, the worse quality it was, the more likely it was to have stronger recommendations for different actions. Do you see what I mean? The weaker it was, the more confidently the evaluators would say, “We have some clear policy recommendations”. Supply and demand are critical.

Finally, I would love to answer your question in a more evidence-based way, but I cannot. The reason why I cannot is that it is so hard to find evidence behind particular policies and legislation when you are on the outside. An initiative we are involved in with the Institute for Government and Sense About Science, which David kicked off, is looking just at whether you can show the
workings behind particular policies. It is extraordinarily hard. If we take something like the Department for Education’s *Educational Excellence Everywhere* White Paper and look at even really simple things such as the referencing, we find that it goes nowhere. It goes to a splurge of different, random bits of evidence—so we cannot find the evidence behind the particular policy.

There is a lot of good practice, but we have found examples where even policies that have good evidence behind them have forgotten to show it, so we cannot even reward the good practice. In South Africa, they now have White Papers that have a section that shows the evidence. That may be something you want to look at. It can be empty, which is fine; you are being transparent about the fact that there is no evidence or it is of very dubious quality—it is a think tank with some wishy-washy survey—but at least you have something to get your teeth into. That could answer your question.

Q17  
Lord Hunt of Wirral: Mr Halpern, given all the work on behavioural insights, to what extent should public opinion be listened to? Several times we have responded as a legislature, as with the Dangerous Dogs Act. Now, post-Brexit and post the American elections, people say that it is all going wrong because we are not listening to the public. I have a horrible feeling that the public would want us to undergo the parachute test. How could we listen better?

David Halpern: I will give you my personal view, which is obviously not necessarily government policy. There are mechanisms that can solve that issue. Personally, I think that there is a particularly strong case for the use of what are sometimes known as deliberative forums, which bring a sample of the public to hear evidence on an issue. Effectively, it is like a legal jury. You could take 100 people. We were involved in one in Australia, interestingly, on obesity; we help other Governments these days. There were 120 people, who were exposed to evidence from a whole load of experts and other stakeholders and asked to give a view themselves: “What do you think?” You get a very different, much more sophisticated view from the public when they have heard about the issues, not least from one another. They are asked to engage in the trade-off.

One of the ways we should respond to these kinds of challenges is by introducing similar sorts of sophisticated mechanisms for the public to hear and give a view, not necessarily a binding one, that addresses some of the concerns. You mentioned it specifically in relation to behavioural stuff. It is especially true there, because often it concerns everybody’s behaviour out there. There is naturally a degree of suspicion sometimes about whether you really want the Government nudging you, and using these more subtle approaches. Adair Turner’s work to change the defaults on pensions is a great example. One of the things that underlines it as an excellent piece of work was that there was very good-quality consultation. In some ways, the public, when given the evidence, gave permission to make the change—to change the defaults on pensions. And by the way, it has been extraordinarily effective; 6.5 million extra people have started saving for a pension since 2012.

Jill Rutter: In the wake of Brexit—not in the wake of the Trump victory, but in September—the Institute for Government did some polling. We asked people to what extent they wanted politicians to consult experts when formulating policy. More than 80% of people—there was no difference between leavers and remainers—said that they still expected government to take on board the views of experts. They also wanted politicians who delivered on their promises.
was the other big message from that polling. They also had great confidence that this Government would deliver. That was quite an interesting message as well.

Q18 **Lord MacGregor of Pulham Market:** What are the constraints that prevent government departments from proposing evidence-based policy and legislation? Is there a lack of capacity within government for dealing with that?

**Jonathan Breckon:** The capacity issue is about the smart demand from government, civil servants, your advisers and staff to interpret and engage with the evidence. As the Alliance for Useful Evidence, we have been piloting, with Civil Service Learning, training of the policy profession. Here, with the Parliamentary Office of Science and Technology, we have been helping clerks, researchers and other staff in both Houses with their capacity to interpret evidence, and to know what is rubbish and what they can trust—really digging down. That kind of intelligent consumption of evidence is the bigger thing; that is where the capacity issue is. In the supply, there is almost too much evaluation, with academic papers and research. That is why things like the What Works centres are so crucial; they synthesise it and put it into an actionable form, but we still need that almost absorptive capacity.

**Lord MacGregor of Pulham Market:** Is the in-house capacity sufficient?

**Jonathan Breckon:** I think it is. The in-house capacity is more about staff demanding the right things.

**Jill Rutter:** It is an interesting question. Departments all have reasonably sized analytic teams. There is a quite big analytic capacity in government departments. There is a question of how far that capacity is deployed in policy-making. Sometimes the view is, “These are the sort of people we will put in a box here and consult when convenient”. There is another quite interesting question about the willingness of civil servants to challenge Ministers when they do not necessarily think there is a great evidence base behind the policy that Ministers are suggesting. That never happened in our day. If you do not feel that there is a licence to say, “Okay, but that is not actually what this suggests”, it is quite difficult.

Jonathan says that there is a strong evidence base. I think it is quite variable. We have just been doing a project on tax policy-making and whether it is a question of supply or demand. There is good work done by the IFS, obviously, but across academia as a whole there are very few people who do really serious academic work on tax policy. There are little pockets but not a hugely massive evidence base out there. In a sense, the Government can create more of that if they are more willing to go outside and get engaged with academia, so that academia knows what questions the Government are asking.

There is also always a real problem with timing. In 2012, we did a report, *Evidence and Evaluation in Policy Making: A Problem of Supply or Demand?* In it there is a quote that was given, unfortunately, under Chatham House rules. At one of our seminars, a Minister said, “The problem is, if there is no evidence that is immediately out there and I want to make a decision, I am up against the political cycle. A reasonable forecast is that I am probably in this job for 18 months or two years. I want to get things done. I need the evidence now. If I ask you to get the evidence for me, it will take you six months to develop a proposal and a bit longer to get it funded, and you will come back with the
results in a couple of years’ time. By that time, I will be Fisheries Minister”. Actually, he was not Fisheries Minister by that time—he would have had time to use it—but there is a real conflict between what is there now and what Ministers need now. Ministers are always going to have to make decisions with only partial information.

The Chairman: Before I bring in Dr Halpern, Lady Dean and Lord MacGregor want to follow up.

Baroness Dean of Thornton-le-Fylde: I had a question about technology, but we may as well sweep it up in this, as Dr Halpern referred to other consultations that could take place for evidence. In this world of technology, is there a place for better use of technology in developing proposed legislation? We heard last week from the Hansard Society that it is doing some work that may help. There is the other argument—from the Institute of Chartered Accountants, I think—that you do not want to overengineer the thing, because then you are also restricting it, in a way, to people who have full access to the technology. Is there a way we could use what we have at the moment or, perhaps, different technology? Have you looked at that?

David Halpern: A bit. Can I sweep it into a slightly wider point? On the earlier question, I would point to three kinds of areas or particular lacunae. There is some evidence that is good stuff. Of course, it varies between domains. Generally, there is a shortage of evidence about which interventions work. You can find a lot of evidence on numbers, what is going on and what the problem is, but then you have to make a leap into what we are going to do about it. That is when you start running out of evidence pretty fast. Of course, that is partly the point of the What Works approach. What can we do about that?

There is then an issue to do with capacity inside the Civil Service—having the skills to do it. In principle, if you are doing policy, you can induce variations, for example, rather than going for a single solution. If you are doing a rollout, you can use something called a step-wedge rollout—you can randomise the sequence of the rollout—which will tell you whether or not something is effective. That can be harnessed to generate evidence, but traditionally our civil servants have not had those skills. We had a separation between our analysts and those who do the policy, which is a mistake. Chris Wormald, I and others are trying to do a lot about that, to retrain our entire policy-making profession to have those skills, and therefore generate the evidence.

Jill touched on the other point, which is not to be dismissed. There can be ambivalence about why you would want to generate evidence in the first place. It can look like all downside. If you are a Minister, you think, “Do I really want to pause to find out? Do I really, really want to know whether or not this thing worked? Am I going to find out in two years that my precious, superb idea did not work?” Even in a local authority people may think, “I’m going to have extra hassle to find that out. Who is going to benefit? Everyone else, but I, personally, will suffer some cost”. So there are some political factors, too. I do not think they are overwhelming. We now have a world where there are Ministers who know what a randomised controlled trial is, for example, which is an amazing development.

On the technology point, if you mean it in a very particular way about consultation, it can definitely help, but normally it brings with it the same issues. I alluded to the example of the consultation, or deliberation, on obesity
that I held in Australia, in Victoria. That used technology very heavily. People received a lot of information and discussions were done online, which greatly lowers the cost, but you still have to crack who is the sample. Consultations are always dogged by that. Whether they are done online or in some other form, the people who come forward are definitely not a representative sample of the public. You must actively crack that issue.

**The Chairman:** Lord MacGregor, you wanted to follow up.

**Q20 Lord MacGregor of Pulham Market:** Before I ask my questions, I ought to explain why I was smiling wryly when Ms Rutter was talking. She was my principal private secretary when I was Chief Secretary to the Treasury. She was an absolutely admirable one and understands some of the issues she started to touch on. That is what I want to address. I can understand the points you are all making about well-prepared legislation over a period of time and so on, but frequently Ministers are faced with an immediate, urgent situation. The Dangerous Dogs Act was mentioned. I had to deal with that. I had to deal with BSE and a lot of health issues, where it was very difficult to get evidence within the space of 48 hours. Our officials did very well to try to find it. There was a huge public outcry, much debate and demand in Parliament for immediate Statements and immediate reactions. You have to deal with that. Is there a better way of dealing with it?

**David Halpern:** It is nice to have a Blue Peter “something I prepared earlier” in evidence terms. We can try in a serious way to anticipate the evidential needs and harness our academic communities to answer some of those questions. Of course you are right. Sometimes, even with the best will in the world, we will not have that. There will also be manifestos or Ministers who want to take a line on something.

**Lord MacGregor of Pulham Market:** That is the other one I was coming to.

**David Halpern:** The corollary is that of course we should try out new things, but when we do that, can we put in place a mechanism that will tell us whether or not they are effective? I go back to the humility point. There is a deeply interesting question about how it interacts with a matter of law. If you buy the argument about humility and uncertainty about effects, wherever possible you want at least to test, for example, variation in dosage or approach and to have that possibility in legislation, so that you are not locked into a fixed position for a national rollout, but have the capacity for learning in the system, to tweak and adjust practice going forward. In those situations, where there is an imperative to act, we should at least try to look at what mechanisms we put in place to learn and refine going forward.

**Lord MacGregor of Pulham Market:** What happens very often is that civil servants, who are in touch with all sorts of bodies, try to find the best experts as quickly as they can.

**David Halpern:** Yes.

**Lord MacGregor of Pulham Market:** But sometimes the thing comes at you out of the blue.

**Jill Rutter:** There is a really interesting question about trying to seize the space. This is something on which you will be much more expert than us—we
are mere civil servants. Could you get to a stage when it was acceptable to say, “This is what we know. This is what we do not know now, and this is how we are finding it out. In the light of what we think we know now, we think this is the best approach”? I realise that interacts in a quite difficult way with the certainty of Parliament wanting to know what it is passing. It does not give Ministers a whole bunch of discretions to make up policy as new evidence emerges. What you really want is to be more adaptive and find ways in which, as new information and evidence emerges, you can come back and do something different, if your first go at it was not the best in the light of the emerging evidence.

One really interesting thing about the question of public engagement is whether we can take the public debate to a more sophisticated level, where it is okay to say, “This is not blindingly obviously the right answer that will work in all circumstances and that I will defend” or whatever. As David said, an evaluation that tells me that it was quite a good idea at the time, when in retrospect it did not work, is one of the worst things that can happen to me politically, because then I get headlines about wasting money by cancelling a programme and things like that. It is better to duck and hope that my successor in three months takes it on and makes the difficult decisions.

It would be interesting to see how you could have much better acknowledgement that Ministers have a really difficult task to do, which is to make decisions. It is one of the big disjunctures between academics and politicians. Jonathan might talk about this. Academics will always say, “On the one hand, on the other hand; caveat, caveat, caveat”. A politician says, “Yes, but I am in a binary world. I have to do or not do. That is the sort of decision I have to face”. Getting those two worlds to talk to each other better is crucial to the better use of evidence.

**Lord MacGregor of Pulham Market:** The other thing I was going to raise, of course, was the manifesto issue. Government is about politics. Politicians have their own views on what they think policy should be. They also respond to the public when working out manifestos. The manifestos contain a lot of policy proposals that are politically driven, in the long run. I know that the Civil Service is now trying to understand what is going to go into manifestos—

**The Chairman:** There will be a question on party manifestos later. Can we hold it until then?

**Lord MacGregor of Pulham Market:** Okay.

**The Chairman:** Thank you very much. I want to bring in Lord Pannick and Lord Judge quickly. Then we shall try to improve our productivity.

**Q21 Lord Pannick:** My question is a variation on the theme that we are developing. How often do you encounter Ministers or civil servants who say, “The evidence is ambiguous or unavailable, so I am going to go with my political instincts—my experience. That is why I am in politics”? Is that a recurrent theme? Are they ever right?

**Jill Rutter:** I will give you an example from my time at the Treasury. I used to be press secretary to Ken Clarke, who was an excellent Chancellor of the Exchequer. Basically, he never thought that the Treasury and the Bank of England understood at all what was going on in the real economy. I remember
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various debates about the forecasts going into the Budget. At the time, we did not have the OBR; we have now made it a much more technocratic process, subcontracted to Robert Chote and his friends. At the time, it was billed as the Chancellor’s forecast; it was a first draft, but it was the Chancellor’s forecast. I remember very strong debates when Ken Clarke would say, “I just do not believe what you tell me is going on in the economy. It does not feel like that in Nottingham”. He was probably more often right than not right.

That is one of the huge values of our system. We have talked about a specific sort of evidence, but we should not be too narrow about the sorts of evidence. Ministers, as constituency MPs, are a vital source of a different sort of evidence. It is Ministers as constituency MPs who say, “Something is going wrong with the Child Support Agency. This is making a lot of people really worse off and is not working as the legislation intended”. Optimally, you want a blending of that sort of experience with, “Do you have a hypothesis about why this might work? Is it really a general problem? Have we specified it right?”

Getting the problem definition right is a really important starting point for a lot of policy. We jump to say that there is a problem. When we were doing a thing called the advanced policy school and asked a bunch of officials in the Home Office what they thought was one of the biggest reasons why policies went wrong, they said, “Because too often you jump to the solution without understanding which problem you are trying to address”. A solution without a problem will never work.

A lot of civil servants, rightly, defer to the political judgments of Ministers. They are not trapped inside an SW1 bubble. They have a much stronger view of what is happening on the ground. That is vital input and the evidence agenda should not crowd it out.

Q22 Lord Judge: My question goes back to the problem of urgent legislation. There has to be an answer and there are 48 hours to do it. Is there anything to be said for using a sunset clause when you have to legislate in those circumstances?

David Halpern: Yes, there is a strong case for doing so. It is precisely the sort of mechanism that addresses the issue of putting something in place to figure out whether it was in fact effective.

As a small aside, when the Behavioural Insights Team was created in 2010, it was built with a sunset clause—not in legislation—that it would be disbanded in two years unless it was able to show at least a tenfold return on the cost of the team and so on. Frankly, the presumption was that it would not work. It turned out that it was very effective and we were able to show that, so the PM decided to double it rather than shut it down. In fact, the sunset clause could be used much more widely, but we need to link that to the kind of evidence that would determine it.

We should bear in mind that, if there is a blanket application of something and there is no variance, we may struggle to figure out whether it was effective at all. That is why the sunset clause is required—it is a means of ensuring you incorporate methodologically sophisticated tests of efficacy but then it starts to conflict with the presumption of a rival principle, normally expressed in terms of fairness: everyone should be treated the same. That makes it a lot harder to find out whether or not the thing worked. I realise that it would be as difficult to sit in a courtroom and say, “Your honour, spin a coin about the judgment that
You will use on a given individual”. But you can see why, at the margin, you need a bit of that in the system to be able to answer the question. The answer is definitely yes to shutting down things that don’t work well, but we should note what we would need to do to be able to answer the question well.

The Chairman: We must move on.

Q23 Lord Norton of Louth: I have two questions, which derive from some of the points you have made. You made the point that you can take evidence and identify the problem, but you may not be able to get evidence to determine consequences. Now that we at least have post-legislative review three to five years after enactment, I wonder whether a partial answer to the point you identify would be to stipulate, when a Bill was introduced, the criteria by which we would know whether or not it had been successful.

The other question picks up on points that have already been made, particularly by Jill Rutter. We cannot discuss this with the politics left out. That point has clearly been made. There are going to be tensions. For some Ministers, the evidence is, ”If we do not do this, we are going to lose votes”. There will be that tension. How do you resolve it? Where is the point at which you say, ”I am sorry, Minister, the evidence is overwhelming that it will not work”? Do you at least put on the record that it will not work, if the Minister insists on carrying on with it?

Jill Rutter: Back in 2011, we wrote a report called Making Policy Better. One of the things we suggested—it has not been taken up—was that when the Civil Service thought that there was not a robust enough basis for proceeding with a policy for spending public money or requiring private resources to comply with a regulation, it should be able to seek what we called a policy direction. In the same way as you can get an accounting officer direction on value for money, regularity and feasibility, which was added as a criterion in the 2000s, after tax credits, by the Treasury, we thought that you could get the Civil Service to take more responsibility for saying, ”Yes, we think that there is an adequate basis for proceeding”. Ministers want to proceed anyway. You do not want unelected civil servants saying to Ministers, ”You cannot do that”. Ministers will always want to do innovative things. We do not want to constrain policies only to things that have been done somewhere else before. We want policy innovation, but when people think that there is not a good enough basis for proceeding, they should be able to seek a policy direction and put on the record that they did not think there was an adequate evidence base. As I said, that idea has not been taken up.

Much more systematic compliance with the commitments on post-legislative review would be inordinately helpful. One thing that changes a ministerial incentive set is when a Minister thinks, ”Okay, I know that this is not really the right thing to do, but I can see short-term political convenience in it. What is the disincentive to doing that?” It is about being able to do things that say whether someone is acting in the absence of a respectable hypothesis. Things not working will happen, if you are innovating. Things that were never going to work and that you should not have tried, and wasted all our time and money on, are the ones you should really be called out for. If there is much more systematic knowledge that you personally, not your successor, will be asked to account for in a post-legislative review, there will be a tipping of the scales—a slight change in those incentives.
The Chairman: Mr Breckon has been waiting very patiently to get in.

Jonathan Breckon: One of the common misunderstandings we come across, particularly in our training of civil servants and others—charity leaders and people in local government—is about the term “evidence-based policy”. There is often a misunderstanding that evidence will trump everything else. That was never the model. The model was inspired by medicine and the very eminent, brilliant David Sackett, who died a couple of years ago. It was always a triangulation between professional judgment, the wider science and what you saw in front of you; it could be your patients, your constituents or your stakeholders. There is no easy way out of that triangulation between research, professional judgment and the stakeholders. Those models are everywhere. The police use them. Teachers use them. There is even something called the Centre for Evidence-Based Management that uses them. There is a lot of guff spoken in the management field and business, and they are trying to get more robust. So we must have that model.

I go back to the digital point. The question of digital platforms is crucial. I sit next to a digital democracy team, which I believe has submitted written evidence. The crucial element is not only getting the sampling right, as David said, but having deliberative forums where you can take people on a journey, particularly with research that is ambiguous and hard to deal with. There have been some evidence checks in Parliament that have opened up the review of evidence. There was one on the Department for Education, for instance. It was a great initiative, in that it was an opportunity for the public, as well as academics, to review the evidence around a particular government department. What happened was that a very passive online forum got captured by parents lobbying on things like term-time holidays, summer-born children, et cetera. I am a parent, so I know about that, and I am in these discussion groups, thinking, “Great, we have an opportunity to lobby them”. But they did not understand the evidence. Deliberative democracy is even more crucial in the complex area of research than anywhere else. We need to look at that.

The Chairman: Dr Halpern, do you want to add anything? It is not obligatory.

David Halpern: No, I will shut up for now.

The Chairman: Thank you very much. We will move on.

Q24 Lord Judge: I wonder whether we can go back to the pre-legislative stage—to the manifesto. The Government of the day always regard their manifesto as practically holy writ—except the bits they decide that they do not want to implement for one reason or another. My question relates to whether party manifestos and the policies espoused in them should be based on solid evidence. There are follow-up questions. Should they be, if they are not? Can they be, if they are not, for the reasons you were discussing with Lord MacGregor?

Jill Rutter: We have had an interesting exercise trying to do the evidence benchmarking that Jonathan mentioned, which Sense About Science is leading, using our joint evidence transparency framework. At one stage, we were thinking about doing departmental rankings. One of the things that civil servants said to us was, “You cannot judge us on that, because those are manifesto commitments. We do not use evidence on manifesto commitments”. What we have actually found from doing the benchmarking is something quite
interesting: there is no uniform rule on manifesto commitments. When a manifesto commitment is, “We are going to try to meet this objective”, they are quite good at exposing an evidence base. The problem is when the manifesto commitment is to a means, not to an end. Then you jump instantly to that.

One of the problems of government or opposition is that you might tie yourself—particularly if you are not a governing party forming a manifesto—to very specific means without being able to discuss them with the people who will have to implement them, so that you end up with something. The Institute for Government works with opposition parties to prepare them for government. One of the pieces of advice we give is that they should set out strategic objectives, priorities and so on, but not tie themselves to very specific commitments, because they might find when they get into government that there is a better idea.

One assumes—rightly, I think—that Ministers come into government to do things that will have the effects they want. They should be interested in making sure that they are implementing the headline, flagship promises in their manifestos in the best possible way, rather than sticking to the absolute letter. The Cabinet Secretary has a figure that there are about 540 manifesto promises in the 2015 Conservative manifesto. I do not think many of the public could name more than three or four of those, so I am not sure how literally we should take that.

Some policies are just statements of values. On those, it should be clear that it is a statement of values and is not being introduced for an evidential reason—it is just because you think it is the right thing to do. If you just say that, you exempt yourself from evidence-based scrutiny.

Jonathan Breckon: We have real, practical experience. We did something called the manifesto check, when we looked at all the manifestos in 2015, including those for Plaid Cymru, the Greens and UKIP. I have been invited to speak at UKIP. We did them all, so we had very practical experience. The trouble with looking at the evidence behind them, in a very practical way, is that it goes back to transparency. One party—I will not name it—had a whole background literature that it was happy to give us, partly because it was worried about bodies such as Full Fact and others, which jump on parties and say, “Let us tease out the detail of their manifesto. What does that mean?” It was very hard practically to check the evidence behind the manifestos. It is such a political operation, even down to the date when they come out. We were trying to check them with the heads of policy from all the political parties, in a very consultative way, but it was really hard to do. I cannot answer your question in an evidence-based way, but we checked all the manifestos. We did it with a great website called The Conversation UK.

Lord Norton of Louth: On the manifesto point, presumably there is a particular problem if there is a coalition and post-election bargaining on what will go into the Government’s programme. There is a problem with testing and producing any evidence when there is compromise, rather than concession.

David Halpern: Exactly. There are normally some mechanisms that kick in. I agree with Jill in general. If commitments are specified as objectives, with a bit more wriggle room, it is better. Yes, you want to improve outcomes for young people, with New Routes. et cetera, but do you want exactly 3 million apprenticeships? Do you want a bit of wriggle room?
In 2015, there was an expectation that there would be negotiation, as that had happened the previous time, and a lot of things would drop. In many northern European systems, in particular, that is the way these things get hammered out. If we wanted, we could supplement it in other ways. There has always been a case for having a Department for the Opposition, where you would give them some access to evidence in another way. In the Netherlands, the equivalent of the OBR does fact checking and looks at the economics and the numbers beyond that, to see whether or not something is likely to be effective and at what cost. It is theoretically possible to put all those things in place. They are not that difficult. It might help to address your concern.

**Jill Rutter:** Effectively, however, it hands over the timing of Dutch elections to a bunch of Treasury officials. When we had an event where the Dutch CPB talked about that, even we thought that it might be a bit too far for us to go. Basically, it tells the political parties how long it will take to do the manifesto checks, and the date of the election follows from that.

**The Chairman:** Okay, we will not follow that example.

Q25 **Lord Pannick:** On the subject of transparency, is there any justification for government not to publish the evidence base for legislative proposals, absent some special factor such as national security or foreign policy?

**David Halpern:** It is hard to come up with one. I have been a civil servant. I am no longer a civil servant, although I am pretty close to being one in my day-to-day life. I am very much on the side that we should publish as much as possible. It generally helps in the medium term to set out what your case is. Can there be examples? Theoretically, there could be something that was commercially sensitive or whatever, but that is rarely the case. Indeed, the research community itself could go further. There is a strong case for saying, for example, that you should publish research protocols in advance, with what you think is going to happen, rather than adding your hypothesis retrospectively, after you have the answer and the evidence. I am quite ultra on that side. I struggle to find many examples of why you would not publish.

**Jill Rutter:** You are committing public resources, so you ought to tell people the basis on which you have decided to commit those public or private resources. There are relatively few exceptions. If it is a national security exception, at the very least you might want to talk to the Intelligence and Security Committee, on Privy Council terms, about the basis on which you are doing it. There is a good case for doing that.

Even more interesting is the extent to which you could divorce producing the evidence base from the policy adjustments. The way evidence is used in government is one you will be much more familiar with, David, as evidence in a court of law. I use the evidence to make my case and win my departmental battles, rather than necessarily giving a very objective analysis of what the optimal outcome is. It would be very interesting if on some of these issues—not the examples that Lord MacGregor gave of things that require immediate action, but on some longer-term actions—the Government put out the evidence base first and said, “This is what we think the problem is”. You then use that as the basis for thinking, “If we all agree that that is the problem, what are the potential ways we do it?” That is one of the things that the Turner commission did very well. Too often, we use evidence to make the case for a solution we have already come up with. We conflate that. The evidence might be a bunch of
slightly cherry-picked things that support the case for doing X, rather than a proper consideration of what the problem is and what the choices are.

**David Halpern:** It used to be called “spray-on evidence”.

**Lord Pannick:** To what extent is there strong resistance within government to transparency on publishing the evidence base? Are we pushing at an open door?

**Jonathan Breckon:** It depends on who you talk to. Some are very supportive. We find some analysts, for instance, who say, “Fantastic. This is an opportunity. I have this evidence”. I was speaking to a very senior ex-analyst from the Department of Health who was desperate to get the material she was getting to Ministers into a wider public domain. There are others who find it politically awkward, so it depends on who you speak to.

I go back to your first question about the wider transparency question. You might find this too radical, but I think that we should be up front when there is no evidence and say, “That is a blank. This is a values-based belief”. We live in a democracy. That democracy should trump evidence, as regards my beliefs and my normative approach. Be up front. As we said before, the problem is the spray-on evidence, or sometimes just a mess when you cannot even find the evidence. I would rather be up front and say, “That is the blank spot. We are doing this, but let us not pretend that it has evidence behind it”.

**Jill Rutter:** A frustrating thing in the benchmarking exercise is that there are a lot of cases where departments say that they have reviewed evidence or whatever, but they do not share it with anyone else. You almost have to take it on trust that they have looked at the evidence and made the right judgment. Maybe, but if they have, they should be able to convince us that they have.

**The Chairman:** Does the Cabinet Office intervene in that situation, to find out more about the evidence?

**Jill Rutter:** That is a question for our What Works national adviser to the Cabinet Office.

**David Halpern:** It can. We have Cabinet government. Ministers can say, “What is your evidence?” and push for it.

**The Chairman:** I was not thinking of the Ministers. I was thinking of the civil servants in the Cabinet Office.

**David Halpern:** It is erratic; it depends. There is a degree of scrutiny that occurs in internal and official discussions all the time, where you might push on it further. That happens quite a lot. I think that in general we should get the evidence out there and let it be tested more generally.

One concern that people might have is that sometimes you reveal your hand very fully by saying that you have asked for evidence on the following thing, but generally I think we should do it. I would go a stage further; Jonathan alluded to it. My view is that Governments should set out the things that they do not know but would like answers to. Even stronger than putting out your evidence is to say out loud, “We know that we have a problem”, whatever it may be—drugs, for example—“but we are not sure what would work, particularly around intervention”. You can immediately see why Ministers and Governments would be hesitant to do that. That is partly the answer to your question. If you put out a list of all the things we do not know the answer to, the *Daily Mail* will make
real mischief: “Oh my God, what do you know?” It is actually the right position
to be in, to lay down the challenge to a wider research community by saying,
“Come in and help us to answer those questions”, and to build a bridge.

The Chairman: Staying with the evidence theme, I bring in Lord Maclennan.

Q26 Lord Maclennan of Rogart: I would like to ask Jonathan Breckon a question.
The Alliance for Useful Evidence has stated that “policymakers should use more
systematic reviews”. Is there any evidence of standards or requirements that
departments must meet in drafting or introducing legislation? If not, should
there be?

Jonathan Breckon: There should be standards. At the moment, there are
standards of evidence per se that are used in the wider research community.
There is also advice from the Treasury in its Green and Magenta Books about
the best ways of going about research, evaluations or cost-benefit analysis to
make the case. When we do our training, I am amazed how few people in the
Civil Service have heard about the Green or Magenta Books.

The problem with the standards of evidence, and how they impact on
legislation, is that in the UK I have counted 12 formal hierarchies of evidence.
They tend to have things like systematic reviews and randomised controlled
trials at the top. At the bottom, it might be that you just collect a bit of data.
They are a way of judging how trustworthy evidence is, particularly evidence of
impact. There are 12 in the UK, with possibly a 13th coming along. That is
excluding all the international ones. There is something called GRADE, or the
Maryland scale for scientific advice. I am sorry to get so boring and technical,
but it is important. It would be a nightmare for you to say, “We must have a
single standard for evidence that we can apply for legislation”.

Where we should have some kind of standard is on transparency. That is doable
and fixable. In our joint work with the Institute for Government and Sense
About Science, we found that some of it would be undergraduate stuff. Just do
your referencing. If you were an undergraduate, you would be failed—D
minus—if you had not even shown the research that we know is available, let
alone things that are harder, where it is hidden, obscured or cherry picked. We
could have standards on transparency but not on the quality of evidence related
to legislation.

The Chairman: Does either of the other witnesses wish to add anything?

Jill Rutter: For some legislation, the Government require impact assessments,
which are often produced at a quite late stage, to be submitted to the
Regulatory Policy Committee. It is only a partial standard, because it applies
only to regulation that affects business or civil society. It does not apply to
spending and things like that.

The other place where you might look for challenge is the Treasury. The
Treasury should be satisfying itself, on big proposals anyway, that they
represent value for money. If there is not a decent basis for thinking that
something will deliver the effects it is supposed to have, it is difficult to see how
the Treasury would not challenge that. Of course, the Treasury does not always
win its battles on these things, as we know.

David Halpern: For lots of reasons, including the correct role of politics, we
often make a leap with relatively little evidence. We could at least make
progress on transparency, to show our workings in a way that is testable, so that other people can examine them, using the mechanism we touched on before. That is fine. If you are going to make a leap, that is okay, but what mechanism did you put in place to see whether it was effective? That seems to me a reasonable aspiration to have for government.

**Lord Maclennan of Rogart:** I would like to know whether there should be some follow-up to transparency. Should there be a civil servant’s concerted view about the lack of evidence, if there is complete transparency?

**Jonathan Breckon:** There should be a good nudge. What is reassuring is that departments themselves and other parts of the government system have been taking up almost unilaterally, or have found very useful, the transparency framework we have been working on with Sense About Science and the Institute for Government. If I have understood your question correctly and it is about whether a civil servant should push it and follow it up—

**Lord Maclennan of Rogart:** No, it is about responsibility for following up.

**Jonathan Breckon:** Who should have responsibility for that? I am not sure, in government. I am outside government, very deliberately, so I would like to be that nudger. Internally, could you have a tsar for transparency? David, could you imagine such a role?

**David Halpern:** If government really wanted to do it. We have done it in other areas. There are other ways. The natural place might be the chief scientists, who are now a fairly mature network. We might say that we should ask, first, what was the evidence on this particular issue, and secondly, have we been open about it? At the very least, it is reasonable for departments to say what their position is on transparency, and to answer the question that was asked earlier.

**The Chairman:** Lady Dean, you wanted to come in briefly.

**Baroness Dean of Thornton-le-Fylde:** I have a quick question. Everything we have been talking about has been pre-legislation. Dr Halpern, in your opening address you referred to the fact that sometimes legislation is passed that is not necessary or does not work. There have been instances, of which universal benefits may be one, where the Government tried something out—I call it piloting; you probably have a different term—in one or two areas of the country, which influenced the final application of the legislation. Do you think there is an argument for doing that more frequently—not in every case perhaps, but for substantial changes on issues such as welfare benefits and universal benefits and a whole host of things?

**David Halpern:** I clearly do think that. My role in government, as national adviser on What Works, is partly to champion that approach. You mentioned benefits. Lord Freud has been a great and passionate advocate of more empirical methods. When he pushed through some of the reforms, not only did they try to get evidence before, where they could, but they even put into legislation the capacity to carry on experimenting. That is exactly the right place to be.

Could you do it in lots of other areas? I will give you a concrete example that Oliver Letwin got very interested in. It is a small one, but it is illustrative. It
concerns licensing arrangements for small outlets; the example often given is a community centre or a church hall. Do they need to get a big licence to serve a couple of bottles of wine? The question arose, why could we not test it? Why could we not test variations in the legislation? If there was a very light touch—in fact, if you could just say online, “I am going to do the following thing”—would that be enough? What if there was nothing at all? Could we then track the number of drunken folks in the region coming out of the church hall or whatever accordingly?

We rapidly get pushback, especially from the legal establishment, which finds it slightly abhorrent that we would deliberately vary practice, of law in this case. In principle, it applies to law or, indeed, any other practice. We might want to do that in order to establish efficacy. My own view is that we should absolutely do that. When people have objections, we should remember that that is how we made progress in medicine. When it is literally life or death, we have been prepared to vary practice to find out whether something is marginally less or more effective.

Q27 Lord Hunt of Wirral: Dr Halpern, could you tell us a bit more about the What Works centres? I have great respect for NICE, but I had not realised that it was a What Works centre. Could you tell us how it has been built up and to what extent it could be extended?

David Halpern: I will be delighted to do so. You are right. NICE was created in 1999. Retrospectively, we now refer to it as a What Works centre, because that is what it does—it says that on the can. It does not instruct clinicians what pills to give you, but it gives you some sense of relative efficacy. It rather raises the question posed by Archie Cochrane in his famous tome in 1972, when he said, “I have been critical of my medical colleagues, but look at everyone else”. How many judges, teachers and so on are running randomised controlled trials? You might say, ”It’s a fair cop”. Why do we think that when it is a matter of life and death we will test and experiment, but we will not do it in relation to education and so on? If that is the question, the What Works centres are the attempted answer.

In the last five years, we have constructed a number of them. They vary in their design, but basically they are in the business of stimulating the generation of better evidence. They are almost always focused on a given profession or group. They are also about transmission—putting evidence in the hands of that profession—and building the absorptive capacity to understand the difference between good and bad evidence. Education is possibly the best example. The What Works centre in education is called the Education Endowment Foundation. It had its fifth anniversary yesterday. The background is that perhaps once a decade in education there was a good-quality trial of an intervention. Those are probably the numbers we are talking about.

Since 2011, there have been 127 large-scale randomised controlled trials in education in the UK, involving more than 7,000 schools and nearly 1 million children. For the first time, we are starting to be able to answer these kinds of questions. What is the most effective way of teaching maths? Are school uniforms effective? Are teaching assistants effective? By the way, it has thrown up lots of incredibly interesting surprises. School uniforms turn out not to be very effective. Teaching assistants, on whom we spend £4 billion a year, look as though they are not especially effective. On the other hand, teaching an hour of philosophy to a young disadvantaged kid improves their reading, writing and
maths by the equivalent of an extra term of school at age 11. Who knows what it does for their philosophy?

You will never find the answers to those kinds of questions sitting in an armchair or reviewing the existing variants; you have to do what NICE has done. We now have centres covering education, criminal justice, local economic growth, well-being, better ageing and early intervention. Some of them are smaller. The DfE is in the process of producing one for children at risk as well.

**Lord Hunt of Wirral:** What about older people?

**David Halpern:** We have one called the Centre for Ageing Better, which is funded by the lottery.

**Lord Brennan:** We are looking at parliamentary scrutiny of evidence-based policy arrangements. The Government make a legislative proposal, Parliament considers and enacts it, the Government execute, and thereafter nobody seems to have an adequate check, either in Parliament or elsewhere, on what has happened. The crucial step in that process is Parliament, without which the event would not occur. If transparency aids competent legislation, what do you think, for example, about having a Joint Legislation Committee of Parliament to which, after a Queen’s Speech, the Government should present pre-legislative proposals in White Paper form, with an evidence-based annexe or whatever it might be, to avoid Committee-stage consideration where, without transparency or adequate evidence-based policy information, you have a lot of uninformed and untestable opinion being used by everybody as a secure basis for legislating? That does not seem to work. My last point is, what happens afterwards? In any other walk of life, with matters of such consequence you would have results-based analysis, so why not here? What can Parliament do?

**Jill Rutter:** I would like to start. We have been doing a project jointly with the Chartered Institute of Taxation and the Institute for Fiscal Studies on making tax policy better. Tax policy is almost an extreme case of some of these issues, because of the dynamic of the Budget process. One of the things that we are thinking of recommending is that there need to be evidence sessions in the Finance Bill Committee on what measures are trying to do—what is the intent and purpose, and how have the Government decided that they are the right ways of trying to do things? Tax policy is one of the prime cases where the purpose behind the measures that the Government introduce is often extremely hard to discern.

You are absolutely right. A pre-legislative stage that said, “What is the evidence base for the problem you think you are addressing and for the particular proposals you have?” would be enormously helpful in guiding the subsequent scrutiny stages. It would also act as a real incentive to Government by saying, “Get your act together before you bring the proposals”. If you know that you are going to be asked, it concentrates the mind wonderfully, to make sure that you have a very good story to tell and have worked out where the weaknesses are. It would be very useful to bring in external witnesses as well.

On a lot of ongoing policies, we have seen some initial steps in evidence-check exercises. Jonathan mentioned the Select Committee on Education, which did one yesterday on grammar schools. It got in academic experts to give their views on the evidence base behind selection; it brought in Nick Gibb, with two chief analysts at the Department for Education alongside him, to question them
on the evidence base behind the Government’s new proposals on education. That is a good use of Parliament.

I am not sure whether you want to sunset absolutely everything, but you could have a clear, fixed-point review when Parliament says, “We expect you to come back”*. There will be different periods for different sorts of legislation, but you could say in the legislation, “This will be subject to a proper post-legislative review at this point”. Maybe a really good role for a Joint Committee would be to look at post-legislative reviews.

There have been one or two developments on tax policy. The work that the House of Lords Economic Affairs Committee now does in looking at some of the draft clauses of the Finance Bill and saying, “What are these trying to achieve?” seems to be quite a lot of progress compared with the previous experience of parliamentary scrutiny of Finance Bills. The more Parliament can show that it is interested in the evidence base, the more Ministers, who very often take their cue on what is important from Parliament, will be encouraged to think that it really matters to them and their reputation. So Parliament has an absolutely vital role to play.

Jonathan Breckon: It is a terrific idea. The Parliamentary Office of Science and Technology is reviewing the current use of evidence in Parliament. The review is not ready yet; I tried to get an early copy so that I could share it with you. It is looking at the current practice, but there may be some recommendations about additional institutions or ways of doing things. The pre-legislative stage would be a great one. The follow-up would be very useful as well. A really practical example happened outside—it happens to come from the Institute for Government. At one of its policy reunions, it looked at things like the Sure Start centres and children’s centres, which have had cross-party support, but it was crucial to learn how evidence had been used, and in some ways quite distorted. It was very much an evidence-based programme to help in the early years. Lots of people will be retiring and leaving, and we need to capture the lessons learned, even though it is years after the fact. It would be fantastic if that were a recommendation from your Committee.

David Halpern: I have spent a long time in No. 10, under more than one Prime Minister. It is pretty clear that sometimes you introduce legislation because you can do it and it is a way of creating an intentional spotlight. You then hope that you will figure out the detail when you are in flight, as it were. There is some logic to doing that, because you want to call attention to something, but you need to make sure that there is scrutiny.

We are talking about evidence very broadly. One of the key points is that evidence is not like democracy; not all evidence is equal. We need to move to a world, both inside Whitehall and in Parliament, where people are able to discern the subtler differences: how good was the method that gave rise to the evidence? Randomised controlled trials are by no means the only good tool, but the reason why they are often cited is that they are a particularly powerful form of evidence around interventions and are very rarely used in most fields. That is at least a tell-tale. It will not be a bad thing for Ministers to live in a world where they are occasionally prompted about the quality of the evidence, not just about whether it exists at all. It has ramifications through the system. When Ministers start demanding it—when they come back from Parliament or an interview to the Whitehall department and say, “What the hell was my evidence?”—it ricochets throughout the system.
The Chairman: We have already covered technology, so I will move to a question from Lord Norton.

Lord Norton of Louth: In its 2004 report on Parliament and the legislative process, this Committee proposed a Joint Committee on post-legislative scrutiny. I want to come back to the other end—the input side—to look at whether there should be generation of more coherent legislative standards. A few years ago, the Leader’s Group on Working Practices in this place suggested that there should be a Legislative Standards Committee. Of course, the Better Government Initiative variously put in evidence and recommended that there should be the generation of legislative standards covering the preparation and presentation of Bills. Do you think that would be desirable and achievable?

David Halpern: I have to defer to your knowledge of those procedural matters, which is much greater than mine. I spend a lot of my life trying to avoid legislation, as I explained. There are enough problems outside legislation that we can try to bring evidence to. One thing I would say is that it does not have to take years and years. Sometimes it is possible to build this in real time.

To give a concrete example, in the US there has been a lot of interest in the specific issue of food labelling—whether restaurants should be required to have calorific information down the side of the menu and so on. Superb work has been done by Christina Roberto at Harvard, literally in parallel to the drafting of legislation, on running trials to see whether or not it makes a difference. Incidentally, the result was that it depends what side the numbers are on. Whether they are on the left or the right makes a massive difference as to whether they have any impact on behaviour, because people just happen to look at one side in particular.

The point is that it is possible to live in a world where we can introduce evidence at lots of stages. We should seek to do so wherever we can. Let us do it pre, during and afterwards, where we can. As to the best mechanism, I feel that I need to defer to those who are more expert than I am.

Jill Rutter: It may be a good approach. I never did much legislation, because I came from the Treasury. The Treasury is now the top legislator in government, but when I was there we did not do huge amounts. There is always a danger with anything that it might degenerate into a tick-box exercise. We have seen that with impact assessments, to an extent; you make all your policy decisions and then commission the impact assessment from a bunch of outside consultants at the end of the process, because you know you have to do it. I have done things where I have required people to fill out sustainability checklists. You know that it is done right at the end of the process, rather than what you really want, which is people regarding it as an integrated part of the conversation.

There is one thing that Parliament could very usefully do. It may be completely unrealistic politically, but we need to get into the notion of good and bad failures, which I think comes from Tim Harford’s book *Adapt: Why Success Always Starts With Failure*. There are good failures, when something was really worth trying, was quite well founded and there was perfectly good reason to believe that it was worth doing, but it just did not turn out like that and we all learned from admitting the failure. That is opposed to the bad failure, when it was never going to work, should never have seen the light of day and should never have got anywhere near Parliament.
It would be enormously helpful if we could find a way of giving Ministers and civil servants more space to fail well and learn from that, rather than everything degenerating into stuff like, “You are a bunch of incompetents wasting money”. The House of Lords might be a better place to try to do that. We do not want government that is extraordinarily limited in its ambitions, because we will never find out new things. It would be a terrible thing if we said, “You can only do things if you can meet all these tests now”, because we learn a lot from experimentation.

We can argue about the consequences, but if you had asked for evidence on council house sales in the 1980s under Mrs Thatcher, would you have found any? Evidence for what? I do not know. Another example is privatisation. Governments do big things. We sometimes want Governments to do big things and to try things. We do not want to be a block on progress.

**Jonathan Breckon:** I am not sure whether having some kind of evidence standards to go with your standards of good legislation would work. They would work if they were about transparency. More important is the point about absorptive capacity—in intelligent consumers helping and working with you and all your staff and colleagues to interrogate what is untrustworthy and what would be useful. That is not easy. Tick-boxing standards might not be the best way.

**Lord Norton of Louth:** I take that point. On Jill Rutter’s point, one of the recommendations of the Better Government Initiative for what would be on the list would be to look at risk. You would be encouraging the Government to reflect on that. It would not just be a tick-box that they had looked at risk. You would be asking, “What is the assessment of risk?” There is no harm if they recognise that there is a risk but there may be a case for proceeding.

**Jill Rutter:** I have argued that there is quite a strong case for the Government to publish their risk registers. If there are no risks on your risk register, you are asking the wrong questions. A much better conversation about where the uncertainties are, where the problems might arise and stuff like that would help everybody to do things better, at the end of the day. A lot of it would probably point to doing a bit less as well. That is certainly true on the tax side. We think that doing less would be a key early step towards doing better.

**David Halpern:** I would make the case strongly, as we certainly do with Ministers when things come to Cabinet, to look for every opportunity to induce some variation. You say, “Minister, that is such a great idea. Why would you do only one variation? Let us try five”. Potentially, you could do that in Parliament and look for opportunities to say, “Do not do one”. There is a concrete example with right to buy. One of the issues we were looking at in discussions on how many more billions we should spend on the subsidies was that the forms are written in legislation. Literally, the forms that you have to fill out are written in legislation. There are lots of very talented people here, but are you sure that you got the best possible variation? It is unlikely. Why on earth would you have locked that down?

**The Chairman:** I am afraid the clock is against us, and there we must finish. We knew that we would benefit from hearing from you three today. You have not disappointed us one little bit. It has been fascinating. We are very grateful to you for sharing your insights and experience with us. It has contributed enormously to the work that we are doing. Thank you very much. If you have nothing else to do later today, I suggest you give Washington a telephone call—
they might be glad of the contact.
The Bar Council of England and Wales—Written evidence (LEG0009)

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Constitution Committee Inquiry: The Legislative Process Call for Evidence.¹⁰

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council considers that in the case of government led bills there are opportunities for improving the legislative process’s ability to produce “good law”, particularly by encouraging or enabling the Government to bring forward legislation that restates the law without re-opening existing components of it. It also believes that there is room to improve public participation at the early stages of the legislative process, particularly by seeking direct online comments on legislation and by increasing the use of Joint Committees and Public Bill Committees for pre-legislative scrutiny.

Creating good law

The Office of the Parliamentary Counsel describe “good law” as “law that is: necessary; clear; coherent; effective; [and] accessible.”

Question 1 – How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

5. There is a great deal of variation in whether good law is delivered by current practices and it is not possible to generalise. Even where amending legislation makes the law more effective, it might at the same time make the law less coherent or less accessible.

¹⁰ Constitution Committee Inquiry: The Legislative Process Call for Evidence 2016
Question 2 – Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

6. Many aspects of the political process militate against the consistent creation of good law. These include: the need to prioritise the scarce use of Parliamentary time, a desire to be responsive to trends and public opinion and the deterrent effects of the risks in legislating, such as negative comment on proposals or pressure to accept unwelcome amendments. Against this political backdrop it is inevitable that some legislation will fail to meet one or more of the Office for Parliamentary Counsel’s description of good law.

Question 3 – Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

7. On the whole, legislation introduced into Parliament is well drafted. It is more open to question whether the policies described in the legislation are sound, and the Bar Council would encourage the consistent and widespread use of pre-introduction consultation and pre-legislative scrutiny to allow full scrutiny of the policies and legislation when a Bill is formally introduced, particularly where this reaches expert users of the legislation. Pre-legislative scrutiny is particularly effective where it is undertaken by Joint Committees, which leads to greater consistency of scrutiny during the passage of a Bill.

8. The Bar Council is aware that a particular barrier to the creation of good law is that the parliamentary processes encourage government departments to amend or supplement existing bodies of law, often making those bodies of law ever more complex and less clear and accessible. The Bar Council understands that this is because departments are unwilling to risk restating areas of law for fear that old battles will be reopened at a cost to certainty for people and businesses. If a parliamentary mechanism could be designed which would allow a greater use of restatement without those risks, better law might result. One approach to this might be a system where some aspects of a Bill which represent existing law are not open to amendment, which might encourage departments to be bolder in proposing coherent restatements of the law.

Brexit

Following the UK’s withdrawal from the EU, Parliament will have to legislate across a range of areas previously legislated for at an EU level.

Question 4 – What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?

9. The impact of the UK’s withdrawal from the EU on the volume of legislation will be heavily dependent on the speed with which the Government acts to change the law. Following the announcement that most of the law emanating from the EU will be preserved, at least initially, it is difficult to provide any estimates of the volume or type of legislation that might come forward.

Question 5 – Will there be changes required to how the Government and Parliament deal with legislation following Brexit?
10. At present, while some Directives are implemented by means of primary legislation enacted following the usual full Parliamentary procedure, the majority are implemented by means of subordinate legislation made under section 2(2) of the European Communities Act (ECA) 1972. Such legislation may amend or repeal primary legislation. The generous scope of that power was affirmed by the Divisional Court in the “metric martyrs” case, *Thoburn v. Sunderland City Council* [2002] QB 151 [http://www.bailii.org/ew/cases/EWHC/Admin/2002/195.html](http://www.bailii.org/ew/cases/EWHC/Admin/2002/195.html). Even where the affirmative resolution procedure is adopted for an ECA instrument, the opportunity for meaningful public and Parliamentary debate on the terms of each instrument is extremely restricted.

11. However, the abbreviated process derives its legitimacy from the fact that each Directive will itself have been the subject of the elaborate legislative process at EU level. That process invariably involves two or more rounds of public consultation by the Commission before a proposal is formally put to the bipartite EU legislature (the Council and Parliament); detailed scrutiny and amendment by the Parliament (acting through its appropriate Committee and in plenary session); and, more often than not, a degree of scrutiny by national legislatures (in this respect the work of the Lords EU Select Committee and its Sub-Committees set a high standard among the Member States). At each stage, stakeholder and public involvement helps shape the legislation as it makes its journey towards adoption.

12. It would be a matter of great constitutional concern if the “Great Repeal Bill” mooted by the Government were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s. 2(2) instruments. Such a process would bring about a significant democratic deficit which would undermine the legitimacy of resulting legislation. It is one thing to use a subordinate instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees. Indeed our own Supreme Court has already affirmed that the ECA 1972 power is confined to transposing into the content of EU legislation into domestic law. Government may not lawfully use it to “piggy back” different or additional content of its own (sometimes known as “gold plating”) onto the implementation exercise: see *United States of America v. Nolan* [2015] UKSC 63, [2016] AC 463 [http://www.bailii.org/uk/cases/UKSC/2015/63.html](http://www.bailii.org/uk/cases/UKSC/2015/63.html).

13. We would invite the Committee to draw to the attention of the Government the importance, following Brexit, of a legislative process involving sufficient public and Parliamentary scrutiny of any future proposal to alter the content of law deriving from an EU instrument otherwise than through full primary legislation.

Technology

New technologies—and particularly developments in information technology—have changed the way that people access information and share their opinions, experiences and insights.
Question 6 – How effectively do Parliament and the Government make use of technology at this stage of the legislative process?  
14. Very little use is made of technology other than to publish the legislation and the accompanying paperwork. Further comment is provided in response to question 10.

Question 7 – How could new or existing technologies be used to support the development and scrutiny of legislation?  
15. See the response to question 10.

Public involvement and engagement
Engagement with those affected by new legislation, or those with expertise that can assist the development and scrutiny of legislation, is an important factor in ensuring that legislation is effective in meeting its policy objectives.

Question 8 – To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?  
16. The opportunities to be involved in this stage of the legislative process are limited. It may have been possible to respond to a Government consultation, and it may have been possible to send evidence to a Committee conducting pre-legislative scrutiny, where that takes place. In both cases, however, opportunities to comment on detailed drafting are practically limited, either because it may not have been published (in the case of Government consultations) or because the Committee is more interested in broader principles and limits the format for submissions (in the case of pre-legislative scrutiny).

Question 9 – What factors inhibit effective engagement?  
17. At the moment it is often only effective to express views on legislation by using traditional political lobbying techniques, which is labour intensive and requires strong networks. Most experts, end users and others interested in new legislation are effectively excluded from the legislative process.

Question 10 – What mechanisms could be used to increase or improve engagement with the public and stakeholders?  
18. Considerable progress has been made in making information about Bill procedures and Bill papers available to the public. The Bill pages on Parliament website provide reliable access to the paperwork but could be improved. The new form of Explanatory Notes has improved the accessibility of Bills, although performance by government departments remains patchy.

19. Nevertheless, there is room for further improvements in participation by interested parties and the public in the process, many of which are enabled by the internet.

20. At the moment it is often only possible to express views on legislation by using traditional political lobbying techniques, which is labour intensive and requires strong networks. Most experts, end users and others interested in new legislation are effectively excluded from the legislative process. It would be possible for one or other House of Parliament to host an internet-based form for collecting a wider range of comments on the provisions. This need not disrupt the timing of procedures because the comment window could be limited to the period between Introduction and Second Reading of the
Bill. A modern system could simply be accessed by MPs or Peers, or committees, interested in seeing the comments for use during the scrutiny process.

21. Although the OPSI has made progress with its consolidation work on UK legislation available through the legislation.gov.uk site, legislators and future users of legislation would probably find it helpful if OPSI or Parliament could extend this work by routinely publishing consolidated papers showing how the provisions of Bills would affect the body of UK law by publishing copies of the law as it would be after the changes proposed in the Bill come into force.

22. We believe that consideration should be given by the House authorities to making increased use of Public Bill Committees (previously known as Standing Committees) to allow the gathering of evidence from interested parties. This has the advantage of both informing parliamentarians and engaging the public and stakeholders.

Information provision

Informing the public, stakeholders and parliamentarians about potential legislation is an important part of effective law-making.

Question 11 – How effectively is information about potential legislation disseminated at this stage in the process?

23. Please see our comments on the Parliament website in response to question 10.

Question 12 – How useful is the information that is disseminated and how could it be improved?

24. No comment

Parliamentary involvement

Parliament is central to the legislative process, but its involvement varies across the different stages of the legislative process.

Question 13 – To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?

25. Parliamentarians will be involved in debates on public policy issues that may lead to legislation.

Question 14 – Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

26. No comment

12 October 2016
Sir David Bean, Chairman, the Law Commission—Oral evidence (QQ 102-112)

Sir David Bean Chairman, the Law Commission; and Professor David Ormerod, Law Commissioner for Criminal Law and Evidence

Wednesday 21 December 2016

Watch the meeting

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

Evidence Session No. 7 Heard in Public Questions 102 - 112

Examination of witnesses

Q102 **The Chairman:** I welcome Professor David Bean and Professor Ormerod on behalf of the Law Commission. Thank you for your written evidence to us, which met a lot of your criteria as per your founding statute, in that it is clear, lucid and accessible and covers the subject well. Nevertheless, we should like to ask you a few oral questions. I shall kick off. You will have seen—I know you have been reading the evidence and following the Committee’s progress—that we quote the Office of the Parliamentary Counsel definition of what should be good law: “necessary, clear, coherent, effective and accessible”. It varies slightly from your definition but yours was put in statute so you are stuck with it.

Apart from the need for consolidation, what factors cause legislation to fall short of these criteria and what do you think can be done to tackle such factors? Sir David.

**Sir David Bean:** Some of the criteria you have mentioned are to do with substance. Our work includes work on law reform. We hope we draft legislation that is fair but that is not really a drafting point; it is a content point. As to being modern and accessible, it should be contained in one place—consolidation is part of that—available free of charge on an accurate website and, so far as possible, capable of being understood by a non-specialist. Not all statute law will be easily readable but, as far as possible, it should be intelligible without the aid of lawyers.

One of the adjectives you used was “cost-effective”. Legislation should be sufficiently clear to avoid money being wasted on pointless litigation or appeals that would never have happened if the drafting had been better in the first place. I am sure you will, in due course, ask Professor Ormerod about our sentencing code proposals. Part of that is brought about by hundreds of cases every year being brought on rather technical points where a judge has imposed a sentence that is simply illegal because the legislation is so diffuse and complicated. We try to be cost-effective in that sense.

**Professor David Ormerod:** It is about the investment of time. It is clear that the legislation is trying to serve several purposes. Clearly, the policy must be robust and the representation of that policy in the legislative formula must be
faithful. You have to look beyond that, however, to the ultimate user of the legislation. The litigant, the citizen, the trader, the businessman or whoever it may be must have the capacity to understand that legislation. The advantage of the Law Commission approach is to ensure that the legislation has that degree of clarity because we have the time and the resource to devote beyond the policy to the form in which the legislation appears.

**The Chairman:** One has to remember that a lot of the Government’s legislative programme is developed and delivered under enormous pressures—political and other—which makes it rather more difficult. Nevertheless, we still want to identify ways of improving it. You operate in rather calmer waters but under different pressures, and I think you have quite a lot to teach us. We shall see what we can draw out of you in the next 45 minutes.

**Q103 Lord Beith:** In your written evidence, you refer to the four projects that you thought illustrated ways of making good or better law, including those for firearms, the process for getting married—rather a diverse collection. Are there many lessons from this that ought to be applied to the normal making of law, as opposed to your process of reviewing and remaking it?

**Sir David Bean:** The single lesson from our working methods is, perhaps, “Consult, consult, consult”. We consult widely, not just lawyers but people involved on the ground, and we try to develop a consensus. Some government legislation is obviously not like that but the sort of stuff that we do, which is non-partisan, is greatly helped by consulting people who know about what is happening and trying to develop a consensus. For example, we have a project on mental capacity and deprivation of liberty safeguards where we are consulting not just lawyers but healthcare professionals about what is happening on the ground.

There is one on what we call event fees or transfer fees—not in the football sense—where residential property, perhaps in a retirement home, is subject to clauses in the lease that require sums to be paid if there is a transfer of ownership. We consult developers, managing agents, residents of retirement homes and so forth. Perhaps David has something to add on firearms.

**Professor David Ormerod:** Yes, just to give an example and put flesh on those bones, the extensive stakeholder engagement begins even before a project is taken on. So when we are contemplating whether a project is suitable for the commission, we would already engage with as wide a range of stakeholders as possible to understand from them the nature of the problem, so that we can ensure that the solution is carefully targeted and tailored to meet it. Throughout the process, it is not simply the case that we then produce our own report, going away into an ivory tower and coming back. Far from it—we are engaged throughout with the stakeholders. It is an iterative process and quite dynamic, whereby we engage them in reviewing drafts and refining the policy. So when we produce the legislation, not only are we confident that the policy is robust in terms of research, we know it will meet the needs of the ultimate consumers in the firearms context, whether they are the police officers who have to apply this on the ground or firearms enthusiasts in possession of particular items and so on. There is that continued engagement and involvement.

To give an example in relation to the mental capacity project mentioned by the Chairman, I think the team attended 83 different consultation events across
Sir David Bean, Chairman, the Law Commission—Oral evidence (QQ 102-112)

England and Wales during the four-month consultation period. There were 583 consultation responses, not only from healthcare professionals and care home providers but from family members who were responsible for the care of people with learning disabilities and so on, so it really is across the board.

Lord Macgregor of Pulham Market: I would like to compliment you on your evidence to us. One question that kept coming up in my mind—I do not quite know whether I have the answer to it—is how you make a distinction between what I might describe as more technical or less politically controversial legislation, where one is undertaking all this consultation that you have just described, and other legislation that either derives from a manifesto or is much more driven by political considerations.

Sir David Bean: That is perhaps a matter for you rather than for us. We do two sorts of work. Our programme, which is drawn up once every three years, is where we suggest subjects. It has to be approved by the Lord Chancellor, but we will not undertake a project unless a department has indicated that there is a serious intention to take forward reform. The other sort of work is references from departments to us. Again, the department indicates to us that there is a serious intention to take forward reform. We would not be asked to take on a project, and would not agree to do so, if it were party political. A good working rule to my mind is that if there would be a Division at Second Reading in the House of Commons then we should not go anywhere near it, but quite a lot of legislation is not in that category and that is where we can make ourselves useful.

Professor David Ormerod: I would like to add that the devil is always in the detail. Something that is potentially very controversial—sentencing or firearms, for example—does not necessarily fall outside our remit, provided that what we are doing does not make significant policy change that has a party-political dimension. For example, we have 34 pieces of legislation on firearms spread across 100-odd years. We need to be able to identify the pressing problems of a technical nature, rather than of a policy-driven nature, so that we can seal the loopholes that are being exploited by criminals and make sure that the legislation is future-proofed against developing technology and so on. Those things are all perfectly capable of being achieved by the commission without trespassing into the political arena.

Lord Brennan: Part of your statutory duty involves the consolidation and codification of the law, yet at some stage in the report you have given us you mentioned that there have been only two significant consolidation Bills in the last 10 years. Is the volume and intensity of legislation getting to the pitch where it makes consolidation impractical, legislatively or financially? If not, what can be done about it?

Sir David Bean: In my view, consolidation remains a desirable activity. The old style of consolidation was exemplified, if I may show you my copy, by the Companies Act 1985, which I bought from HMSO for £19 at the time it came out—say £50 in today’s money. What you got for your money following Parliament’s efforts in consolidation was a document like this. Then, as soon as further amendments started being made, that document rapidly became useless. Now we have moved on to the age of the internet and a free-access website, legislation.gov.uk. If you consolidate an area of law now and future-proof it in the way that we are likely to propose for the sentencing code, you do not have to do the consolidation again and you can amend the statutory code
that you have created while still having the legislation in one place and available to the public free of charge. So the usefulness of consolidation has actually increased since the days when it was fashionable.

It is very striking that in the years up to 2006 there were 200-plus consolidation Acts in 40 years and since then there have been two. It would be a great pity if it were consigned to history. We are under a statutory duty to promote it. I will hand over to David so he can tell you why the proposed sentencing procedure code will be more useful than a traditional consolidation.

**Professor David Ormerod:** In response to your question, sentencing is a good example in that it is an area in which there is almost perennial amendment. However, that does not diminish the need for consolidation; in fact it could be argued to enhance that need. Officials have been very candid in telling us that they can no longer accurately and confidently predict the impact of further legislative change, given that the sentencing landscape is so confused, spread across hundreds of statutes—I do not need to tell some members of the Committee precisely how confused. So clearing the landscape and having a single statute in which all the provisions relating to sentencing procedure appear will make it easier in future for valuable policy changes to be identified and assessed for their impact.

In the sentencing code project, we started by identifying all the existing law, which runs to some 1,300 pages of primary legislative provision. Even if we simply republished that, it would be impenetrable to most users, and that can of course include litigants in person, defendants and lay magistrates. The intention is to redraft all that in a single statute, using clear language wherever possible and other drafting techniques to make it as accessible and clear as possible.

In addition, we have already published a report demonstrating that it is possible to remove the difficulty with transitional provisions. Something that is a systemic failure with the sentencing legislation is that you end up with parallel regimes of sentencing law. If you are looking at a historic sex offender, for example, you would have to identify what the date of the offence was and which particular version of the sentencing legislation was in force at that time. We have identified the opportunity to sweep all that away so that, from the date of commencement of the sentencing code, anyone sentenced under that code would be dealt with under the procedures of that code—subject to the very important caveat that no one can be given a graver penalty than that which would have been available at the date of the commission of their offence. That avoids judges having to look back across various parallel regimes.

Having achieved that, the challenge is to maintain that code as the single source of primary legislation, and obviously that lies in the power of the Palace here. We are not going to restrict your autonomy or sovereignty in making any future legislative change in relation to sentencing, but we need to encourage a culture whereby future sentencing legislative changes are by the code—they are insertions, amendments, repeals to the code—and we hope that can be achieved

The best that we can do, of course, is to try to engender a culture of that. It might be possible for the House authorities to do more than that by producing rules that will encourage parliamentarians in the future to adopt precisely that approach.

**The Chairman:** Your answers so far are very clear, concise and lucid, but the
acoustics in this room are not very good, despite the microphones. Could you both speak a little louder and directly into the microphones, if you can?

Q104 **Lord Hunt of Wirral:** Apart from your work on sentencing, why did you decide not to have any specific consolidation project currently?

**Sir David Bean:** Our funding is very limited. It has been sharply reduced since 2010 and continues to be reduced. What we can do within our core funding is very limited. Consolidation is an expensive business because Parliamentary Counsel, as you will know, are a scarce and expensive resource. If we were to undertake a new consolidation or codification project, it would almost certainly have to be funded by the department making the request. You have had a good deal of evidence, for example, about immigration law; both the primary statutes and immigration rules are in a terrible state, as witnesses have told you. There are two jobs to be done. One is the streamlining of the rules and the other is the consolidation of the primary statutes. For either of those, we would need funding from the Home Office to be able to do it because it is a big task—but a very worthwhile one, I think.

**Professor David Ormerod:** I think that there is a lack of appetite for consolidation, which is disappointing because the gains that can be achieved by consolidation should not be underestimated. To go back to sentencing, there has been an independent survey that suggests that around 30% of appeals in the Court of Appeal Criminal Division on sentencing involve an unlawful sentence. That is because of a mistake by the judge as to the powers available in relation to the sentencing determination. The cost of that is astronomical. So even if you consolidate—and you can do more than that; a kind of “consolidation plus” and additional streamlining is possible within a consolidation project—it can have an enormous cost savings, and not only in litigation.

To switch to another example, if you look at some of the work we are doing around planning law in Wales and take an area where the law is fragmented across many pieces of legislation, you can draw it together in a single statute and make it accessible. That might promote investment in the context of planning law, whereby there may be greater impetus for development in a particular region because the planning law is clear and the implications are identifiable. So there are savings to be made and political advantages to be had by having clear, consolidated legislation.

Q105 **Lord Brennan:** Lord Hunt has put forward a point which I feel, as he does, is very important. Is it possible, without you having to commit yourself to it, to consider in each of your three-year programmes a couple of consolidation projects that are in the public interest in the context which Professor Ormerod has just described? Have you determined the budgetary cost and, if it is feasible, the cost benefit to be derived from it? If the Government say no, you have offered it; if they say yes, you can do it.

**Sir David Bean:** My colleagues and I certainly feel that we should not lose sight of our mission in the 1965 Act to give some priority to codification, consolidation, streamlining and simplification. Reform will continue to be an important part of what we do but it should not be 100% of what we do. We will not be permitted or funded to do consolidations unless we can rekindle the interest in them in Westminster and Whitehall—and I hope very much that we can. If, for example, we were able to take on immigration in the next year or two, that would be a very big project. Three years down the line, I am sure
there will be something else that is a good candidate. But I would be very disappointed if the next 10 years had as little consolidation or codification as the last 10 years.

I do not know whether this Committee is aware of it, but the Welsh Government are very keen on consolidation and codification. Professor Ormerod has mentioned our work on a planning code for Wales. The aim is that the Welsh would like to have, instead of the planning law encyclopaedia, which is seven or eight ring binders, a planning code for Wales which would be a single, quite slim document. Last week, the Counsel General for Wales published a statement on behalf of Welsh Ministers expressing their enthusiasm for codification. We hope in future to move on from planning to other statutory topics in Wales. Perhaps Cardiff will be setting an example for Westminster to follow.

Q106 Baroness Taylor of Bolton: You make a very strong case for consolidation and for more work in these fields. You will be aware that Parliamentary Counsel gave evidence last week; they quoted the website that you mentioned earlier, Sir David: legislation.gov.uk. Their suggestion was that, because current texts can be updated very frequently, there is perhaps less need for consolidation. But the picture that I am getting is that, before you can get to the stage of having less need and updating things online, you have to—to borrow the phrase used earlier—“clear the legislative landscape” and the confusion that exists there. Do we have to get rid of the backlog before we can get to the position that Parliamentary Counsel were talking about of updating online?

Sir David Bean: Broadly, yes. I disagree with the suggestion that consolidation is now less useful or less necessary, as I said earlier. Reading the evidence of the Leader of the House of Commons and Parliamentary Counsel, I understand that there have been some unfortunate experiences in the past. The example that they gave was a massive education consolidation in 1996 in the last years of the Major Government, and then a change of Government in 1997 with the Education Act 1996 turned upside down, which was bad timing. But I do not think that that should deter us from doing consolidations now. It is right, as Elizabeth Gardiner said to you, that it involves a lot of resource—but, as we have been saying, there are benefits from it as well.

Q107 Lord Morgan: We heard some disturbing evidence from the Senior President of Tribunals about immigration law and I want to ask about that. We were told that there had been eight immigration Acts in 12 years, three EU directives and some 30 statutory instruments. Does the Law Commission feel that some kind order or consolidation would be appropriate in this area—and, if not, why not?

Sir David Bean: Very much so. I have the immigration law handbook here. It is not an official publication but all the judges and practitioners in the field use it. It has no commentary; it is just the basic texts. It is 2,000 pages long. Part 1 is the primary statutes. Excluding odd sections of the Senior Courts Act and matters like that, the specific immigration statutes are about 14 in number, going back to the Immigration Act 1971. There is no way that you could know what to look for on legislation.gov.uk since the primary statutes are in 14 different places. Then, after the procedural rules and practice directions, there are the Immigration Rules, which run to 648 pages in this book—not in a very large font, by the way. I agree with my colleague Lord Justice Ryder that this is a very pressing problem. The Court of Appeal and the Supreme Court have complained again and again about the complexity of the Immigration Rules. In this morning’s Times there is a law report of a decision of the Supreme Court.
last week in which Lord Carnwath said there was an urgent need for a streamlining of the Immigration Rules, and that has been said many times before. So I would see that as a real priority.

Of course we will not be asked, nor should we be, to consider great questions of public policy—say, on whether immigration controls in this country are too lax or severe—as those are matters for the politicians, but behind that there is real value in some technical work to try to bring this within bounds. One of my judicial colleagues, who knows far more about immigration law than I ever have or ever will, considers that the Immigration Rules could be reduced by 200 or 300 pages without great difficulty.

Q108 **Lord Judge:** You touched on the issue of funding. How many cuts have you had in the last three to six years?

**Sir David Bean:** Our core funding from the Ministry of Justice was £4 million in 2010. It was reduced to £3 million, in round figures, by 2015, and there was an indication at the beginning of this year that we were to be put on a trajectory from £3 million to £2 million by 2020. I hope that decision might be modified. It is right to say that that is not our only source of income, otherwise, frankly, we would almost have gone out of business. We can receive references from any government department or the Welsh Ministers and usually, when asked to do a reference, we will say, “Yes, we’ll do it but you’ll have to pay for it”. We can charge for that extra work. Treasury rules are that we cannot make a profit on references but our basic infrastructure, as it were, and a small number of programme projects can be paid for from core funding. It would be very unfortunate if the commission became entirely dependent on reference income because that would mean we had no choice in the projects that we took on. We would become—to think of my and your old profession, Lord Judge—like a barrister waiting for the next brief. It would be very difficult to maintain a coherent programme as an independent body.

**Lord Pannick:** You have powerfully explained the urgent need for action on immigration law—to streamline, as you put it. Has the Law Commission put this point to the Home Office and, if so, what reply have you received?

**Sir David Bean:** We have put the point to the Home Office, and some discussions are going between our staff and theirs. That is all I am in a position to say at this stage, but I hope the discussions will bear fruit. Anything that your Committee can do or say in that regard would be most welcome.

**The Chairman:** We are running rather short of time. I am going to have to ask for questions and concise answers, if I may.

Q109 **Lord Maclellan of Rogart:** The Senior President of the Tribunals said that immigration policy is separately provided in guidance and that one could access that through the Home Office website, but he described it as rather dense and unconsolidated. Does the commission have views about the relationship between primary and secondary legislation, and between legislation and guidance? What steps should you take to consolidate secondary legislation or guidance alongside primary legislation?

**Sir David Bean:** In the highly contentious area of immigration, I think it would be above our pay grade, and probably beyond what parliamentary process could easily accommodate, to try to alter the balance between primary statutes, the
Sir David Bean, Chairman, the Law Commission—Oral evidence (QQ 102-112)

Immigration Rules and guidance. The Immigration Rules are not subject to paragraph-by-paragraph debate and amendment as primary statutes are, which makes them easier for the Home Office to change. Substantial change to primary statutes, on the other hand, would obviously involve a big government programme Bill with a great deal of time for debate. In more technical areas one could perhaps alter the balance without creating too many waves, but on immigration it is not a matter for us to say, “Well, you should have more in the Acts or in the rules”. I quite appreciate what you say in principle but one must be practical. If we were to do work on the primary statutes, it would have to be consolidation rather than major reform.

Q110 Lord Hunt of Wirral: In your evidence, you have stressed that you highly value the involvement of stakeholders in your law reform projects. How do you best achieve such involvement?

Sir David Bean: Going back to what I said earlier, it is a question of consult, consult, consult. We try to identify people who actually know about the subject. I think David mentioned what is being done in firearms law as an example. Our staff have meetings with stakeholders, and sometimes we organise symposia. Another of David’s team’s projects—of some interest in this building, perhaps—is on misconduct in public office, another interesting area of criminal law. We held a symposium at which a number of people, mainly lawyers, made suggestions, some of which I thought were very useful, some less so. It was a very helpful discussion, and there will be more on other subjects in the course of the year.

Q111 Lord Norton of Louth: To follow up on that, you have already referred to the value of the legislation.gov.uk website and how you are exploiting it. In your evidence, at paragraph 1.47, you also mention that you are in discussion with the National Archives about utilising the site for greater engagement. Could you expand a little on that?

Professor David Ormerod: In relation to the sentencing project in particular, there are two dimensions to that. We are due to produce a draft of the entire code in the summer of 2017 and we have spoken to the National Archives about the possibility of it hosting it on its website, making it clear that it is not current legislation. That will be an open public consultation for six months and we will be encouraging practitioners and judges to test it to destruction and see whether the new legislation works. That will obviously be a strong card when it comes to consolidation; not only will parliamentary counsel be able to validate to this House that it is a faithful representation of the present law, we will also be able to demonstrate that it works in practice. When the new sentencing code is enacted, as we hope it will be, it will be hosted on the National Archives website in the usual way as a legislation.gov.uk title. We hope, however, that there will be additional functionality. In addition to being able to reveal or hide the Explanatory Notes, the schedules and so on, there will also be the opportunity to add material that has not made its way into the Bill—for example, a table. One of the most common causes of unlawful sentences being passed is judges making errors in the combinations of sentences that might be permissible. We envisage a table in the form of an old-fashioned mileage chart, with all the penalties available on both axes, and you can simply look at whether you can pass a suspended sentence and a community order and it will tell you. That will avoid vast numbers of unlawful sentences and bring huge savings in terms of appeal time. That kind of
functionality can be hosted on the website, along, perhaps, with things such as a table showing all the historical maxima for the most commonly prosecuted offences, which have changed significantly over time. Historical sex cases are obviously an issue. The maximum sentence for indecent assault changed from two years to five years to 10 years and so on. Having the dates on which those occurred available as a chart, with access through the legislation.gov.uk website, would be very valuable. It is about providing that additional accessibility once we have already produced clarity in the legislation. That is not to suggest that simply publishing on a website diminishes the need for clarity in the legislation itself.

**Lord Morgan:** Will the attempt to redraft the sentencing code remain accessible for future scholars?

**Professor David Ormerod:** We hope that the sentencing code, if enacted, will then be the only source of legislation on sentencing indefinitely. Future legislative change would be brought about by amendment to that code. This has happened in other jurisdictions where there has been a sentencing code for 20 or 30 years. Parliaments in those jurisdictions have simply amended that code so that judges, practitioners and members of the public know that it is the single source of primary law on sentencing.

**Lord Pannick:** Your evidence at paragraph 1.26 describes your model for law reform. How does that affect the need for pre-legislative scrutiny in Parliament?

**Sir David Bean:** It is more a matter for you than for us, but where we have had rounds of consultation and stakeholders have sent us comments that we record, we hope that reduces the need for pre-legislative scrutiny here. Our working methods sometimes include the publication of a draft Bill and sometimes the draft Bill is left until later. But where a draft Bill is published with the report, that is all in the public domain and people have a chance to look at that. Nothing will prevent last-minute suggestions, however many times we have consulted, but we hope we can relieve you of some of the burden by consulting on the draft text. I should say also that, whether or not we do a draft Bill alongside the report, our in-house parliamentary counsel are very much involved in the discussions that lead to the report. Where we are working up a proposal that involves a critical phrase in legislation, sometimes parliamentary counsel says to us, “What you are thinking of suggesting cannot be put into words”. We then try to improve on it.

**Q112 Lord MacGregor of Pulham Market:** I think you have almost answered the question I wanted to ask. I tried to come back to you earlier on core funding. I must say I was astonished by the figure you quoted in your report; I thought it must be a misprint but obviously it is not. What would be the cost/benefit analysis of doing that to the text you have on immigration laws and reducing it very considerably?

**Sir David Bean:** That is a very good question and not an easy one to answer. Suppose, for example, the cost of streamlining the Immigration Rules and consolidating the primary statutes was £1 million. Think about how much it costs the taxpayer when a case goes up through the First-tier Tribunal and the Upper Tribunal and gets to the Court of Appeal, with the Home Office lawyers obviously being paid for by the taxpayer and the lawyers for the appellants possibly also being paid for by the taxpayer. It is a test case so others may be
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held up behind it, incurring more costs and so on. How many of those do you need to get to £1 million? That is simply in paying for the process. You then hope that once the code is in force, fewer such pointless cases will founder on technicalities. That is part of the rationale for our sentencing code as well.

**Professor David Ormerod:** There are also the non-monetised or not immediately monetised benefits. Going back to the planning law example, yes, you might avoid litigation costs, but if you can then enhance the likelihood of investment in or development of a particular industry, that may have much more significant benefits.

**The Chairman:** Thank you very much. There we must draw to a close an extremely interesting and useful session. On top of your very valuable written evidence, you have given us a lot of further food for thought. Thank you very much, Sir David and Professor Ormerod.
Better Government Initiative—Written evidence (LEG0001)

1. The Better Government Initiative (BGI) is an informal body made up of people with practical experience in government at a very senior level who have no links to particular political parties (www.bettergovernmentinitiative.co.uk). We are concerned with the processes of government rather than the political choices associated with individual policy initiatives or programmes. Our evidence deals with the arrangements for deciding the content and quantity of legislation and the material provided to support Parliament’s scrutiny function; we do not discuss the actual drafting of Bills, which is a specialist function of Parliamentary Counsel.

Background
2. In January 2010 we undertook a detailed examination of the legislative process during the preparation of our report Good Government: Reforming Parliament and the Executive\(^\text{11}\). We were concerned at the continuing growth in quantity and decline in quality of legislation, which we attributed to poor preparation of the policies to be given effect through legislation and weaknesses in the support for scrutiny of Bills during their passage through Parliament. We considered it surprising and damaging that the quality of legislation was not protected by explicit agreed standards for the preparation processes for Bills and the quality of documents presented to Parliament.

3. We subsequently submitted our conclusions in May 2012 to the Political and Constitutional Reform Committee’s enquiry Ensuring Standards in the Quality of Legislation in the form of written evidence\(^\text{12}\). Our principal recommendations were:

- There should be explicit standards for the preparation and presentation to Parliament of legislation.
- Compliance with the standards should be checked by a Cabinet Committee and certified by its presiding Minister.
- A cross-party Parliamentary Committee should monitor compliance with the legislative standards and recommend against providing time on the floor if they had not been met.
- Pre-legislative scrutiny should be the norm.
- The legislative programme should be limited to a size compatible with thorough Parliamentary scrutiny without automatic guillotining in the Commons.

4. In April 2011 the House of Lords Report of the Leader’s Group on Working Practices had also recommended the establishment of a Parliamentary Legislative Standards Committee\(^\text{13}\).

5. We submitted further written evidence to the PCRC at the committee’s request in January 2013 commenting on the view of the then Leader of the House of Commons (Andrew Lansley) that a Legislative Standards Committee would introduce delay and that it would not be possible to assess a Bill without looking at policy. We argued that any delay would be minimal, since the Executive would do its utmost to conform to

\(^{11}\) http://www.bettergovernmentinitiative.co.uk/wp-content/uploads/2013/06/Good-government-17-October.pdf
\(^{12}\) http://www.publications.parliament.uk/pa/cm201213/cmpolcon/writev/ensuringstandards/mem07.htm
\(^{13}\) http://www.publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm
agreed standards of practice, and that it was perfectly possible to judge whether there had been a serious policy preparation process without attempting to judge the acceptability of the proposed policy. We urged the committee to recommend the establishment of a Legislative Standards Committee.

6. When the report of the PCRC’s enquiry *Ensuring Standards in the Quality of Legislation* was published in May 2013 it recommended that there should be a set of standards for good quality legislation agreed between Parliament and the Government and that a Joint Legislative Standards Committee to oversee application and effectiveness of the Code of Legislative Standards should be created.

7. We are not aware of any further activity in this field until the establishment of your inquiry.

**The Standards**

8. Legislative standards are needed to cover the preparation process necessary to develop policies and procedures to the stage where they are capable of being expressed in legislative form with a reasonable prospect of successful implementation. They also need to specify the material that should be provided to Parliament (in addition to the Bill itself) so as to enable an informed judgement to be made of whether or not this has been achieved.

9. There is a broad measure of agreement among those with an interest in improving the quality of legislation about the scope of any standards. In our view either the Bill itself or accompanying material should provide adequate information on:

- the purpose of the Bill;
- the reason why new legislation is needed;
- the costs, risks and intended benefits in terms suitable for post-legislative scrutiny;
- the consultation process, explaining why the proposed option has been adopted and providing evidence, including from the front line, of how it will work in practice;
- the effects, if any, on Scotland, Wales and Northern Ireland.

10. To be effective, the standards would need to be agreed between Parliament and the Government and enjoy the full support of the Prime Minister.

**Compliance procedures**

11. Compliance procedures are needed both within Government, to ensure that departments preparing for legislation are meeting the required standards, and within Parliament to provide an independent check.

12. Within Government this task might appropriately be undertaken by the Cabinet Committee responsible for overseeing the legislative programme. We have proposed that the Chair of that committee should be required to certify that the agreed legislative standards have been met when a Bill is presented to Parliament.

13. Andrew Lansley, in his evidence to the PCRC enquiry, argued that a Parliamentary Legislative Standards Committee would simply be unnecessary - “a bureaucratic process”

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14 [http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/8502.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/8502.htm)
Better Government Initiative—Written evidence (LEG0001)

– and that the Government would take all necessary steps to improve the quality of legislation. We consider, on the contrary, that Parliament cannot properly carry out its scrutiny role without its own independent capacity to assess compliance with standards.

14. The Legislative Standards Committee would require technical support; we have suggested that this might be provided by the Scrutiny Unit.

The process
15. The first essential step is to establish an agreed explicit set of standards. We have suggested that this might be done by means of a Parliamentary Resolution (a draft, which would also apply to major policy proposals not requiring legislation, is at Annex A) but there may be other appropriate methods of establishing standards that are clear, unequivocal, and agreed between Parliament and Government.

16. We envisage that when a Bill is published the responsible departmental Minister should lay before Parliament a statement of how the standards had been met. Scrutiny Unit officials would then examine that statement in detail, where necessary seeking clarification from the department, and submit a report to the Legislative Standards Committee either confirming the statement or indicating areas of weakness.

17. With such arrangements in place it is to be expected that the overwhelming majority of reports would be favourable. Where weaknesses were identified the Committee would consider whether they were serious enough to require further work to be undertaken before the Bill could proceed and, if so, would recommend that time on the Floor should not be provided.

Additional recommendations
18. Many of the difficulties faced by Parliament in scrutinising legislation arise from the sheer volume of material to be considered. Observance of the standard that legislation should only be employed when it was strictly necessary – not merely declaratory – might help reduce this, but in addition the Government should make every effort to restrict the legislative programme to a size that can realistically be considered by Parliament without automatic guillotining.

19. Pre-legislative scrutiny is a valuable procedure. The Government should aim to extend it to every Bill.

20. We recognise that there are cases, for example emergency legislation or urgent first-session legislation foreshadowed in an election manifesto, where pre-legislation scrutiny or full observance of the standards may not be practicable. In such cases the responsible Minister should provide a memorandum to the Legislative Standards Committee explaining the circumstances.

October 2016
Better Government Initiative—Written evidence (LEG0001)

ANNEX A

Illustrative Parliamentary Resolution

That in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament:

Ministers have a duty to Parliament to ensure that their policy and legislative proposals have been thoroughly prepared. The main elements of thorough preparation, which should be set out in a document laid before Parliament when a bill or other policy is presented, are:

a. definition of the problem to be addressed and explanation of why action is desirable or, in the case of legislation, why it is operationally necessary;

b. analysis of the costs, benefits, and risks of different options; and definition of the purpose and intended effect of the proposal in terms suitable for use as criteria in post-implementation scrutiny;

c. demonstration of the considerations which led Ministers to the proposed option;

d. demonstration of how the proposal will work in practice;

e. evidence of consultation on the proposal.

Guidance to Ministers should set out how the provisions in the resolution should be interpreted.
SUMMARY

The Bingham Centre for the Rule of Law welcomes the House of Lords Constitution Committee’s (HLCC) large-scale inquiry into the legislative process.

The processes by which legislation is created and scrutinised by Parliament, and the need for inclusive, effective and accountable consultation in the course of those processes, raise significant rule of law questions concerning the transparency, clarity, coherence, consistency and accessibility of law.

Our evidence on Stage 1 (Preparing legislation for introduction into parliament) is in two parts:

- **Part one**: general matters
- **Part two**: Brexit matters

We have separated these as the Brexit issues speak to very immediate concerns and, for the convenience of the HLCC the separation may be convenient in addressing matters that also relate to work of other select committees looking at Brexit issues.

This evidence on general matters addresses the issues under the heading of questions posed in the consultation documents. It makes 12 recommendations in total and proceeds as follows:

1. **Introduction** [paras 1-3]
2. **Overarching point – rule of law standards and legislative process**: Q 1-3, 8-14 [paras 4-10]
3. **Creating good law**: Q 2, Q 3 [paras 11-32]
   - Transparency and timing
   - Draft bills
   - Frontloading documents (eg, impact assessments, draft codes)
   - Effect on devolved jurisdictions
   - Titles of bills and packaging of content
4. **Brexit**: Q 4, Q 5 [para 33] - refer to Part 2 of our evidence
5. **Technology**: Q 7 [para 34-40]
   - Speaker lists and links to the Lords Whip website
   - Widening the pool of consultees in government pre-legislative consultation
6. **Public involvement and engagement**: Q 9, Q 10 [para 41-54]
   - Consultation periods of 12 weeks
   - Stakeholder training for consultation responses – drafting legislative amendments
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- Government consultations – publication of consultee responses improvement to government responses

- Parliamentary involvement: Q 14
  - Models and standards
  - Seeking evidence from government about practice

Written evidence (Part 1 of 2) from the Bingham Centre for the Rule of Law on HLCC Inquiry into the Legislative Process

Introduction

1. The Bingham Centre for the Rule of Law welcomes this opportunity to submit evidence to the HLCC Inquiry into the Legislative Process. Our evidence on Stage 1 (Preparing legislation for introduction into parliament) is in two parts:
   - **Part one**: Stage 1 – general matters
   - **Part two**: Stage 1 - Brexit matters

   We have separated these as the Brexit cut across a wider set of questions and might inform some of the questions the Committee poses in later stages and, for the convenience of the HLCC, it may be convenient in addressing matters that also relate to work of other select committees looking at Brexit issues.

2. The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high-quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

3. The lead author of this submission is Dr Lawrence McNamara (Senior Research Fellow and Deputy Director of the Bingham Centre), with input from Professor Dawn Oliver (Faculty of Laws, UCL), Professor Christina Murray (Director, Bingham Centre), Angela Patrick (Barrister, Doughty St Chambers), Swee Leng Harris (Research and Training Coordinator, Bingham Centre, who is the lead author of part 2 of our evidence, relating to Brexit), and Centre research assistants Chris Spiller and Alexia Staker.
4. The Bingham Centre for the Rule of Law welcomes the Committee’s large-scale inquiry into the legislative process. We particularly welcome the decision to consider the pre-legislative process as a separate and distinct stage worthy of particular attention. We encourage the Committee to include in its consideration of the pre-legislative stage all of the processes of policy formation which precede the tabling of legislation in Parliament for its first reading, from early stakeholder engagement, through formal consultation, including on Green and White Papers to the production of draft Bills for public and Parliamentary scrutiny. Altering Government policy after significant investment of political and practical resources have been made by Ministers and at Cabinet level in the language of a Bill can be difficult. Engagement in the process of legislation at the stage when the policy which will underpin its terms is being formed is often most effective at ensuring the final law is evidence-based, effective and coherent. It is important that both the processes leading to enactment and the substance of laws will be consistent with and promote the rule of law. The articulation of clear standards will assist both goals, and pre-legislative process that shows fidelity to the rule of law will make for better substantive law.

5. The processes by which legislation is created and scrutinised by Parliament, and the need for inclusive, effective and accountable consultation in the course of those processes, raise significant rule of law questions concerning the transparency, clarity, coherence, consistency and accessibility of law. In almost all of the consultation questions, rule of law benchmarking would provide a framework against which the Committee might consider the evidence it receives and which the Committee might consider as valuable standards that warrant embedding in the legislative process.

6. As Tom Bingham observed in his landmark work The Rule of Law, the rule of law is not a vague concept but contains concrete principles that can be identified and applied as standards against which laws are made. The founding Director of the Bingham Centre, Professor Sir Jeffrey Jowell QC, has developed these arguments (eg, J Jowell, ‘The Rule of Law: A Practical and Universal Concept’ in Jowell, Thomas & van Zyl Smit, Rule of Law Symposium 2014). Among the principles is legality: a society under the rule of law lives under a system of rules and principles, and not anarchy.
7. The Bingham Principles have also been adopted by Council of Europe’s European Commission for Democracy Through Law (‘The Venice Commission’) which, this year, published ‘The Rule of Law Checklist’, which sets out benchmarks for assessing fidelity to the rule of law. The Bingham Centre for the Rule of Law was a contributor to the Commission’s work. The Venice Commission identifies legality as “a core element” of the rule of law, giving some content to its terminology, describing it as, “legality, including a transparent accountable and democratic process for enacting law” (para 18). The Venice Commission notes that the rule of law requires “the involvement of people in the decision-making process in a society”, “establish[es] accountability of those wielding public power” and promotes access to rights, “which protects minorities against arbitrary majority rules” (para 33, 50).

8. The Rule of Law Checklist has benchmarks for legality include law making procedures (Section II(A)(5)), and the following questions are posed as specific elements of those benchmarks, with the first (in bold, emphasis in original) being an overarching question, and then (i) – (vi) listed as specifics:

**Is the process for enacting law transparent, accountable, inclusive and democratic?**

i. Are there clear constitutional rules on legislative procedure?

ii. Is Parliament supreme in deciding on the content of the law?

iii. Is proposed legislation debated publicly by Parliament and adequately justified (eg, by explanatory reports)?

iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?

v. Where appropriate, are impact assessments made before adopting legislation (eg, on the human rights and budgetary impact of laws)?

vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

9. The Centre welcomes the Committee’s 14 consultation questions, which in many respects aim to elicit views about these matters, but our view is that rule of law standards should also be considered by the HLCC in its Inquiry. There is evidence that the use of standards is effective, especially over time as practice improves.\(^\text{15}\) We return in more depth to these standards in answering question 14, below.

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\(^\text{15}\) See for example the Human Rights Joint Committee, Second Report of Session 2009-10, Work of the Committee in 2008-09, which observes improvement in government practice, at [38]-[42].
10. Recommendation 1: The Bingham Centre recommends that the HLCC identify clear rule of law benchmarks for the legislative process which would ensure that the legislative process is consistent with and promotes the rule of law. The Venice Commission’s benchmarks in this regard might be fruitfully adopted or adapted with regard to process and supplemented in a more comprehensive way by the Constitution Unit’s *Code of Constitutional Standards* referred to below in our answer to question 14, and further in part 2 of our evidence (relating to Brexit matters).  

*Creating good law*

**Question 2:** Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

11. A legislative process that is consistent with the rule of law will include a parliamentary pre-legislative process that allows for and facilitates genuine and effective interaction between the government, parliament and the wider community, both in government consultations and the scrutiny of draft bills. There is a strong case for the use of standardised or default positions in a number of areas, so that there is predictability about what process will be used (eg, timing, green paper, white paper) and then any proposed departure from the default should be published and explained.

*Transparency and timing*

12. It is often difficult for the public and stakeholders to engage with pre-legislative scrutiny due to the lack of transparency and predictability around the timings of draft legislation and consultations, and whether draft bills will be presented at all. For example, legislation for a British Bill of Rights and a Counter-Extremism Bill have been flagged since the start of the current parliament, but it is not clear when (if ever) these will appear, or whether there will be draft bills ahead of the bills. There are no clear commitments about what any consultation periods will be once legislative proposals do emerge.

13. A lack of transparency and predictability around the timing of legislative proposals makes it extremely difficult for the public and interested parties to engage effectively with the pre-legislative process. This is especially the case for those working with disadvantaged and vulnerable groups, who are often heavily reliant

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16 See esp para xii of Part 2 of our evidence.
on volunteer contributions, for whom adequate time to engage is crucial. It is not only the amount of time available for responses that is important; the scheduling can affect input where, for example, consultation are published at the very start of a holiday period and it is difficult for small civil society organisations to marshal volunteer or staff contributions to provide the best input possible.

14. We recognise that legislative priorities change and that government and parliament need to be responsive to change during the life of the parliament, and that at times there will need to be departures from predicted schedules and adequate consultation periods. However, the benchmark and starting point should always be clear accessible schedules and adequate consultation periods; departures should be the exception and on every occasion should be justified.  

15. **Recommendation 2**: There should be easily-accessible timetables for upcoming legislative proposals that provide interested groups with adequate time to engage with the process. Where an easily accessible timetable is not provided then there should be a published explanation of reasons for departing from that standard.

**Draft bills**

16. Pre-legislative scrutiny of draft legislation is a means of promoting the rule of law standards of transparent, clear, coherent and accessible law. Since 1997 repeated governments have indicated their support for the scrutiny of draft legislation as a means of producing ‘better’ laws.  

For example in 2006 the House of Commons Communities and Local Government Committee concluded that a draft Equalities Bill, “would enable wider public and greater parliamentary scrutiny”. Consultation on draft legislation must not be a political formality to convey legitimacy upon legislation, but a genuine opportunity for the public and interested parties to engage with the legislative process.

17. The absence of draft bills is especially troubling where legislation will be complex and/or will have constitutional importance or wide-reaching effects. Such proposals should ideally be open to as much scrutiny from civil society and Parliament as the

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17 On fast-tracking of legislation, see for example HL Select Committee on the Constitution, Fast-track legislation: Constitutional implications and safeguards, Vol 1, 15 Session of 2008-09, HL116-I.


19 HL Select Committee on the Constitution, Pre-Legislative Scrutiny in the 2006–07 Session, HL Paper 43 at [10].
timetable allows, and should ordinarily proceed with draft legislation in the first instance.

18. Examples of legislation where draft bills would have been appropriate were the Fixed-Term Parliaments Bill and the Parliamentary Voting System and Constituencies Bill, which were introduced without first being subject to pre-legislative scrutiny as draft bills.20 Similarly, the Liaison Committee reported in 2015 that the Treasury Committee had been expecting to scrutinise a draft Bill on National Insurance Contributions in the autumn of 2013, only to be told shortly before the House rose for the summer recess that no draft Bill would be published and that the Bill itself would be introduced in the autumn.21

19. By contrast, a Liaison Committee report of 2015 stated that the Political and Constitutional Reform Committee’s pre-legislative scrutiny of the Recall of MPs Bill, and the government’s acceptance of almost every recommendation made by the Committee, resulted in a substantially improved Bill being introduced to Parliament.22 The publication of clear, thorough explanatory notes accompanying a draft bill should also be encouraged.23

20. **Recommendation 3**: The default position should be that all bills are produced in draft unless there is a good reason not to do so, and reasons for not doing so should always be published.24 Draft bills should be accompanied by clear, thorough explanatory notes.

**Front loading documents (eg, impact assessments, draft codes, etc)**

21. Along with publishing draft bills to allow for greater scrutiny, government departments could front-load other relevant documents (such as impact assessments, drafts of essential delegated legislation or codes of practice) surrounding a new bill. If organisations are able to analyse the impact assessments at the same time as the draft legislation they will be able to make a more informed criticism of the proposed legislation. This would aid Parliament in scrutinising the draft bill. We recognise, of course, that impact assessments require a resource

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commitment by government. However, where legislation is certain to be introduced in some form (eg, where a matter is a manifesto commitment) then the resource commitment is earlier in the process but is not additional resource commitment.

22. We also suggest, as indicated in our answer to question 14, that a 'standards impact assessment' might also be appropriate at this point.

23. Recommendation 4: Impact assessments should accompany draft bills.

**Effect on devolved jurisdictions**

24. There should be special consideration of the role of pre-legislative scrutiny when it comes to the impact of legislation on devolved jurisdictions. Even in relatively simple ways, effective scrutiny can enhance the quality of law, and avoid rule of law failings with respect to meeting appropriate standards of clarity and coherence. For instance, *Cunningham v Chief Constable of the Police Service of Northern Ireland* [2016] NIQB 25 (see esp para 22ff) provides a useful example of how pre-legislative scrutiny can affect rule of law issues. It concerns court rules and the Justice and Security Act 2013. Colton J pointed out that lifting an amendment drafted for the jurisdiction of England and Wales without proper consideration of the potential ramifications in other jurisdictions created problems for its application in Northern Ireland. In order to make sense of it, Colton J had to use a heavily purposive reading of the law, as its literal reading gave rise to absurdity. This obviously clashes with the rule of law requirement for laws to be clear and coherent, and that dispute resolution should be effective. As Colton J observed (paras 22-23):

“One of the difficulties that arises in relation to this matter is the fact that a draft appropriate for the jurisdiction in England and Wales has been directly imported into the Northern Ireland jurisdiction. ... It is perhaps regrettable that the rule was not specifically modified to reflect the architecture in this jurisdiction and that in both jurisdictions it did not expressly indicate that the rule related solely to Section 6 applications which would have avoided any of the issues which have arisen in this case.”

25. Recommendation 5: Adequate scrutiny should be given to legislation to ensure that it will not unnecessarily cause difficulties in dispute resolution in devolved jurisdictions. The HLCC may wish to consider whether there is a place for some systematic notification of parliament and review of legislation where flaws have been identified, especially where the courts have considered a matter.
Question 3: Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

**Titles of bills and packaging of content**

26. The use of vague, general or non-descriptive titles for proposed Bills, and the inclusion of a wide scope of unrelated content, can hinder the development of good law, detracting from transparent law making and the ultimate accessibility of the law.

27. First, it is unsatisfactory if a Bill’s title does not adequately reflect its content. The problem may occur where several issues are dealt with in one Bill. It is particularly troubling where a draft Bill or Bill proposes laws that make major changes to an area of law or which would have substantial effects on vulnerable people or engage important public interests. Where proposed legislation would have such effects it should always have a clear, descriptive title.

28. For instance, in the Criminal Justice and Courts Act, Part 4 had wide-ranging effects on judicial review, obviously entailing public interest concerns (not least in its effects on interveners) but the title of the Act did not indicate the content.  

29. The risk of a title being not merely vague but misleading should be strictly avoided. For example, in Australia, academics criticised the ‘Criminal Code Amendment (Animal Protection) Bill 2015’ on the grounds that it was in fact designed to insulate the animal agriculture industry from scrutiny and was counter to animals’ interests.

30. Secondly, and related to the title issue, the production of large Bills covering a multitude of unrelated matters can reduce the effectiveness of public engagement and parliamentary scrutiny and the coherence of the final legislation. For example, the Bill that would become the Coroners and Justice Act 2009 was heavily criticised for containing content far wider than the issue of coroners reform, with provisions ranging from data protection to witness anonymity. This occurred despite a large-

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scale pre-legislative scrutiny exercise on coroners reform, including the production of a draft Bill subject to earlier parliamentary scrutiny. These kinds of “Christmas tree” exercises are perhaps understandable given constraints on parliamentary time. However, they should be discouraged as bad practice. As the Joint Committee on Human Rights explained in its consideration of the Coroners and Justice Bill:

"The breadth and size of the Bill and the legal complexity and diversity of the topics it covers have been the subject of concern during the Bill’s passage through the House of Commons given the limited time provided for scrutiny. .... Large, multi-purpose bills of this sort are almost impossible to scrutinise effectively within the limited timescale provided by the Government. Given the range and significance of the human rights issues raised in this bill, the Government should have introduced two or three separate bills, each of which would have been substantial pieces of legislation in their own right or ensured that there was sufficient time for full pre-legislative and Committee stage scrutiny in the House of Commons.”

31. **Recommendation 6**: The titles of Bills and draft Bills should be clear and properly reflect the content of the proposed legislation, especially where a Bill or draft Bill proposes laws that make major changes to an area of law or which would have substantial effects on vulnerable people or engage important public interests.

32. **Recommendation 7**: The content of Bills and draft Bills should be limited in so far as possible to avoid the creation of “Christmas tree” Bills. Bills should be internally coherent and generally should avoid covering a diversity of unrelated reforms.

**Brexit**

**Questions 4 and 5: Brexit**

33. Please see Part 2 of our submission for detailed discussion of Brexit matters.

**Technology**

**Question 7: How could new or existing technologies be used to support the development and scrutiny of legislation?**

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Speaker lists and links to the Lords Whip site

34. The use of technology to increase government transparency and improve public participation in the pre-legislative process is extremely valuable. Examples of good practice on the parliamentary web site include the Bills pages that provide documents and show the stages of the Bills. The new search engine for the web site has also been a great improvement. However, there are simple changes that could further enhance the development and scrutiny of legislation.

35. Among them, technology could easily be used to provide a better guide in advance to who will be speaking in debates or, at least, who is interested in speaking in debates. This is particularly relevant as it enables the public and civil society, industry bodies or academics or others who are able to inform debate to identify the parliamentarians who may be most interested in the issues.

36. The Lords’ Whip website is an extremely useful tool for determining who is speaking in which debates. This website, however, is not obviously linked from the Parliamentary web site; a search from the parliament.uk home page for lordswhip.org brings up 8 hits, none of which reveal a part of the web site where there is a link that a browsing user would find – six are press notices, one a written answer to a question in 2010, and the other a Commons committee report.

37. There is no House of Commons equivalent. We appreciate the concerns raised in the HC Committee on Procedure in its Fourth Report of session 2002-03 (19 Nov 2003) at paragraph 18, where the Committee notes that a key difference is that not everyone who applies to speak will be able to speak. However, a list of those who had applied to speak would still be of considerable value for the purposes of public engagement.

38. Recommendation 8: The parliament web site should contain an easily located link to the www.lordswhip.org.uk site, and indicate that it contains speaker lists, among other information.

39. Recommendation 9: There should be an online system that enables the public to see who has applied to speak in Commons debates, and that system should be clearly and easily located via a link on the Parliament web site.

Widening the pool of consultees in government pre-legislative processes
40. The use of targeted and informal consultation is valuable as it enables expert stakeholder input into policy and legislative development early in the process, especially where time is limited. However, there may be a good case to make use of online platforms to enhance and widen the pool of contributions at this stage. For example, it would be possible to publish immediately the list of organisations that have been invited to offer input and to open, even on short timeframes, input opportunities for others.28

Public involvement and engagement

Question 9: What factors inhibit effective engagement?

Consultation periods of 12 weeks

41. There has been a decrease in time available for consultation. Until 2013 the assumed period for consultation was 12 weeks, to be extended where feasible and sensible.29 However, in 2013 the Government’s Revised Consultation Principles indicated that the time for consultation “might typically vary between two and 12 weeks.”30 Therefore although the new government guide to consultations states that consultations “should last for a proportionate amount of time”, it is clear that this is in actuality a decrease in time compared to previous norms. For the purpose of upholding the rule of law principle of transparency the presumed time for consultation with outside groups should return to 12 weeks. An extended period of consultation may be necessary, for example, when consulting on an issue which impacts on disabled or vulnerable people.32

42. Recommendation 10: There should be a return to the previous assumed period of at least 12 weeks for consultations and the position in the HM Government 2008 Code of Practice on Consultation. These standards should apply to all pre-legislative stages, including green papers and white papers.

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32 We note that experience in some instances has clearly been that suitable accommodations have not been made. See, for instance, the Joint Committee on Human Rights, A Life Like Any Other? Human Rights of Adults with Learning Disabilities, Seventh Report of Session 2007-08, Vol 1, at [226].
Question 10: What mechanisms could be used to increase or improve engagement with the public and stakeholders?

Stakeholder training for consultation response – drafting legislative amendments

43. Stakeholders can make profoundly effective contributions to law and policy, helping to shape legislation in a variety of important ways. An effective way of improving pre-legislative scrutiny, and improving the quality of Bills that parliament considers, would be to build the capacity of specialist organisations and stakeholders in ways that mean their responses to consultations – especially on draft Bills and Bills – will be in a form that is of the most assistance to those who are considering amendments to legislation. For example, where a stakeholder body identifies a problem or shortcoming in a proposal and suggests a valuable change to a draft Bill but either does not produce any proposed changes to the draft provisions, or produces proposed changes that are not effective or suitable, the stakeholder contributions may be less effective and process less efficient (especially as parliamentary or government staff need to spend time transforming proposals).

44. Although guides for Peers and MPs do exist for public bills in the House of Lords and the House of Commons, there does not appear to be an easy to access guide on the creation and style of legislative sections and amendments for the public or interested stakeholders.

45. The provision of specialist training may provide useful capacity building for stakeholders. This would be beneficial both to Parliament and to the public as it would simultaneously improve non-Parliamentary organisations’ understanding of the legislative process as well as the quality and usefulness of submissions to consultations.

46. Recommendation 11: There should be specialist, advanced legislative process and drafting training available for organisations that engage regularly with legislative change.

Government consultations – publication of consultee responses and improvements to government responses

47. While government consultations on law and policy are always welcome, for these consultations to be effective it is imperative that the government makes public and pays adequate attention to submissions it receives. As a senior parliamentary official has noted, "Government replies tend to be fulsome in their praise of a report and discreet about the recommendations that have not been accepted". If there is no effective transparency of the submissions that have been made to government or in the response by government then civil society groups and the public can lose faith in the process and there is a risk that good points which affect matters such as clarity and legal certainty are ignored with the result that the Act in due course is defective. The rule of law principles that the legislative process (and the law itself) should be clear and transparent are also damaged in the process.

48. To avoid this, the government should take two steps as a matter of course. First, consultation responses should be published, just as they are by parliamentary consultations. There have been consultations where this has occurred. For example, the Cabinet Office published the responses it received to its Justice and Security Green Paper. It should be seen as good practice and the norm, and any departure should be stated and justified.

49. Secondly, government should respond to consultations in ways that fully address the points raised in submissions. As the Cabinet Office’s ‘Consultation Principles’ states, consultations should “Explain the responses that have been received from consultees and how these have informed the policy.” The response to consultation, to be effective, should be able to demonstrate the practical outcome of consultation on policy. This is particularly important when proposed policy is going against the weight of submissions; in this case the attention paid to this issue should be proportionate and the reasons for disagreement should be addressed. For example, in the recent consultation on proposed changes to immigration fees 142 of 147 responses said that fees should not be raised, and “the majority argued that the large fee increases proposed would deny access to justice for vulnerable people wishing to challenge a decision of the Home Office.”

37 Ministry of Justice, Tribunal Fees: The Government response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber), September 2016, at [7]
The government response states the principle behind the change (user-pays) and then sets out measures it states will provide protection to vulnerable people. However, without the government response having set out in any way the substance of arguments in the majority of responses, it is difficult to evaluate the adequacy of the government response as against the consultee responses. This is troubling when the weight of consultee views was so overwhelmingly negative. An appropriately detailed picture of the consultee responses should be provided and an appropriately detailed response from the government should be provided – one which directly addresses the substance of consultee concerns – as this would both enhance the quality of scrutiny at this point and would subsequently provide better basis for productive and informed debate in Parliament. While it clearly must be open to Government to disagree with the substantive responses to a consultation, dismissing serious concerns without explanation undermines not only the consultation exercise but the credibility of subsequent legislation.

50. This point is particularly important when it comes to questions about the evidence base for proposed reforms. As the National Audit Office has highlighted in a recent report, the Ministry of Justice did not properly examine how Legal Aid, Sentencing and Punishing of Offenders Act would affect the wider system before the act was put in place.\textsuperscript{38} Sir Amyas Morse KCB, the Comptroller and Auditor-General and head of the Office, noted, “Without this understanding, the Ministry’s implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for taxpayer.”\textsuperscript{39} This information could have been gathered through more effective and engaged use of pre-legislative consultation. Similarly, if the evidence base for government policy seems to clash with expert or public opinion, the consultation response should explain this discrepancy.

51. The specific questions posed in consultation are also extremely important as the questions may limit the range of matters on which a consultation seeks answers and with which the public engages. Where a significant number of respondents raise an issue outside of the parameters of the questions, or challenge the premises of questions, the response to consultation should address those points.

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52. The publication of responses received to a consultation and the adequacy of the government response go directly to rule of law standards: they are essential for transparency and accountability, and they and will inevitably enhance the clarity and coherence of the substantive law that follows.

53. Recommendation 12: The default position should be that responses made to government consultations are published. Where there is a departure from that position it should be justified.

54. Recommendation 13: There should be guidelines for good practice on for government responses to consultations which specifically address the need for the government to explain adequately the basis for any departure from the weight of submissions and evidence.

**Parliamentary involvement**

**Question 14: Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?**

55. The Committee could consider what provisions there are within government to ensure that proposed legislation is compatible with the rule of law and other constitutional principles at the pre-legislative stage. It would be useful if the Committee could ask for evidence from government as to how in practice constitutional matters are considered in the legislative process, by whom, and at what stage.

56. There is a strong case for the adoption of parliamentary-endorsed benchmarks and standards that can be applied at all stages of the legislative process. This includes application in the pre-legislative stages of formulation of law and policy within government and in parliamentary pre-legislative scrutiny. We have in mind two examples in particular. First, and directly applicable to – and derived from – the UK parliament, the Constitution Unit at University College London has created a *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee*.\(^40\) Secondly, the legislature in New Zealand provides an example of how standards might be applied, with legislature having has set up a Legislation Design and Advisory Committee that has created a set of constitutional

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\(^{40}\) [https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/159](https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/159).
guidelines against which proposed laws may be tested. This is an impressive step forward which deserves consideration by the UK Parliament.

57. The Code of Constitutional Standards or a development if it could be applied voluntarily by HC and HL Committees and would not require government acceptance or endorsement. If the government knows that committees such as the HLCC and possibly others may raise Code issues in the course of scrutiny of raft bills or bills then the government ought to take them into account when formulating policy and getting bills drafted. This should be done clearly and in ways beyond those currently required by the Cabinet Office Guide to Making Legislation. The preferred position is that government should produce a ‘standards impact statement’ with draft bill or bill.

58. In a related manner, when legislation is being developed by departmental lawyers there should be mechanisms in place to ensure they take account not only of a code of standards but also of reports of the House of Lords Constitution Committee, the Joint Committee on Human Rights and the Lords Delegated and Regulatory Reform Committee. This would ensure a greater, if indirect, involvement of parliamentarians in the legislative process.

59. Recommendation 14: The Committee should consider models and standards such as those above, and in particular the Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee and should ask for evidence from government as to how in practice constitutional matters are considered in the legislative process, by whom, and at what stage. We note here the recommendations in Part 2 of our evidence – on the Brexit matters, esp at para [xiii] – and in section 5 of that where we specifically refer to the Code of Constitutional Standards in recommendations regarding legislation for Brexit.

16 October 2016
I. This is Part 2 of The Bingham Centre for the Rule of Law’s submission to the Constitution Committee’s inquiry on the Legislative Process. It begins with a short response to the present inquiry, addressing questions 4 and 5 of the inquiry. We elaborate on these matters and others that relate to Parliament’s role in upholding the rule of law in the Brexit process in the Briefing Paper that follows. We shall submit Part 1 of our evidence as a separate submission, addressing the other inquiry questions.

II. In light of Brexit, the Centre welcomes as particularly timely the Committee’s inquiry into the Legislative Process. The law reform process associated with Brexit will be immense, so systems need to be established to ensure rigorous legislative scrutiny by Parliament and parliamentary control of law making, which will have beneficial upstream effects on the preparing legislation for introduction in Parliament.

What Needs to Happen to Give Effect to Brexit in Law?

III. In general terms, the UK’s exit from the EU will involve (see further Briefing Paper [3]-[7]):
   a. Negotiation of agreements on the UK’s exit from and future relationship with the EU, as well as potentially negotiating trade agreements with non-EU countries; and
   b. Review of UK laws and an extensive law-making process to deal with EU laws that may otherwise no longer apply following the UK’s exit to:
      i. Clarify which EU laws continue to apply in UK law, the implications of changes to those laws by the EU and future European Court of Justice decisions on those laws, and how those EU laws are to be enforced in the UK after Brexit;
      ii. Ensure that any references to EU institutions or laws in UK laws do not render the UK laws ambiguous or unclear; and
      iii. Establish new UK laws to replace the EU laws that the UK wishes to change, and possibly to implement new relationships with other countries and international institutions.

IV. There will be overlap in substance and process between the international negotiations and Brexit law reform process. In particular, there will likely be some EU frameworks that the UK will want to remain part of, for example, cooperation on national security. For these matters, the UK will want to negotiate to stay within the EU law and framework such that the law continues to operate in the UK after exit from the EU. These matters may also require UK legislation to implement EU law and frameworks.

Relevant Rule of Law Principles

V. This submission focuses on the following rule of law principles, with which the Committee is already familiar (rule of law principles are discussed in Appendix 1):
• The law must be accessible, intelligible, clear, and predictable (Briefing Paper [52]-[54]).
• Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion (Briefing Paper [59]-[61]).
• Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably (Briefing Paper [62]-[65]).

Q 4. What impact will the UK’s withdrawal from the EU have on the volume and type of legislation?

VI. The Prime Minister and Secretary of State for Exiting the European Union have announced a proposed Great Repeal Bill—to be included in next year’s Queen’s Speech—which will convert EU law into UK law and repeal the European Communities Act. The Government has indicated that the Bill will:
   a. End the jurisdiction of the European Court of Justice (CJEU) in the UK;
   b. Give ministers powers to use secondary legislation to take account of developments in negotiations with the EU; and
   c. Give the Government powers to establish domestic regimes to replace EU regulation and licensing.42

VII. The nature and scope of the legislative powers to be given to the Executive in the Great Repeal Bill is as yet unknown. Accordingly, we make the following general observations and recommendation in relation to Henry VIII clauses (Briefing Paper [13]-[15]; [30]-[39]):
   a. The enormous task of Brexit law reform will give rise to an understandable temptation to delegate large swathes of legislative power to the Executive by passing skeletal primary legislation that includes broadly drafted provisions to delegate law-making, sometimes using Henry VIII clauses.
   b. In rule of law terms, unnecessarily broad Henry VIII clauses in skeletal legislation threaten the rule of law because such clauses can give the Executive almost absolute discretion on questions of legal right and liability rather than defining in law the criteria for resolving the questions.
   c. This problem is compounded by the trend towards skeletal drafting of primary legislation that lacks substance and detail for the delegated legislation that it authorises.
   d. The problems of Henry VIII clauses can be mitigated in part through provision for strong parliamentary scrutiny of delegated legislation.

VIII. Recommendation: Parliament should ensure that Henry VIII clauses are used sparingly and only in legislation drafted with sufficient detail for legal certainty (Briefing Paper [24]). Further, primary legislation should provide for strong parliamentary scrutiny of proposed delegated legislation, with affirmative procedure

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IX. At this preliminary stage, we note the following questions that arise in relation to legal certainty and the incorporation of EU law into UK law through the Great Repeal Bill:

a. Which parts of EU laws and frameworks does the UK want to remain part of? For example, does the UK want to continue cooperation with EU countries in relation to surveillance, counter-terrorism, national security and policing? If so, is it appropriate to incorporate EU laws in these areas into UK law, or is it easier to continue the UK’s present participation in the EU regimes?

b. How will UK law respond to developments in EU law, including amendment or repeal of EU law by EU institutions and CJEU decisions? Will these developments have no relevance or application in the UK, or will these developments apply in UK law, or might Parliament review developments and determine their application on a case by case basis e.g. by passing resolutions?

c. What will be the legal effect of existing references to EU law and institutions in UK legislation after the UK leaves the EU?

X. Given the importance of resolving these questions to ensure legal certainty after Brexit, the Great Repeal Bill should be subject to the kind of careful pre-legislative scrutiny recommended in Part 1 of our evidence, including the publication of a draft Bill at a minimum, and perhaps also a white paper.

Q 5. Will there be changes required to how the Government and Parliament deal with legislation?

XI. Parliament is charged with the responsibility of making laws. Accordingly, as part of Parliament’s scrutiny of legislation, Parliament should consider the fidelity of new laws to all rule of law principles (discussed in Appendix 1). The rule of law can be enhanced through a careful and robust Brexit law reform process that seize the opportunity to make UK law as clear and accessible as possible (Briefing Paper [3]-[12]).

XII. **Recommendation**: To promote the fidelity of legislation to the rule of law, parliamentarians and parliamentary committees should use the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee* when undertaking legislative scrutiny. Many of the Code’s standards translate broad rule of law principles into specific standards (Briefing Paper Appendix 2).

XIII. The Government should similarly use these rule of law standards when drafting legislation. A mandatory step in the drafting process that considered fidelity to the rule of law might assist to regularise use of the standards in the face of the enormous task of Brexit law reform, as would a requirement for a rule of law impact assessment to be published with Bills (see also Part 1 of our evidence [55]-[59]).

XIV. There is a further rule of law point concerning the process by which laws are made: the process for Brexit law reform should not make the law unpredictable and unstable. The law can change, and the UK’s exiting the EU will necessitate large-scale reforms to UK law. However, parliamentary processes for changes to law that are transparent and clear can contribute to maintaining predictability and stability.
Executive Summary
The UK’s departure from the EU raises many contentious issues, some of which are constitutional in nature. This paper focuses on procedural rule of law questions concerning how Parliament can safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum. The international negotiations and law reform process resulting from the UK’s exiting from the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done.

In this context, Parliament has an important role to play to safeguard and apply rule of law standards when carrying out its activities of law-making and scrutiny of Government. Parliament can safeguard the rule of law in its law-making by ensuring fidelity to rule of law principles in the content of laws made to give effect to Brexit, and through transparent and stable processes for law-making in the context of Brexit. Parliament should guard against skeletal drafting of legislation and poorly defined Henry VIII clauses because they undermine Parliamentary sovereignty and the rule of law. Laws concerning the following areas warrant particular parliamentary scrutiny because they strengthen the rule of law: anti-discrimination law; freedom of information; and human rights.

The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiation of the agreements for the UK’s exit from and future relations with the EU that will have fundamental consequences for UK law, allowing Parliament to scrutinise and approve the negotiations.

**Recommendation 1**: Parliament and its committees can apply rule of law standards when scrutinising legislation to promote fidelity to rule of law principles.

**Recommendation 2**: Parliament should scrutinise particularly carefully Brexit-related reforms in anti-discrimination, freedom of information, and human rights.

**Recommendation 3**: Parliament should ensure that Henry VIII clauses are used sparingly and only in legislation drafted with sufficient detail for legal certainty.

**Recommendation 4**: Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate.

**Recommendation 5**: Parliament should have greater resources to safeguard the rule of law—e.g. the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.

**Recommendation 6**: All parliamentary committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit.
Recommendation 7: UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.

The Bingham Centre stands ready to provide rule of law assistance to Parliament.

This paper contains the following sections:

- I. Introduction
- II. Parliament and the Rule of Law in the Context of Brexit
- III. Skeletal Legislative Drafting, Delegated Legislation, and Henry VIII Clauses
- IV. Engagement with the Devolved Institutions
- V. Conclusion
- Appendix 1. What is the Rule of Law? An Explanation of Rule of Law Principles
- Appendix 2. Using Rule of Law Standards in Legislative Scrutiny
- Appendix 3. Policy Areas that Protect the Rule of Law
- Appendix 4. Parliament’s Scrutiny of International Negotiations
- About the Bingham Centre

I. Introduction

1. This paper aims to inform the work of Parliament by setting out preliminary rule of law issues relating to Brexit. The international negotiations and law reform process resulting from the UK’s exiting the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done. The UK’s departure from the EU raises many contentious issues, some of which are constitutional in nature. This paper focuses on procedural rule of law questions concerning how Parliament can respect and safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum.

2. While there were many and varied reasons that motivated the vote to leave the EU, it is common ground that a core and dominating theme was the wish to restore power over law-making to the UK Parliament, thus putting control over UK law in the hands of those democratically elected by and accountable to the people. Consistent with that goal, it is crucial that UK constitutional

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44 Boris Johnson, ‘There is only one way to get the change we want – vote to leave the EU’, The Telegraph (16 March 2016) http://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/; Michael Gove, ‘Why I’m backing Brexit’, The Spectator (20 February 2016) http://blogs.spectator.co.uk/2016/02/michael-gove-why-im-backing-
principles are protected, including the rule of law. The rule of law is not an abstract principle, rather, it is a practical concept by which proposed laws should be assessed. It is not the sole preserve of lawyers and courts, but a constitutional principle that Parliament has a role in safeguarding. As the sovereign law-making institution in the UK, Parliament has a vital role to play in applying the rule of law as part of its scrutiny of legislation and Government.

II. Parliament and the Rule of Law in the Context of Brexit

3. In general terms, the UK’s exit from the EU will involve:

   a. Negotiation of agreements on the UK’s exit from and future relationship with the EU, as well as negotiating trade agreements with non-EU countries (referred to generally as “international negotiations” in this submission); and

   b. Review of UK laws and an extensive law-making process to deal with EU laws that may otherwise no longer apply following the UK’s exit to:

   i. Clarify which EU laws continue to apply in UK law and the implications of changes to those laws by the EU and future European Court of Justice decisions on those laws, as well as to ensure that any references to EU institutions or laws in UK laws do not render the UK laws ambiguous or unclear; and

   ii. Establish new UK laws to replace the EU laws that the UK wishes to change.

(Referred to generally as “Brexit law reform process” in this submission).

4. There will be overlap in substance and process between the international negotiations and Brexit law reform process. In particular, there will likely be some EU frameworks that the UK will want to remain part of, for example, cooperation on national security. For these matters, the UK will want to negotiate to stay within the EU law and framework such that the law continues to operate in the UK after exit from the EU.

5. The international negotiations and Brexit law reform process will pose a difficult challenge in terms of scale and complexity for the UK Government and Parliament. Yet the Brexit law reform process also presents a significant opportunity to improve the clarity of UK law whether EU standards are incorporated or new UK laws made.

6. The rule of law is a recognised UK constitutional principle that must be respected and safeguarded in the processes and outcomes of the international negotiations and Brexit law reform process, and Parliament will play a key role in this context. We base this paper on the eight rule of law principles identified by Lord Bingham and note that the adoption of his formulation by

the Venice Commission has given considerable influence to his articulation of the principles. The principles are explained in more detail in Appendix 1.

Protecting the Rule of Law in the Brexit Law Reform Process

7. Two narrow examples illustrate the complexity of decision making that the UK faces across a multitude of areas such as employment, health and medicines, environment, consumer protection, finance and banking, agriculture, and arts and culture.\(^45\)

a. The UK’s Tobacco and Related Products Regulations 2016 were made by the Secretary of State under powers conferred by section 2(2) of the European Communities Act 1972 to implement Tobacco Products Directive (2014/40/EU). The Regulations rely on EU institutions and standards: for example, reg 5(3)(a) requires that a container pack of a tobacco product have a health warning that includes a text warning and colour photograph specified under the EU Directive. Does the UK wish to remain in the Directive and if so can the UK successfully negotiate this? If not does the UK wish to incorporate this EU Directive into UK law or make a new UK law? What would be the cost to UK businesses operating in the EU of complying with different standards if the UK sets its own law? If the UK continues to follow the EU Directive, what happens if the EU revises the Directive? The Court of Justice of the EU (CJEU) has already ruled that the Directive is valid, would the UK follow future decisions of the CJEU on the Directive?\(^46\)

b. Commission Regulation (EU) No 666/2013 of 8 July 2013 sets ecodesign requirements for vacuum cleaners and forms part of UK law because it is an EU regulation and therefore has direct effect in the UK. It is an example of many technical EU Regulations currently setting standards in the UK. When the UK leaves the EU, will we keep this Regulation by incorporating its standards into UK law, or set our own technical standards for the efficiency of vacuum cleaners? If the UK continues to follow this Regulation, what will be the effect in UK law if the EU amends or replaces the Regulation or the CJEU makes a decision on the Regulation?\(^47\)

8. The following rule of law principles provide guidance for the Brexit law reform process:


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- The law must be accessible and so far as possible, intelligible, clear, and predictable.
- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
- The law must afford adequate protection of fundamental human rights.

9. Parliament is charged with the responsibility of making laws. Accordingly, as part of Parliament’s scrutiny of legislation, Parliament should consider the fidelity of new laws to these principles. The rule of law can be enhanced through a careful and robust Brexit law reform process that seizes the opportunity to make UK law as clear and accessible as possible. In order to promote fidelity to the rule of law, parliamentarians and committees can apply the rule of law standards set out in the Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee. These rule of law standards are discussed and extracted in Appendix 2.

10. The rule of law principles outlined above also point to areas that warrant particular scrutiny in the legislative reform process necessitated by the UK’s departure from the EU. These areas include anti-discrimination law, human rights law, and freedom of information law, which are discussed in Appendix 3.

11. There is a further rule of law point concerning the process by which laws are made: the process for Brexit law reform ought to enable the law to be predictable and stable. The law can change, and the UK’s exiting the EU will necessitate large-scale reforms to UK law. However, parliamentary processes for such changes to law that are transparent and clear will mean that the outcome will be relatively stable and predictable.

12. There may be an inclination to pass as much law as quickly as possible to expedite the Brexit law reform process, but such haste would undermine parliamentary legislative scrutiny and the rule of law. For the purposes of legal certainty, it may be best to incorporate as much EU law as possible into UK law so that the Brexit law reform process can take place without undue haste. However, there would need to be clear rules on the effect of EU institutions’ decisions on EU laws incorporated into UK law, otherwise the incorporation of EU law may lead to uncertainty with implications for all aspects of life in the UK including, especially, business.

13. The rule of law also includes principles concerning the exercise of legal power, particularly the exercise of power by the Executive:
   - Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
   - Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
14. These rule of law principles are intrinsically related to the UK constitutional principles of the separation of powers and the sovereignty of Parliament. Parliament makes laws that are implemented by the Executive, and those laws define the scope and limits of power conferred on the Executive. Poorly defined Henry VIII clauses in legislation that is drafted in skeletal form undermine these principles, especially the sovereignty of Parliament, by enabling the Executive to make laws that define the scope and limits of the Executive’s power. A Henry VIII clause enables primary legislation to be amended or repealed by delegated legislation with or without further parliamentary scrutiny.

15. In rule of law terms, unnecessarily broad Henry VIII clauses in skeletal legislation threaten these two rule of law principles because such clauses give the Executive almost absolute discretion on questions of legal right and liability rather than defining in law the criteria for resolving the questions. Overly broad Henry VIII clauses threaten the latter rule of law principle by conferring power without limits on the Executive that can be exercised unreasonably since the power may be established and defined by the Executive itself. This problem is compounded by the trend towards skeletal drafting of primary legislation that lacks substance and detail for the delegated legislation that it authorises.

Enhancing the Rule of Law through Parliamentary Scrutiny of International Negotiations

16. As argued by Lord Bingham, the rule of law requires compliance by the state with its obligations in international law as in national law. The Executive conducts international negotiations and enters into treaties, while Parliament has responsibility for passing UK laws as needed for the UK to comply with its international obligations.

17. The agreements for the UK’s exit from and future relations with the EU will have fundamental consequences for UK law and law-making. The UK is a democracy in which Parliament is sovereign, including over the Executive, although the Executive negotiates treaties under its prerogative powers. Both Parliament and the Executive must respect the rule of law aspects of these activities.

18. The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiations to allow Parliament to scrutinise and approve the negotiations. The impetus for such engagement is not only political, but also has a legal dimension because Parliament will need to amend or repeal the


49 House of Commons Library, ‘Brexit: how does the Article 50 process work?’ (30 June 2016).
European Communities Act 1972 in line with the agreements reached with the EU.\textsuperscript{50}

19. The question of the Government’s power to send notice under Article 50 is the subject of multiple legal challenges concerning the nature and extent of the Executive’s prerogative power, whether prior authorisation by Parliament is required, and requirements that may arise from the unique constitutional arrangements of Northern Ireland.\textsuperscript{51}

20. The need for Parliament’s scrutiny of international negotiations is discussed in relation to rule of law principles in more detail in Appendix 4, without concluding on the legal questions raised in these cases.

21. Ultimately, concluding an agreement on the UK’s future relationship with the EU prior to the UK’s leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

Recommendations

22. \textbf{Recommendation 1}: When scrutinising legislation, Parliament and its committees can apply rule of law standards from the \textit{Code of Constitutional Standards} — derived from the work of the House of Lords Constitution Committee and produced by the Constitution Unit — to promote fidelity to rule of law principles. Appendix 2 introduces the Code and extracts the standards that relate to rule of law principles.

23. \textbf{Recommendation 2}: Parliament should scrutinise particularly carefully Brexit-related reforms in areas of anti-discrimination, freedom of information, and human rights.

24. \textbf{Recommendation 3}: Parliament should ensure that Henry VIII clauses are used sparingly, and when used, are carefully drafted and only used in primary legislation that provides appropriate detail and substance for legal certainty.

25. \textbf{Recommendation 4}: Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate. For example, any inquiry on anti-discrimination laws by the Women and Equalities Committee should refer to the rule of law principles of equality before the law and equal protection of the law in the inquiry’s terms of reference.

\textsuperscript{50} House of Commons Library, ‘Brexit: how does the Article 50 process work?’ (30 June 2016), 30.

26. **Recommendation 5**: Parliament and its committees should have greater resources to safeguard the rule of law.\(^{52}\) For example, the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.

27. **Recommendation 6**: Many parliamentary committees will very likely have Brexit as part of their work,\(^{53}\) so all committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit. The Bingham Centre acts as the secretariat for the APPG on the Rule of Law, which regularly holds meetings to discuss rule of law questions that arise in the work of Parliament, and could provide a briefing session drawing on expertise such as Founding Director Professor Sir Jeffrey Jowell KCMG QC.

28. **Recommendation 7**: UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.

29. The Bingham Centre stands ready to provide assistance to Parliament on rule of law questions including, for example, to give oral evidence or facilitate a closed informal session for MPs and Lords on committees to meet and discuss the relevance and application of rule of law principles for their work in the context of Brexit.

### III. Skeletal Legislative Drafting, Delegated Legislation, and Henry VIII Clauses

30. This section explains the problems of skeletal legislative drafting and inappropriately broad delegated legislative powers in rule of law terms, and the risk that Brexit will exacerbate these issues. To address this threat to the rule of law, Parliament can use relevant standards in the *Code of Constitutional Standards* and build on the work of the Delegated Powers and Regulatory Reform Committee.

31. There is a trend of skeletal drafting of primary legislation to merely outline the law and Parliament’s intention without details. The Constitution Committee has rightly criticised the trend of “vaguely-worded legislation that left much to the discretion of ministers”\(^{54}\) for its erosion of the principle that the law should be clear and certain.\(^{55}\)

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\(^{52}\) House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [32].

\(^{53}\) Ruth Fox, ‘It’s Brexit... So What Now for Parliament?’, *Hansard Society* (24 June 2016), [37].


\(^{55}\) See e.g. House of Lords Select Committee on the Constitution, *Cities and Local Government Devolution Bill [HL]; Psychoactive Substances Bill [HL]; Charities (Protection
32. Delegated legislation, also known as secondary or subsidiary legislation, is legislation made by the Executive using power that has been delegated by Parliament in primary legislation. Delegated legislation is necessary because Parliament does not have the time or resources to address detailed administrative matters in primary legislation. Delegated legislation does not receive the same level of parliamentary scrutiny as primary legislation, and is very rarely rejected by either House (Parliament generally does not have the power to amend delegated legislation). Accordingly, provisions in primary legislation that delegate legislative power to the Executive must be carefully drafted and defined for clarity and certainty as to the purpose and scope of the power.

33. The distinguishing feature of Henry VIII clauses is that they give the Executive power to make delegated legislation that includes provisions amending or repealing the primary legislation. Such clauses may sometimes be necessary and appropriate, but there are many instances where they are not.

34. Skeletal drafting of primary legislation and use of poorly defined Henry VIII clauses work in opposition to the rule of law principles that legal rights and liability should be determined by application of the law and not the exercise of discretion, and the Government (ministers and public officers) must exercise their powers properly. These principles require that the decision making power of Government should be defined and limited by the laws made by Parliament. Poorly defined Henry VIII clauses in skeletal legislation allow Government almost unfettered ability to set their own rules for their decisions, and thus wield power that looks more like arbitrary discretion than accountable decisions according to law.

35. The enormous task of Brexit law reform will give rise to an understandable temptation to delegate large swathes of legislative power to the Executive by passing skeletal primary legislation that includes broadly drafted provisions

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and Social Investment) Bill [HL] (22 June 2015), [2]-[3]; see also, House of Lords Delegated Powers and Regulatory Reform Committee, Special Report: Response to the Strathclyde Review, (23 March 2016), [33]-[38].


that delegate law-making to the Executive, sometimes using Henry VIII clauses. This temptation arises from the scale of the Brexit law reform process, which involves each area that has been affected by EU law, so that delegating large swathes of legislative power to the Executive may appear the easiest and most efficient approach in the extraordinary circumstances. Yet, the pressure from the extraordinary circumstances of Brexit ought not result in fundamental UK constitutional principles being eroded or disregarded entirely. Rather, constitutional principles should be respected by Parliament and the Government in their response to Brexit.

36. There is also a risk of pressure on the limited resources of institutions responsible for primary legislation encouraging inappropriate reliance on delegated legislation. Government proposals for law are translated into Bills by the specialised lawyers in the Office of Parliamentary Counsel. However, the Office of Parliamentary Counsel only has a team of around 50 lawyers and Parliament only has around 20 lawyers to advise its work, whereas Government as a whole is estimated to have around 2,000.58 It has been reported that the Government will need additional lawyers to cope with Brexit.59 The relatively small number of lawyers working in Parliament and the Office of Parliamentary Counsel indicates the limited resources available in the institutions that are responsible for drafting and scrutinising primary legislation.

37. The rule of law standards in the Code of Constitutional Standards extracted in Appendix 2 include standards for delegated powers, delegated legislation, and Henry VIII clauses. These standards can assist Parliament’s legislative scrutiny concerning the delegation of legislative power.

38. Furthermore, Parliament can build on the work of the House of Lords Delegated Powers and Regulatory Reform Committee, which scrutinises the delegation of powers in Bills as they pass through Parliament and ensures that such delegation is clearly drafted, necessary and appropriate. The Committee’s Guidance for Departments: on the role and requirements of the Committee is an important and practical resource to promote proper legislative drafting and delegation of powers. The Guidance’s principles concerning Henry VIII powers are undoubtedly concordant with rule of law principles, and a sensible process for managing the use of Henry VIII powers is set out the principle:


Every Henry VIII power ... should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the [delegated powers] memorandum.60

39. Application of this principle allows Parliament to retain proper control over the exercise of powers to change primary legislation.

IV. Engagement with the Devolved Institutions

40. In light of the Sewel Convention, the devolution settlements, and the UK constitution, it is important that the devolved institutions are involved in the decision making on international negotiations as well as consequential adjustments to the devolution settlements.

41. The competences of the devolved legislatures and governments are defined with reference to the EU. Accordingly the reserved and devolved matters will be affected by changes to the application of EU law in the UK, and ought to be revisited and recast to ensure clarity after the UK leaves the EU. Such change will likely need the legislative consent of the devolved legislatures.

42. The need for legislative consent by the devolved legislatures for changes to devolved matters arises from a constitutional convention: the Sewel Convention. The Convention has been incorporated into legislation for Scotland under the Scotland Act 1998, which was amended by the Scotland Act 2016 to state: ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’61 The Wales Bill that is currently making its way through the UK Parliament similarly incorporates the Sewel Convention in the same terms.62

43. Legal experts differ on the application and effect of the Sewel Convention as incorporated in the Scotland Act in the current circumstances of Brexit. Some argue that there is no legally enforceable constraint imposed on Westminster by the legislative recognition of the convention, others point to comments from the UK Supreme Court that parliamentary sovereignty may possibly be subject to limited constitutional constraints, and there is uncertainty as to the effect of the word ‘normally’.63 These questions may fall to the courts to be

60 House of Lords Delegated Powers and Regulatory Reform Committee, Guidance for Departments on the role and requirements of the Committee (July 2014), [35].
61 Section 2 of the Scotland Act 2016; The Sewel Convention is also included in the Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive (2001) available at: http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf.
62 Section 2 of the Wales Bill 2016–17 as introduced into the House of Lords on 13 September 2016.
63 See e.g. Sioned Douglas-Scott, ‘Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies’, The Constitution Unit Blog (13 June 2016) https://constitution-unit.com/2016/06/13/removing-references-to-
resolved in due course. For present purposes it is sufficient to observe that the Sewel Convention reflects the strong political imperative for Westminster and Whitehall to engage with the devolved nations, as recognised by Prime Minister Theresa May.

44. Whilst the constitutional and legal arrangements are different for each of the devolved nations, as are the politics and political will in each devolved nation, there are unique issues in relation to Northern Ireland. These include the Belfast or Good Friday Agreement, in which the rights from EU law are arguably embedded, and the land border that Northern Ireland shares with the Republic of Ireland. The deep political implications of Brexit for Northern Ireland require special attention, as Secretary of State for Exiting the European Union, The Right Honourable David Davis, has already recognised.

45. We note that the House of Commons Standing Order 137A already provides that select committees can communicate evidence to the devolved legislatures, and empowers the Welsh Affairs Committee to invite members of National Assembly for Wales committees to attend and participate in its proceedings (but not vote). The House of Commons could consider expanding this latter power to all of the House of Commons select committees, not only those concerned with the devolved nations.

46. We further note that relations between UK parliamentary committees and the devolved legislatures vary, and observe that expanded powers for inter-parliamentary cooperation under the Standing Orders will also need goodwill and mutual respect in order to be used effectively.

47. We believe that the UK Parliament and Government should continue to engage with the legislatures and governments of the devolved nations in relation to both international negotiations and Brexit law reform process.

V. Conclusion: Moving towards Brexit

48. There are already several parliamentary inquiries on foot concerning Brexit. This paper will inform written evidence submitted to a number of inquiries including:

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66 Standing Orders of the House of Commons (10 February 2016).

67 House of Lords Select Committee on the Constitution, Inter-governmental relations in the United Kingdom (27 March 2015), [197].
49. This paper is also being submitted as unsolicited evidence to:
- House of Lords Delegated Powers and Regulatory Reform Committee
- House of Commons Liaison Committee
- House of Lords Liaison Committee
- House of Commons Justice Committee
- House of Commons Public Administration and Constitutional Affairs Committee
- House of Commons Women and Equalities Committee

50. Many more specific rule of law questions will arise for the UK and EU as the Brexit process unfolds. The Bingham Centre will remain engaged to promote the rule of law in the process.

Appendix 1. What is the Rule of Law? An Explanation of Rule of Law Principles

51. The rule of law principles that are relevant for present purposes are outlined above. This Appendix explains rule of law principles more fully.\(^\text{68}\)

The law must be accessible, intelligible, clear, and predictable

52. When the law meets this requirement, people are able to understand what activity is prohibited and therefore discouraged, and what their rights are so that they are able to claim those rights.

53. Uncertainty on the law discourages business and financial activity, as well as the good operation of UK law generally.

54. Parliamentary processes for legislative scrutiny and law-making can help to alleviate uncertainty by providing clarity on the timetable for the establishment of new laws and on the likely content of those laws.

Laws should apply equally to all

55. This principle means that the law should not have discriminatory provisions, and that the law should not tolerate discrimination. A key example is slavery: equality before the law necessitated the abolition of slavery and explicit legal decision that the law would not recognise a distinction between enslaved and free people. Anti-discrimination law implements this rule of law principle.

56. At the same time, there are categories of people whom the law should treat differently because their position is different. For example, children cannot be prosecuted for crime below a certain age, because children are less mature than adults.

The law must afford adequate protection of fundamental human rights

57. As Lord Bingham said:

*A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.*

58. It is not sufficient that laws meet the formal and procedural requirements of being duly enacted, clear and so on. In terms of content, the law must provide protection for fundamental human rights such as the prohibitions of torture and slavery, freedom of expression, freedom of religion, and right to family life. Whatever proposals may be brought forward for a Bill of Rights for the UK, these fundamental human rights remain matters that should be protected across all areas of UK law.

Legal right and liability determined by application of the law and not the exercise of discretion

59. The rule of law can be understood in contrast with the ‘rule of man’, meaning a society in which one or more individuals rules arbitrarily exercising power unconstrained by law where the ruler(s) are above the law.

60. The entitlement of citizens to Government grants such as welfare and the legal obligations of citizens must be sufficiently defined in law, and not subject to the arbitrary exercise of power. By way of a simple example, ‘We expect the taxes we pay to be governed by detailed statutory rules, not by the decision of our local tax inspector. He has the duty to apply the rules laid down, but cannot invent new rules of his own.’

61. Government decision-makers and officials will inevitably need to exercise discretion when making decisions, but the rule of law requires that such discretion should not be unconstrained and, in effect, arbitrary.

The Government (ministers and public officers) must exercise their powers properly

62. In the UK, Parliament makes laws and the Executive (the Government) applies those laws.

63. Lord Bingham rightly said:

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This is important. When Parliament, by statute or statutory regulations, empowers a specific officer (such as a secretary of state or the Director of Public Prosecutions or the Director of the Serious Fraud Office) or a specific body (such as a housing authority, a social services department, a county council, a health authority, a harbour board or the managers of a mental hospital) to make a particular decision, it does not empower anyone else. It expects that officer or body to follow any guidelines on policy that may have been laid down, but expects that the officer or body will exercise his or its own judgment, having regard to any relevant experience and the availability of resources. It does not expect, or intend, that the decision should be made by some judge who may think that he or she knows better. But there is a presumption that the decision made will be in accordance with the law.71

64. The accepted tests for judicial review of Government decisions reflect this principle by enabling courts to overturn a Government decision where it is unlawful and has therefore departed from the intention of Parliament. The court does not substitute its decision for the Government official’s decision, rather, the court sets the decision aside if, for example, the decision-maker exceeded their power.

65. This rule of law principle supports and reinforces parliamentary sovereignty by articulating the need for the Executive to act in accordance with the intentions of Parliament.

Dispute resolution

66. Given that everyone is subject to and entitled to protection by the law, a consequential rule of law principle is that ‘Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.’72

67. Cost and delay of court proceedings are enemies to the rule of law. Legal aid serves an important role by enabling poor litigants to have access to the legal system.

68. The more affordable and expeditious dispute resolution is, the better the rule of law is served, albeit that this goal may remain elusive.

Adjudicative procedures provided by the state should be fair

69. This principle may be described as the right to a fair trial, however, the rule of law principle extends beyond the context of criminal law to all public and civil law trials.

70. The independence of the judiciary and legal profession are necessary requirements for trials to be fair.

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71. Various rules serve to protect the fairness of trials. In the criminal law context, these rules include that trials should be conducted in public, and an accused is to be presumed innocent until proven guilty.

The rule of law in the international legal order

72. In order to realise a rules-based international order, it is important that states comply with their obligations under international law. Lord Bingham explained that

*although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so.*


73. Rule of law principles provide broad high level guidance for law-making, but need a systematic tool for implementation. In order to promote the fidelity of legislation to the rule of law, parliamentarians and parliamentary committees should use the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee* produced by the Constitution Unit when undertaking legislative scrutiny. Many of the Code’s standards translate broad rule of law principles into specific standards — the standards from the Code that concern rule of law principles are extracted below.

74. The Code was produced through analysis of reports by the House of Lords Constitution Committee and the principles contained in the Code are drawn directly from the Committee’s work. Accordingly, the Code contains ‘parliamentary constitutional standards’ which have the following advantages that make them well-suited for legislative scrutiny:

*First, they are parliamentary in the sense that they are articulated by a parliamentary actor and not, for example, by judges or government or other outside bodies. Second, they are ‘constitutional’ because they are based on principles or norms*

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In our view, the Code is not a complete list of rule of law principles, for example there are no standards relating to non-discrimination. Nonetheless, the rule of law standards in the Code are a ready tool to promote fidelity to the rule of law in the Brexit law reform process.

Rule of Law Standards from the Code of Constitutional Standards

1) The rule of law

1.1 Retrospective legislation

1.1.1 Enacting legislation with retrospective effect should be avoided.
1.1.2 Provisions that have retrospective effect should be drafted as narrowly as possible.
1.1.3 Individuals should not be punished or penalised for contravening what was at the time a valid legal requirement.
1.1.4 Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake.
1.1.5 Laws should not deprive someone of the benefit of a judgment already obtained.
1.1.6 Laws should not prevent a court from deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced.
1.1.7 Retrospective legislation should only be used when there is a compelling reason to do so.
1.1.8 A legislative power to make a provision which has retrospective effect should be justified on the basis of ‘necessity’, and not of ‘desirability’.

1.2 Legal certainty

1.2.1 The rule of law requires laws to be reasonably certain and accessible.
1.2.2 General warrants should be avoided.
1.2.3 Laws that include a variable monetary penalty should include an upper limit.

2) Delegated powers, delegated legislation and Henry VIII powers

2.1 Defining the power

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77 We have extracted all of the standards in the Code that relate to Lord Bingham’s rule of law principles, including those not explicitly categorised as ‘rule of law’ standards in the Code.
2.1.1 Delegations of legislative power should be framed as narrowly as possible.

2.1.2 The policy aims of a ministerial power should be included in the bill itself.

2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.

2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the bill.

2.1.5 Ministerial powers should be defined objectively.

2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.

2.2 Safeguards in delegation of legislative powers

2.2.1 Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety.

2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a bill then they should be included.

2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.

4) Individual rights

4.1 General principles

4.1.1 The restriction of individual rights should be proportionate.

4.1.2 Provisions that restrict the liberty of the individual should be drafted as narrowly as possible.

4.1.3 Provisions that restrict the liberty of the individual should be accompanied by sufficient limits and protections.

4.1.4 Severe restrictions on the liberty of the subject should only be the result of a criminal conviction.

4.1.5 Statutory powers that allow a minister to impose significant constraints on the liberty of the individual should be subject to direct judicial oversight.

4.1.6 Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights.

4.1.7 Interferences with the fundamental common law right to freedom of expression should be justified appropriately.

4.2 Access to justice

4.2.1 Laws should respect the constitutional right of access to justice.

4.2.2 A bill should not interfere with the common law right of access to justice when it is not necessary to meet the bill’s stated purpose.
4.2.3 A statutory power granted to a public body to deprive an individual of a significant right should be subject to a reference by the public body to a court.

4.2.4 Laws should respect the constitutional principle that individual liberty is to be protected by the courts.

4.3 **Due process and procedural fairness**

4.3.1 Laws that create a power to make administrative decisions that affect individuals should meet the minimum standards of procedural fairness.

4.3.2 The common law principle of natural justice: audi alteram partem (hear both sides before making a decision) should be respected.

4.3.3 The right to a fair trial should be respected.

4.3.4 Laws that confer upon the executive coercive sanction powers should include safeguards for ensuring that fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight.

4.3.5 Laws that create a public decision-making process should ensure that affected citizens have recourse to an effective appeal system.

4.3.6 Laws which impose restriction on the freedom of individuals backed by sanctions should include basic due process safeguards.

4.3.7 Laws should respect the right of an individual detained in a police station to free legal advice.

**Appendix 3. Policy areas that protect the rule of law**

**Non-discrimination**

76. UK equality and anti-discrimination laws have benefited from and been enhanced by the influence of EU law. These laws on equality and anti-discrimination help to safeguard the rule of law principles that everyone should be equal before the law and receive equal protection under the law. The below discussion is not exhaustive, and merely illustrates by a selection of examples the influence of EU law on UK equality and anti-discrimination laws.

77. A key example of EU law’s influence is the Equality Act 2010 that implements the following EU Directives:

   a. 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
   b. 2000/78/EC establishing a general framework for equal treatment in employment and occupation,
   c. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),
78. EU law has enhanced disability rights in the UK including extending employment protection to all employers, requiring assistance for disabled people when travelling, and requiring that Braille labelling is included on packaging for medicinal products.  

79. Protection from employment discrimination for people on the grounds of religion or belief, sexual orientation and age was established under the EU Equal Treatment Directive 2000/78/EC, whereas such protection had not previously existed under UK law. 

80. Furthermore, UK anti-discrimination law has been developed by decisions of the Court of Justice of the EU that reinforced and strengthened anti-discrimination law.

81. UK anti-discrimination law poses few impediments to Parliament or ministers passing discriminatory legislation. EU law and human rights law have in effect provided legal protection for the right to equal treatment in the UK, however once the UK leaves the EU an important part of this protection will fall away.

Freedom of Information

82. General access to information held by a public authority is set out under the Freedom of Information Act (FOI Act), however, the UK Environmental Information Regulations 2004 incorporates EU Directive 2003/4/EC on public access to information on the environment. The Regulations cover a wider range of bodies than the FOI Act, including those performing functions of public administration or controlled by an authority.

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Human Rights

83. Currently, the Human Rights Act is the primary instrument that protects human rights and reflects the rule of law principle that the law protects fundamental rights. However, EU law has also contributed to the protection of fundamental rights in the UK.\(^\text{84}\)

84. In some instances, EU law has provided the basis for human rights standards and tests in the context of surveillance, intelligence gathering and security measures, particularly given the need for counter-terrorism measures. The *Digital Rights Ireland* decision by the Grand Chamber of the CJEU found that the EU Directive on the retention of electronic data communications was invalid because it breached the EU Charter of Fundamental Rights. Similarly, the CJEU is currently considering whether UK bulk data collection powers are incompatible with the right to respect for private life.\(^\text{85}\)

85. As a matter of the rule of law and international cooperation on security issues, it is important for the UK to meet these human rights standards:

   a. In line with the rule of law principle that the law should protect fundamental rights, it is important that laws on data surveillance do not breach fundamental rights;

   b. The decision of the CJEU in the *Schrems* case found that the data protection laws of non-EU countries must be ‘essentially equivalent’ to European law to permit simplified transfers of personal data between countries. Accordingly, UK data protection laws will need to meet EU standards to facilitate intelligence and security cooperation between the UK and EU countries. Data sharing also has economic consequences as it effects e-commerce.\(^\text{86}\)

86. Similarly, the decision of the CJEU in *Kadi* upheld the right to be heard, right to effective judicial review, and right to property in the context of listing individuals to be subject to sanctions.\(^\text{87}\) These kinds of natural justice or due process rights (the rights to be heard and to judicial review) are central to the rule of law. Accordingly, as the UK leaves the EU special attention should be paid to ensure these kinds of rule of law principles and fundamental human rights continue to be upheld.

\(^\text{85}\) C-698/15 R (Davis, Watson, Brice & Lewis) v Secretary of State for the Home Department; the case concerns the *Data Retention and Investigatory Powers Act 2014*, but has relevance for the Investigatory Powers Bill.  
Appendix 4. Parliament’s Scrutiny of International Negotiations

87. The Executive tends to resist efforts by Parliament to scrutinise international negotiations prior to their completion. This resistance is based on the concern held by negotiators that the more they reveal outside of negotiations, the weaker their position is in negotiations.  

88. The Constitutional Reform and Governance Act 2010 incorporated into statute the Ponsonby Rule that treaties, once signed, are published and laid before Parliament for 21 sitting days, and must not be ratified if either House resolves that the treaty shall not be ratified. However, the Government can effectively disregard such a vote by the House of Lords, and if the House of Commons resolves that a treaty should not be ratified then the Minister can lay before the House a statement explaining why the Minister thinks the treaty should nonetheless be ratified, and the 21 day period starts anew.

89. Parliament also plays an essential role at the intersection of domestic and international law, because it debates and passes legislation that gives effect to treaty obligations in UK law, such as the European Communities Act 1972.

90. As such, the Government will need Parliament’s support for the outcomes from its international negotiations. The most controversial treaty will be the agreements on the UK’s exit from and future relationship with the EU. The Constitution Committee recently found that it is ‘constitutionally appropriate’ that Parliament should play a central role in the Brexit negotiations with the EU. The rule of law could be enhanced through a process in which the Government engages with Parliament in advance of and throughout the negotiating process rather than presenting the agreements or elements thereof to Parliament as a finished product.

91. There are good reasons for international negotiations to be conducted in secret so that strategic advantage is not lost by allowing the opposing

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89 Part 2; per https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml some international treaties are not subject to ratification, but discussions so far have indicated that the Brexit treaty will be subject to ratification.


92 House of Lords European Union Committee, Scrutinising Brexit: the role of Parliament (22 July 2016), [18].
negotiators to know your vulnerabilities.\textsuperscript{93} However, the international negotiations for Brexit will have such fundamental consequences for UK law and policy that a mandate from Parliament could strengthen the clarity and certainty of the negotiators’ position. Absent a parliamentary mandate, decisions by the Executive in the negotiations risk effectively dictating or foreclosing options for Parliament’s law-making.

92. As noted by the House of Lords EU Committee, current parliamentary scrutiny can be highly flexible with respect to confidential matters through mechanisms such as committees holding private hearings, confidential briefings, and private meetings.\textsuperscript{94}

93. Additional mechanisms for the Executive to engage with Parliament prior to and during international negotiations should be considered and explored. For example, the Joint Committee on the Draft Constitutional Renewal Bill suggested a ‘soft mandating’ mechanism whereby the relevant minister and officials would meet the committee before negotiations to agree a general bargaining position, and the minister would update the committee during negotiations.\textsuperscript{95}

94. The rate of decision making in the negotiations with the EU will almost certainly accelerate over the two years following notice under Article 50, with the last months and weeks being the most crucial. It would be prudent, therefore, for Parliament to set in legislation rules and processes for the negotiations that take this acceleration into account. The possibly frenetic pace at the end of the two years will limit the capacity of the Government and Parliament to engage and consult with each other at that time. A clear mandate from Parliament in advance on the nature and scope of the Government’s decision making could provide certainty and guidance in the final stretch of negotiations.

95. Ultimately, concluding an agreement on the UK’s future relationship with the EU prior to the UK’s leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

\textbf{About the Bingham Centre}

The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill — a great judge and passionate advocate of the rule of law. A London-based organization working internationally, the Centre is dedicated to the study, promotion and

\textsuperscript{93} House of Lords European Union Committee, \textit{Scrutinising Brexit: the role of Parliament} (22 July 2016), [20].
\textsuperscript{94} House of Lords European Union Committee, \textit{Scrutinising Brexit: the role of Parliament} (22 July 2016), [21].
enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

*October 2016*
The British Academy—Written evidence (LEG0022)

1. The British Academy, the national academy for the humanities and social sciences, welcomes the opportunity to respond to the Committee’s inquiry into the legislative process. The British Academy has a number of Fellows with relevant expertise on legal and constitutional matters and this response draws on that knowledge. This response focuses largely on benchmarks for improving legislation, Brexit and Parliamentary involvement. However, we feel that improvements to the legislative process should not come at the expense of a primary focus on the standards which laws must be required to meet. Additionally, we ask that the committee seeks to ensure that running this inquiry in stages captures any overlap between various aspects of the legislative process.

Creating good law
2. Baroness O’Neill of Bengarve CH, CBE, FBA, HonFRS, FMedSci has helpfully recommended a number of limited and feasible benchmarks in order to improve both the legislative process and the legislation which results. These benchmarks are as follows96:
   - Laws are for citizens
   - Laws must be understood by those to whom they apply
   - Laws must be comprehensible
   - It must be feasible to comply with the law

   The European Court of Human Rights has also stressed the importance of the “clarity and intelligibility” of the law (Malone v UK) (see also Lord Bingham FBA, The Rule of Law, p. 37: “The law must be accessible and so far as possible intelligible, clear and predictable”). Additionally, Baroness O’Neill states that laws must be understood in broad terms by the public in terms of what is demanded of them. To Baroness O’Neill, law should be deemed inadequate if those who must comply with it must seek professional advice ‘at every juncture’ in order to do so. It should be borne in mind that “Enacting adequate, feasible laws matters because unknown and unknowable laws do not remedy but create mischiefs. They not only promote institutional inadequacy, but fuel public disengagement and distrust.”97

Known law
3. Baroness O’Neill has highlighted shortcomings regarding both the volume and frequency of changes to law98. Baroness O’Neill outlines that laws are too frequently made, too complex, and are too often incomprehensible. Laws made too frequently undermine John Locke’s requirement for a society to have ‘known law’ – if law changes too frequently it cannot be known. Whilst the parliamentary process is, in

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theory, more accessible than ever before, the laws thus resulting may not be, in part due to the sheer amount of law produced and the frequency of its production, not least law produced by delegated legislation and written in terms which cross-refer to other pieces of legislation. Moves away from such frequent legislating would therefore be welcome. The aim should be to make few changes well, rather than a large number of changes.

The importance of the jury
4. It should be noted that intelligibility is of particular importance to English law. This importance is due to the role in the application of law played by non-specialist laypeople as members of a jury. When considering the intelligibility of law, it is advisable to consider its application via the jury process.

Brexit
Clarity and accommodation
5. It is desirable that legislation is drafted in a way that is clear and intelligible and that it originates in a body that is accountable to the people (or peoples). European Union law which is adopted in the framework of a complex legal process involving multiple states and multiple institutions is not always as clear and intelligible as one might like. This can present difficulties for EU Member States when they seek to implement those parts of EU law which are not directly applicable into national law (e.g. directives). While the decision to leave the EU should mitigate some difficulties faced by national legislatures, within the UK the implementation of EU legislation which lacks clarity or intelligibility could also conceivably increase legislative complexity. This additional complexity would result from the policy preferences and legislative frameworks of the different UK nations as they potentially diverge further in the absence of a 'harmonising' impetus from the EU.

Planning for Brexit
6. Brexit is going to require a considerable volume of legislation in a short space of time. Planning needs to take place now to ensure that sufficient time is properly allocated in order that the improvements to the scrutiny processes outlined in the remainder of this document are properly implemented.

7. Much of the legislation required for Brexit will not take the form of primary legislation. The sheer volume of legislation will make it difficult for the existing procedures for scrutinising delegated legislation to operate. Establishing a series of specialist sub-committees would allow the necessary reporting and scrutiny to be undertaken.

Improving scrutiny
8. Improving the quality of scrutiny can assist in improving the process of legislation. It is in this regard that we wish to draw the committee’s attention to the approach of this inquiry. Running the inquiry in stages risks utilising an imperfect approach as various aspects of the legislative process will overlap with others. Impact assessment, for example, is included in stage one yet is also relevant to other stages,
especially if draft legislation is amended. The passage of a bill through parliament may result in changes which are not assessed for their impact whilst Select Committees may not have access to impact assessments. Post legislative scrutiny should also be subject to impact assessments and this should be included in the later stage of the inquiry. Applying similar levels of scrutiny to all stages of a bill should have a positive effect on legislation. An example of the need for this is outlined in the next paragraph (9).

9. The Welfare Reform Act 2009 provides an example of the need to improve the process of scrutiny. The Employment, Skills and Enterprise Scheme, introduced in 2011, is an example of a case that covers Stages 1, 2 and 3 of this inquiry process. The Welfare Reform Act 2009 amended the Jobseeker's Act 1995 by inserting a new section 17 with the intention of introducing a scheme which required the unemployed to participate, when instructed, in a specified, work-related scheme. The new section 17 of the 1995 Act authorised the making of regulations, subject to certain conditions, contained in the new section inserted in 2009. As it is not UK practice, the regulations were not available to be debated by Parliament when the legislation was introduced. The regulations, technically made under an Act that dealt with a very different benefit scheme, were not made until 2011. The 2011 Regulations attracted criticism from the Social Security Advisory Committee on policy grounds and from the House of Lords Select Committee on the Merits of Statutory Instruments.

10. The 2011 Regulations were challenged and the Court of Appeal ruled them to be ultra vires and quashed them in R(Reilly) v Work and Pensions Secretary [2013] EWCA Civ 66, creating a situation in which repayments might be necessitated. The Government responded by introducing retrospective legislation, which was criticised by the House of Lords Constitution Committee and later ruled incompatible with Article 6(1) of the European Convention on Human Rights by the Court of Appeal in Reilly & Anor v Secretary of State for Work and Pensions [2016] EWCA Civ 413.

11. The example of the Welfare Reform Act 2009 is equally relevant to stages 1 and 3 of this inquiry. In stage 1 this example has relevance to how policies are changed and added to existing statutes by amendments. The examples of the 2009 Act and the 2011 regulations are also relevant to stage 3 of this inquiry. In relation to stage 3, this inquiry should adequately consider both the use of delegated legislation

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99 The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917
http://www.publications.parliament.uk/pa/ld201012/ldselect/ldmerit/137/13702.htm
See further HC Research series SN05212 08/09 and 09/09 at http://researchbriefings.files.parliament.uk/documents/RP09-08/RP09-08.pdf
101 Constitution Committee, Jobseekers (Back to Work Schemes) Bill, HL 155 (2013)
to incorporate controversial issues and the way in which delegated legislation is drafted. Only by looking across the inquiry stages in this way can the potential shortcomings in the process be properly understood.

**Equalising scrutiny**

12. The contrast between scrutiny of draft bills and scrutiny of actual bills is significant, and the legislative process would benefit greatly from a change to this approach. Whereas pre-legislative scrutiny is commonly presented as a valuable addition to the legislative process, the disparity between deliberation of the draft bill and the actual bill can be significant, as can the difference between the content of the bills. An example is the current Wales Bill as (a) it is constitutional legislation which (b) proceeds on a different set of tests for devolved competence to those originally presented in the draft Bill, and yet (c) has been subject to relatively light scrutiny in the House of Commons. It is therefore necessary that the staged approach of the Committee captures all aspects of the legislative process.

13. Delegated legislation is generally subject to less scrutiny and proceeds in a more compressed time frame. Because much of Brexit legislation (both to incorporate and to repeal provisions in EU instruments) will have to be made by delegated legislation, appropriate procedures for scrutiny need to be planned.

**Request for clarification**

14. Due to the importance of law being accessible, especially to those affected by it, we ask that the committee clarify whether public access to and engagement with the finished law is covered only by Stage Four of the inquiry or throughout the process? Unless the term ‘after Royal Assent’ is interpreted widely to cover impact and implementation – and possibly post-legislative evaluation by Parliament – questions of public access may not be properly addressed.

**Conclusion**

15. Legislation and the legislative process can be improved by a greater regard for the benchmarks outlined above, by greater clarity where possible and by improving scrutiny. Ensuring that law is comprehensible to those who are subject to it is an important principle to which to adhere. Improving the quality of the process of scrutiny such as by equalising the scrutiny on draft and actual bills should improve the quality of laws.

*October 2016*
The Rt Hon. Professor Paul Burstow, former MP and Minister of State for Health, and Chair of the Joint Committee on the Draft Care and Support Bill—Oral evidence (QQ 76-88)

Transcript to be found under The Rt Hon. Steve Webb, former MP and Minister of State for Pensions
Chartered Institute of Taxation—Written evidence (LEG0018)

1 Introduction

1.1 Our comments in this submission reflect our experience as a frequent participant in government consultations, especially in relation to consultations by HM Treasury and HM Revenue and Customs. They also draw on comments made – particularly by our members and other tax professionals - as part of a project on Improving the Tax Policy Making Process, which we are carrying out jointly with the Institute for Government and Institute for Fiscal Studies. This has so far led to an open letter to the Chancellor and is expected to lead to a final report in November 2016. The comments in this submission are, however, our own only.

1.2 As our area of interest is primarily tax legislation our remarks are particularly directed at the (usually) annual Finance Bill, and may not be applicable to other legislation which is prepared and treated differently.

2 Summary

2.1 Creating good law: We are supportive of the ‘new approach to tax policy making’ introduced by the Government in 2011, including the publication of Finance Bill draft clauses for consultation as a matter of course. However we are concerned about the increasing volume of tax legislation and about growing complexity. We propose a reversion to one principal fiscal event a year to reduce the volume of legislation. We support the work of the Office of Tax Simplification and believe an appropriately resourced OTS could have its remit expanded to allow it to look at some draft legislation. We would like to see greater consistency of definitions used in legislation. Consideration should be given to publishing instructions provided to the Office of Parliamentary Counsel, and also to the potential for a ‘tiered’ approach to legislation. We support the use of ‘roadmaps’.

2.2 Brexit: Out of the EU we will have more options to vary our tax system, particularly in relation to VAT, but this risks adding to complexity. We see no reason why the process of amending tax law incorporated from EU law should be different from the process for other changes. Consultation on the practical implications of policy changes will be important.

2.3 Technology: Technology can be used to make consultation more accessible and communication more effective, for example through the use of webinars. Appropriately framed online surveys can have a role in consultation, but are best targeted at those who may not commonly reply to consultations and thus could use a survey to give limited responses. Datasets should be made available wherever possible; more data has
been made public but there are still too many cases where making more data public would enable better responses to consultations.

2.4 **Public involvement and engagement:** There are still too many occasions when changes are rushed through. Secondly, consultations sometimes start at too late a stage, with the central proposal already decided upon, meaning that other routes to achieve the objective more effectively are excluded. Secrecy on the basis of ‘market sensitivity’ may be being over-used. Informal pre-consultation is sometimes useful but is not a substitute for full, open consultation. Potential consultees would be encouraged by the provision of feedback on their submissions, by systematic inclusion of the evidence base for proposals, and by use of the full three months consultation period wherever possible. Broad consultations, whether through roadmaps or independent reviews, might boost public engagement, as would more proactive outreach by departments. Also there should be efforts to encourage greater public understanding of taxation generally, including teaching of tax in schools as part of a broader ‘life skills’ programme within the national curriculum.

2.5 **Information provision:** Finance Bill might be published as soon as they are drafted, rather than all together in December. We are concerned about the quality of information published alongside tax measures. Explanatory notes are not always as helpful as they could be. The quality of Tax Information and Impact Notes (TIINs) is felt by our members to have deteriorated. There are also issues around standing HMRC guidance on existing legislation. Gov.uk covers generalities but often lacks detail.

2.6 **Parliamentary involvement:** Meaningful parliamentary scrutiny of tax legislation is made difficult by technical complexity and the constitutional importance of 'supply'. The House of Lords Economic Affairs Committee deserves credit for the work of its Finance Bill Sub-Committee. The House of Commons Treasury Committee periodically looks at tax issues. However, this scrutiny should not be mistaken for the actual development of legislation, which remains closely guarded by the Treasury.

3 **Creating good law**

The Office of the Parliamentary Counsel describe “good law” as “law that is: necessary; clear; coherent; effective; [and] accessible.”

1. How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?
2. Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?
3. Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

3.1 The ‘new approach to tax policy making’ introduced by the Government in 2011 has led (when followed) to an improved tax consultation process which has in turn led to better tax law. The publication of Finance Bill draft clauses for consultation as a matter of course is a key and welcome
3.2 We are concerned, however, about the increasing volume of tax legislation. Finance Bills have increased significantly in length over the last two decades. HM Treasury produces more legislation than any other department. More legislation makes it harder for taxpayers, and even their specialist advisers, to stay on top of all relevant developments. In our view reducing the volume of tax measures and the frequency of significant changes of direction would release resource for better consultation, produce higher quality legislation and more effective implementation, make life simpler for taxpayers, and potentially increase the impact of measures concluded upon. For this reason we, alongside the Institute for Government and Institute for Fiscal Studies, are calling for a reversion to one principal fiscal event a year (while recognising there may still be a need for technical changes at other times of the year) to reduce the volume of legislation.

3.3 While the length of Bills, and of the tax code as a whole, is not a direct proxy for complexity it is one factor that has contributed to the increased complexity of the UK tax system. The establishment of the Office of Tax Simplification (OTS) has been a welcome move and the statutory underpinning of the OTS a further positive step. The OTS’s work has led to some welcome improvements to the tax system. While care should be taken to ensure the OTS is not stretched too thinly, an appropriately resourced OTS could have its remit expanded to allow it to look at some draft legislation, assessing whether it simplifies, adds complexity or makes no difference to the complexity of the tax code. This could be part of the Tax Information and Impact Note (TIIN) process (see ‘Information provision’ section below). In any case it is important that the role of the OTS in the consultation and policy development process is clearly defined.

3.4 One factor that makes tax law less clear than it might be is inconsistency of terms and definitions used in legislation. Terms such as ‘dwelling’ and ‘residential property’, for example, are defined differently for different taxes and sometimes even in relation to different sections of law relating to the same tax. (An OTS study in 2013 highlighted quite how widespread this problem is.) Greater consistency of definitions would assist understanding of legislation both in draft and in statute.

3.5 Our members and other tax practitioners are concerned that the intention behind tax legislation is not always clear and, consequently, it is not obvious whether government intentions are always being accurately translated into statute. One way in which this might be tackled would be by publishing instructions provided by departments to the Office of Parliamentary Counsel (OPC). It may also be worth exploring the potential for a ‘tiered’ approach to legislation where core aims − which might be the same or very similar as instructions to OPC − are set out at the start of a piece of legislation in a form suitable for the general taxpayer, and more details are provided in lower ‘tiers’ for specialists.
3.6 It may be a problem that Parliamentary Counsel are not apparently advisers, answerable to the departmental policy sections who 'instruct' them, but have to be requested to consider changes to their drafts in order to meet policy concerns, including those of simplification and concerning compliance costs. One reflection of this is the plethora already noted of different definitions in legislation for what is intended to be essentially the same thing.

3.7 The use of ‘roadmaps’ can increase clarity and public understanding. The 2011 corporate tax roadmap is a good example of a roadmap which went beyond merely restating the current position and set out a clear direction of travel over the course of the Parliament. Its 2016 equivalent, while still helpful in some respects, did not achieve this to the same extent. Roadmaps are particularly useful in areas where taxpayers need to plan and make long-term decisions, such as environmental taxes, or pensions and savings. The more that roadmaps can be developed in consultation with those affected, the more effective they are likely to be. Roadmaps also offer an opportunity for pre-legislative scrutiny of the broad direction of travel of a government in a particular area, tax or otherwise.

4 Brexit

Following the UK’s withdrawal from the EU, Parliament will have to legislate across a range of areas previously legislated for at an EU level.

4. What impact will the UK's withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?
5. Will there be changes required to how the Government and Parliament deal with legislation following Brexit?

4.1 Obviously the Brexit vote creates a large amount of uncertainty, in tax as elsewhere. Out of the EU we will have more options to vary our tax system but it is far from clear whether government would, or should, take them up. For example, creating new VAT exemptions and zero rates will no doubt have its advocates, but the Government should give careful consideration to whether the benefits of any change outweigh the additional complexity that this would create.

4.2 VAT is in origin a European tax. If freedom to change it means that options to significantly simplify it are pursued, this could be worthwhile and respond to one of the key concerns about complexity on the tax system raised by small businesses. We do however have a concern that it may mean on the contrary that it becomes subject to a higher volume of changes adding to complexity and formulated without initial consultation, as has happened, without comparable EU constraints, on a greater scale with other taxes.

4.3 Many areas of UK tax law have incorporated legislation based on EU principles, but these are now part of UK law. While leaving the EU will enable us to amend these, should we choose, they will remain in place until this is done proactively. We see no reason why the process of amending this tax law should be different from the process for other
changes. Obviously the capacity of government to effect and communicate changes is limited so changes in these areas should be seen as an additional reason why the volume of changes in tax law more generally should be reduced.

4.4 In all these matters it will be important for the Government to consult carefully with business, tax professionals and others on the practical implications of policy changes, and for the Government to be as clear as possible as early as possible which EU laws they intend to retain and which they intend to repeal. Business hates uncertainty and anything which can provide them with greater confidence on the environment they will be operating in for the future will be helpful.

5 Technology

New technologies—and particularly developments in information technology—have changed the way that people access information and share their opinions, experiences and insights.

6. How effectively do Parliament and the Government make use of technology at this stage of the legislative process?
7. How could new or existing technologies be used to support the development and scrutiny of legislation?

5.1 Technology can be used to make consultation more accessible and communication more effective. For example tax practitioners in many countries took part in the OECD’s webinars around their Base Erosion and Profit Shifting (BEPS) project, which proved to be an effective way of keeping practitioners updated on the project. We would encourage HM Treasury, HMRC and other parts of the UK Government to expand this kind of activity, though we recognise it will generally be more effective at outward communication (presenting and explaining proposals) than at gathering in feedback. Often working with professional bodies such as CIOT (HMRC officials regularly take part in our webinars) can be an effective way to reach particular groups.

5.2 Technology could be used to enable interested parties to see responses to consultations. At present, individual consultation responses are not made public, although HMRC or HM Treasury do sometimes summarise responses. Whilst not a technology question per se, consideration should be given as to whether it would be helpful (or not) to publish responses. Publishing responses may be seen as aiding transparency but has the obvious downside that companies would be unlikely to reveal confidential information (which they may do currently, to aid policymakers).

5.3 Online surveys can have a role in consultation, and might be used to reach people (typically non-experts) who wouldn’t dream of putting in a written response. However government departments and other public bodies should be careful not to use surveys in place of more sophisticated responses. The European Commission has conducted a number of surveys which, on some questions, have unhelpfully sought to lock respondents into choosing one of several unsatisfactory answers.
5.4 Economists and other analysts can be assisted in their scrutiny of legislation and government proposals generally by making datasets widely available and easily accessible wherever possible.

5.5 Technology could be used more effectively to show how existing legislation would change if proposed legislation were enacted (i.e. making use of tracked changes), though we recognise that this would only be utilised by a small number of experts, including those in HMRC.

6 Public involvement and engagement

Engagement with those affected by new legislation, or those with expertise that can assist the development and scrutiny of legislation, is an important factor in ensuring that legislation is effective in meeting its policy objectives.

8. To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?
9. What factors inhibit effective engagement?
10. What mechanisms could be used to increase or improve engagement with the public and stakeholders?

6.1 As mentioned above, the 'new approach to tax policy making' introduced by the Government in 2011 has led to an improved consultation process which has in turn led to better tax law. The CIOT welcomes the generally open and accessible approach that the government departments with which we deal (in particular HMRC) generally take. (A good example of effective consultation was the process around the statutory residence test where the process resulted in legislation which, although long, catered for people with complex circumstances.) However there are still a number of ways that we feel the consultation process might be improved.

6.2 Firstly, there are still too many occasions when the 'new approach' is not followed. One example of this is the 2015 changes to entrepreneurs' relief, which were announced at Budget 2015 to take effect from the same day, 18 March 2015, and rushed through Parliament the following week in a pre-election Finance Act, with no prior consultation on the changes. These changes had to be revisited and numerous changes made in Finance Act 2016. That the Government were willing to reopen the issue was welcome but a proper consultation process would have enabled the flaws in the legislation to be identified and acted upon before passing into law.

6.3 Secondly, many changes, including significant policy changes, highly technical changes, and sometimes both at once, have been announced in Budgets and Autumn Statements without an initial stage of consultation. For example since the 2015 elections basic changes to the taxation of interest and dividends, to the taxation of buy-to-let landlords and to the structure of stamp duty land tax have fallen into this category. This is sometimes in contrast to a more consultative approach in closely related non-tax areas. Consideration needs to be given to how to comply more
fully with the declared policy on consultation or, to the extent that this is unrealistic, what alternatives there might be including more rigorous institutionalised internal challenge within government.

6.4 The result of starting consultations at too late a stage, with the central proposal already decided upon, is that other routes to achieve the objective more effectively are excluded, and also that unforeseen consequences can only be raised by outsiders after the government is committed to a course of action. This results in wasted resources and less effective consultation, as well as excluding groups who might be interested in the purpose and options but have less to say on the technical detail. Tax technical people often feel that they are in a damage limitation exercise in subsequent late-stage consultations and less tax technical stakeholders often feel effectively excluded from the process. Wherever possible we would encourage government to consult on the broad principles of legislation, not just the details.

6.5 Sometimes late announcements without prior consultation are justified by government on the basis of ‘market sensitivity’. While this may sometimes be justified, there is a widespread feeling that this risk is exaggerated. The desire of past Chancellors to produce ‘rabbits out of hats’ on Budget day (and Autumn Statement day) has also been responsible for the emergence of some poorly designed policies at too late a stage of policy development for consultation to be effective at any level above the technical detail. We hope the new Chancellor will resist this temptation so far as possible.

6.6 In the field of tax, informal pre-consultation consultation with selected practitioners and bodies, has proved useful in ensuring the right questions are asked in consultations. However it is important to recognise that this kind of consultation – which is often carried out very rapidly, at short notice - is not a substitute for full, open consultation.

6.7 The volume and frequency of consultations means that organisations such as the CIOT – let alone small firms and private individuals – are often stretched in our efforts to respond to all relevant consultations. (In 2015 the Institute, including our Low Incomes Tax Reform Group, made 187 formal submissions to HMRC alone.) Potential consultees would be encouraged to put effort into responding to consultations by the provision of feedback on their submissions, including why proposals have been rejected. We recognise that the limited capacity of HMRC and other government departments may make this a challenge. Allowing the full three months consultation period recommended in the ‘new approach’ (especially when the consultation period includes a holiday time such as August or Christmas/New Year) would also help increase the number of respondents.

6.8 We noted earlier that the use of ‘roadmaps’ can increase clarity and public understanding. Broader thematic consultations on a particular area of tax – land and property taxation, taxation of pensions and savings – of the kind that might lead to roadmaps may also succeed in drawing in consultees who are interested in the big picture but lack the technical expertise to scrutinise and assess the detail. In key areas these should be
carried out as independent reviews, as with the Turner Review on pensions (which led to the introduction of automatic enrolment). The Turner process achieved a substantial level of public engagement around its emerging conclusions.

6.9 The content of consultations can also help make them more accessible. The Government should seek to ensure that consultations always include the evidence base for the proposals in question. Government should also try to avoid making consultations too narrow, ensuring that consultations cover possible interactions between the policy under consideration and other areas of policy. Above all consultation must be genuine and meaningful, and not simply ‘going through the motions’ for form’s sake.

6.10 We believe the Government could improve engagement with stakeholders and the wider public through a more proactive approach to consultations. As mentioned earlier, webinars can play a role. So too can actually going out and meeting people from relevant groups around the country. Depending on the policy area, bodies such as the CIOT can help arrange such meetings. In the area of tax the OTS has done good, proactive outreach of this kind, especially with small business, and HMRC and others could learn from this. While there are, again, resource implications for this, we believe these could be overcome if the volume of legislation were reduced, as we recommend above.

6.11 Finally, increasing public engagement on tax legislation requires greater public understanding of the tax system. There is very little public debate in the UK about most specific tax measures, and public understanding of key elements of the tax system is limited. Rectifying this is a long term ambition – and a task for bodies such as CIOT as well as for government – but one element of the strategy for doing so should be tax education within schools. Schools do virtually nothing to educate pupils on tax issues. Teaching of tax in schools could fit into a broader ‘life skills’ programme within the national curriculum, explaining what tax is and where it goes.

7 Information provision

Informing the public, stakeholders and parliamentarians about potential legislation is an important part of effective law-making.

11. How effectively is information about potential legislation disseminated at this stage in the process?
12. How useful is the information that is disseminated and how could it be improved?

7.1 As indicated above, the publication of draft clauses (for the Finance Bill) as a matter of course is a positive move. There is a case that, in order to allow additional time for comment, draft clauses should be published as soon as they have been drafted, rather than all together as a ‘big bang’ in December.
7.2 We are concerned about the quality of information published alongside tax measures. Explanatory notes to legislation are not always as helpful as they could be. Sometimes they simply repeat what the clauses of the Bill say. Information on the objective behind the legislation should always be included.

7.3 The quality of Tax Information and Impact Notes (TIINs) is felt by our members to have deteriorated. In particular, figures for the cost to business of measures frequently fail to match the assessments of tax advisers working with those businesses, and of the businesses themselves. TIINs could be improved by including not only objectives but what a measure of success would be, to assist post-implementation review. Additionally, as mentioned above, we would support inclusion of a simplification test within TIINs.

7.4 Although the questions relate to proposed legislation, there are also issues around standing HMRC guidance on existing legislation. Historically the ill effects of complex and unsatisfactory legislation were partially mitigated by detailed HMRC guidance. Although this was an inherently imperfect mitigation it did help. The general perception now is that the guidance is less comprehensive and up to date, in part because the pace at which new law is produced is harder to keep up with, and in part because guidance has had to be migrated from HMRC's own website to the government-wide one (gov.uk) where the style seems to be to cover the wider generality of situations rather than the relatively exceptional ones that are where many uncertainties of tax law lurk. Such situation may represent a small proportion of the population at any point in time but may arise for many people at some point in time, e.g. loss of job, retirement, marital breakdown or death of a close friend or relative.

8 Parliamentary involvement

Parliament is central to the legislative process, but its involvement varies across the different stages of the legislative process.

13. To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?
14. Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

8.1 Really meaningful parliamentary scrutiny of tax legislation is made difficult by the technical complexity of the legislation, the traditional constitutional importance of 'supply' and the greater implications felt for confidence in the Government if a tax measure fails to get through, and the limited role that the House of Lords in particular can play. As an Institute we do not have a view on such conventions per se, but draw attention to the fact that their practical implications are different when each Finance Bill is several hundred pages long, as compared to earlier periods when the content was simply much less.

8.2 The House of Lords Economic Affairs Committee deserves credit for setting up a Finance Bill Sub-Committee which analyses, in the period
between publication of Finance Bill draft clauses and the publication of the final Bill, some of the key (often most controversial) elements expected in the forthcoming Bill. The Sub-Committee takes evidence from tax practitioners and others and makes recommendations, which are generally solidly evidence-based. There is no House of Commons equivalent. The Treasury Committee periodically looks at tax issues in the round – such as its current inquiry into the tax base – and the Finance Bill Committee considers the legislation once it has been introduced into Parliament, but currently, within Parliament, only the Lords carries out meaningful pre-legislative scrutiny of the Bill.

8.3 However, this scrutiny, welcome though it is, should not be mistaken for the actual development of tax legislation, which remains closely guarded by the Treasury.

9 Acknowledgement of submission

9.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

10 The Chartered Institute of Taxation

10.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,600 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

24 October 2017
Judge Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber—Oral evidence (QQ 42-48)

Transcript to be found under Sir Ernest Ryder, Senior President of Tribunals
David Cook, Second Parliamentary Counsel—Oral evidence (QQ 89-101)

Transcript to be found under Rt Hon David Lidington MP, Leader of the House of Commons
1. The topics I will address relate to the following questions from the Call for Evidence.
   - **Creating good law** question 3: Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?
   - **Technology** question 7: How could new or existing technologies be used to support the development and scrutiny of legislation?
   - **Public involvement and engagement** question 10: What mechanisms could be used to increase or improve engagement with the public and stakeholders?
   - **Information provision** question 11: How effectively is information about potential legislation disseminated at this stage in the process?
   - **Parliamentary involvement** question 14: Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

2. I have chosen to address these particular questions because they are linked together by a wider and pressing concern with democratic legitimacy, and, with particular reference to the House of Lords, what can be termed ‘non-electoral legitimacy.’ In submitting this evidence, I will draw on my research and publications in the fields of deliberative democracy and British politics,\(^\text{102}\) in addition to more recent research on new technologies. Following a preamble regarding the need to protect in some respects the present character of the House of Lords, I proceed to consider how the Lords could carry out the development and scrutiny of legislation more effectively by means of deeper and wider engagement with the public.

3. I have argued in *The Political Quarterly* that second chambers such as the House of Lords are inherently controversial by virtue of their antagonistic role within political systems. Since they usually lack the obvious electoral legitimacy that first chambers typically enjoy, they must take care not to overreach public and political perceptions regarding the reasonable use of their powers – perceptions that usually take as their base more fundamental ideas about the legitimacy of second chambers’ composition and powers. In essence, second chambers act as a check on first chambers, but are themselves checked by public doubts about legitimacy.

4. That such doubts exist regarding the House of Lords cannot be doubted. A recent (October 2015) survey carried out by the Electoral Reform Society showed that only 10% of the public supports the status quo, while 48% desired an elected chamber and 22% backed wholesale abolition. Such views both inform, and are doubtless influenced by, widespread opposition to the present arrangements in the media and among political commentators and politicians, who frequently utilise intemperate language in railing against what is seen as an archaic affront to democracy. Some commentators criticise the size of the upper chamber, but most focus upon the fact that its members are unelected. The prevailing mood thus exemplifies the ethos that Anthony King has described as ‘democracy rampant’, or the view that electoral processes are the only legitimate basis of political authority.

5. As against such views, I have argued that a concept of non-electoral legitimacy can usefully be developed by drawing on theoretical resources in political science (e.g. concepts of representation, bicameralism, and deliberative, or reason-governed, democracy) and by applying such concepts to the House of Lords since the 1999 reforms. The post-1999 chamber has typically been more representative of public views than the Commons, and has enabled more deliberative and less partisan debate than is typically found in the Lower House – a feature which has also allowed peers to undertake representation of interests and groups outside party political lines. More recently, in a political context in which the internal travails of political parties have greatly weakened official opposition to the government, the Lords can be seen as the de facto opposition. Taken together, these and other features of the Upper House suggest that many critiques of the Lords effectively misunderstand and/or misrepresent the role and functions of the second chamber in our parliamentary system. Furthermore, replacement of the Lords with a wholly or partially elected second chamber would likely lead to serious new constitutional questions. The inherently controversial character of the Upper House would not be negated, but merely transformed, by such reforms, which would also jeopardise if not eradicate the presence of expertise and experience in the Lords, as I recently argued in a piece for the British Medical Journal.

6. Since the Lords not only plays a vital antagonistic role within the present arrangements but also represent a crucial source of expertise and experience within the Westminster system, ensuring its survival in a recognisable form is one of the most pressing – and also one of the most neglected – constitutional issues in contemporary politics. The most effective way to ensure its survival is to improve public and political perceptions of its (non-electoral) legitimacy, thus blunting populist

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104 http://blogs.bmj.com/bmj/2015/03/31/lords-reform-bad-news-for-expert-scrutiny-in-westminster/
attacks. In my view, this would involve a two-fold strategy: (a) undertake small-scale, practicable reforms (e.g. reducing the size of the chamber, restraining Prime Ministerial patronage); and (b) enact ‘supply-side’ reforms through which the Lords could make itself more relevant and more present in voters’ lives. For the remainder of this submission, I will focus on (b).

7. Supply-side approaches differ from demand-side approaches, which tend to characterise the perceived crisis of British politics as resulting from media cynicism and public misunderstanding of a political class working hard to satisfy rising public expectations. By contrast, supply-side approaches emphasise the need for politicians to engage a more diverse group of stakeholders in policy-making and to revitalise democracy through new accountability mechanisms. The emphasis placed by many peers upon public accountability and ‘surrogate’ representation (i.e. politicians representing interests outside their own, or their parties’) suggests that an opportunity exists for the Lords to engage more broadly and deeply with the public. In my view, deeper engagement of this kind would improve the effectiveness of the Lords in terms of developing understandable law, disseminating information, involving a wider range of stakeholders in policy formation, and making better use of new technologies. In the following material, I canvass some potential avenues in this regard.

8. Useful strategies for the use of technology to enable ‘digital democracy’ are found in the 2015 Report of the Speaker’s Commission for Digital Democracy. While the report focuses on the House of Commons, many of its recommendations are also applicable to the Lords. The Lords would also benefit from ensuring that ‘everyone can understand what it does’ by engaging in a new communications strategy to ensure both increased public awareness of the role of the Lords and the peer, and increased public participation in the work of the Lords. Useful specific recommendations in the former regard include: simplifying parliamentary language; developing digital tools (e.g. jargon busters) to help readers/listeners understand what is happening; piloting a new procedure for amending bills so that amendments can be written, debated and voted on in plain English; and using more infographics and visualisations on the House of Lords website and in parliamentary reports to aid understanding. Future developments in this regard could also include allowing members of the public to use electronic devices in the House of Lords chamber and Westminster Hall (following the three-month trial period in 2015 in the Commons) and experiment with new ways for members of the public to put forward questions for peers using social media platforms such as Twitter. Additional technological strategies could include encouraging greater use of e-petitions and

experimenting with the capacity for viewers to engage in real-time polls regarding issues being debated.

9. A further simple expedient to increase engagement with the public would be to develop the House of Lords website in order to ensure that every Member has an active email address and up-to-date biography, with cross-referencing across peers to shared areas of interest and activity. Likewise, peers should be encouraged to engage much more frequently and consistently with social media (e.g. Twitter, YouTube) and through portals such as Lords of the Blog and Lords Digital Chamber, again with more effort made to link together peers with shared interests. Taken together, these measures would help to encourage members of the public to engage with content produced by peers and, where appropriate, to make contact with peers regarding specific areas of interest (thus mirroring the constituency MP model for extra-geographical and thematic topics). These approaches would also help to disseminate information more effectively, especially if undertaken in conjunction with a ‘jargon-busting’ strategy.

10. A dedicated House of Lords app (e.g. ‘LordIt’, ‘PeerPressure’, or something similar) could be developed to bring a number of these technological initiatives together in a user-friendly, engaging manner. If advertised via multiple channels, this alone could drive substantial additional engagement with the work of the Upper Chamber. It would be preferable if this app were to be ‘co-designed’ – i.e. designed with the ongoing involvement of members of the public in addition to peers and technologists. As I recently argued in an academic paper, co-design processes are vulnerable to a number of pitfalls that can limit their effectiveness (e.g. the tendency to recruit self-selecting participants rather than those with neglected voices). Nevertheless, some element of inclusion is undoubtedly better than none, and measures can be taken to improve inclusion of neglected stakeholders in both initial and future iterations.

11. Co-design processes can also be powerful in terms of fundamental topics such as linguistic clarity and the avoidance of jargon. Consequently, I would suggest initiating ongoing processes of public involvement in matters relating to developing legislation that is more easily understood by members of the public. Such engagement would not necessarily take place face-to-face, but could consist in a substantial group of volunteers who could read draft legislation and identify issues regarding clarity.

12. While digital technology is very useful in terms of generating wider engagement, it is not necessarily suitable for generating deeper engagement. The Speaker’s Report, for example, rightly recognises that online forums are ‘not very good at large-scale deliberation.’ A different kind of approach, and one which resonates with the deliberative character of debates in the Lords, could centre on a version of the ‘deliberative polling’ method pioneered by James Fishkin, Bruce

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Ackermann, and others. As Fishkin and Luskin (2005) note, democracies face the challenge of how to reconcile the seemingly opposed values of political equality and deliberation. As political equality has expanded (e.g. through the extension of suffrage, polling, and referendums), so political deliberation has receded. ‘Most ordinary citizens’, they remark, ‘know and think remarkably little about politics… Thus decisions by referendum involve far less deliberation than decisions by legislatures.’ The question thus arises as to how deliberation – the weighting of competing considerations through informed, balanced, conscientious, substantive and comprehensive discussion – can be incorporated into contemporary political systems.

13. This general concern aligns with the specific need to enable greater engagement between the House of Lords and the public. Deliberative polling, in its original formulation, exposed random samples of citizens to balanced information, encouraging them to weigh opposing arguments and then express their considered opinions. (It thus revitalises the Athenian model, in which groups of several hundred citizens chosen by lot deliberated and decided together.) In the case of the House of Lords, however, depth of engagement rather than statistical representativeness of the population at large would more likely be the principal aim. In this context, I envisage a number of deliberative events in which peers would engage with members of the public along both geographical (e.g. regions and cities within the UK) and thematic (e.g. ‘floating constituencies’ constituted by specific interest groups, ethnic backgrounds, age groups, genders) lines. In such events, as with Fishkin’s deliberative polling approach, participants would be sent carefully balanced briefing materials, laying out the major arguments for and against specific policy proposals. These could then be discussed in deliberative events at which a small panel of peers would act as moderators and facilitators. Participants (including peers) would be asked to answer questions before and after the event; these opinions would also be publicly discussed and reflected upon in order to demonstrate the impact of deliberation upon opinion-formation, and to communicate this aspect of the work of the House of Lords. By utilising deliberative polling, the Upper Chamber would be able to engage deeply with, and gain insight from, members of the public who may not normally engage in political deliberation. The House of Lords would also become a more visible part of the political landscape, both in terms of issues considered and in terms of geographical location.

14. Organising and hosting deliberative events, as with several of the above suggestions, would incur additional costs. Some or all of these costs could be met by reducing the size of the chamber, which would also improve public perceptions of effectiveness and legitimacy.

15. In conjunction with small-scale reforms, the above suggestions would help to address challenges relating to public, media and political

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perceptions of legitimacy. In turn, this would help to safeguard the vital role of experience and expertise in the present House of Lords while also presenting important opportunities for citizens to become more involved in, and knowledgeable about, public policy and law-making.

15 October 2016
The Chairman: Dr Fox and Sir Richard, welcome to the Constitution Committee. You need no introduction, although we have circulated a precis of your distinguished careers. We are very grateful to you for coming to start us off on this rather extensive inquiry. We are not quite sure where it will take us, and I hope that from today’s session we will start to see the parameters of the different issues that we want to engage in more thoroughly. This is an opportunity for you to dilate. We have circulated some questions to you, but if you want to tell us anything that is not covered by those questions feel free to inject that into the discussion at any time.

Q1  The Chairman: Why legislation? What thought is given to whether legislation is necessary or the most appropriate method by which policy can be implemented?

Dr Fox: Thank you for the invitation to appear. I think the reality is that there is no standard test of why legislation is required that is applied upstream in Whitehall. It will differ from Bill to Bill. Sometimes there will be a process in place for consideration of the mischief that they want to remedy and, therefore, why legislation is required; sometimes it will emerge from a rather ad hoc political process in which it is more about Ministers being seen to act, show initiative, respond to media issues and so on. In those circumstances, what emerges is legislation as a means of demonstrating that something is happening and communicating a message, rather than a legal or legislative test about whether the policy you want to achieve is required in legislative terms and needs parliamentary time for it, instead of some other mechanism.

The Chairman: Is there a biblical text somewhere that you can draw to our attention? Has anybody set out to answer this question in three fine volumes?
Dr Fox: The nearest to it is the Cabinet Office Guide to Making Legislation. I do not know to what extent Ministers are aware of it, but it certainly sets out for civil servants the process by which they should approach legislation. If you are appointed to a public Bill team in a department, in so far as you have a bible that is what you have. They have minimal training, and a lot of what they are guided by is in that book, and that is regularly updated from time to time. What is interesting about it is that, often, it does not take account of the changing concerns in this place. For example, a particular obsession of the Hansard Society is that for the past few years it has not taken account of delegated legislation. It does not always take account of changing or developing views of the Delegated Powers Committee. That is highlighted in that Cabinet guide, but the ways in which the Delegated Powers Committee develops its views on certain things are not always reflected in an up-to-date way.

Sir Richard Mottram: When I was looking at who was going to be here this morning I thought it was a slightly odd situation. There are a number of former Ministers around the table who know an awful lot about the answer to that first question, in a way probably more than me. There is a whole set of procedures laid down, as Ruth says, and a very competitive process within government to try to get its Bill into the legislative programme, which will be familiar to a number of people round the table. It is all highly competitive; there always seems to be more demand than supply, and, as we will no doubt come on to discuss, the timetable is insufficiently constrained.

To make a very broad point, because of the nature of our democracy there is a natural inclination to think that the right way forward in relation to something is to legislate about it. There is a sort of bias in the system that says, “We have a problem. What should we do? Let us think about changing the law”. The second quite serious issue is that political signalling, which is very important in our system, is often expressed through an argument in Parliament around a piece of law. In my former life as a civil servant, I thought it was a rather strange way to organise our system. You try to create divides—no doubt a number of those round the table can think of examples of this—between you and the opposition party by framing legislation in ways that potentially might embarrass them, or open up quite serious arguments about law and order in particular, some of which are basically about political signalling. That seems to me to be a very curious way to conduct business.

A great benefit of our system is that Ministers are rooted in Parliament. Possibly a disbenefit of that, certainly not one that would offset it in my view, is that people tend to see things framed in terms of, “How can I shine in Parliament?” One way of shining in Parliament is by taking your Bill through.

Baroness Taylor of Bolton: That is very interesting. One of the issues in looking at something like this is to inject the political reality that is there. You can have an academic exercise about how to legislate, but there is a political momentum. Sir Richard, you said that things were framed to embarrass and signal things that would cause difficulties later. I rather think that most Governments might want to divide but they do not want
too many difficulties in getting through their legislation. What actually determines whether something is well drafted or not? Is it the clarity of the instruction from the Minister? Is it the timescale—the pressure on parliamentary time and parliamentary draftsmen, who have been squeezed over recent years? We have also had outsourcing. What do you think are the main factors that end up with somebody saying, “This is a well-drafted piece of legislation and this is not”?

**Sir Richard Mottram:** One of the interesting questions for the Committee is how far it is to go back in the process. You can have what is apparently a well-drafted piece of legislation, in that it is comprehensible, coherent and so forth, but it has no possibility of achieving the objective. From the perspective of the Better Government Initiative, we got into the legislative thing only because we were interested in the whole process. Obviously, you cannot in a sense do the whole process, but the prior question has to be: is there a basis on which this policy is founded, as it should be in my view, on evidence of some kind, and is what is proposed likely to lead to the outcome that the Government think they are trying to achieve through this change in the law? If it is not, however elegantly it is done and however much scrutiny it gets and so on, it will not succeed. I would have thought there was plenty of evidence of policies pursued by Governments of different political persuasions where the purpose was confused, the levers chosen were unlikely to achieve the objective and, unsurprisingly, therefore, the legislation did not achieve what it set out to do, even if it was clear on the face of it and in the explanatory material around it that the Government knew what they were trying to do.

The issue is how far you want to get into that in relation to all the quasi-technical issues, on which Ruth is a much greater expert than me, about how you conduct the process, although I do have views about that. My view is that if it is to be a good piece of law it has to be founded on a good piece of policy-making, and that involves a prior set of questions.

**Baroness Taylor of Bolton:** But, as you said, getting a slot in the legislative programme is quite a competitive process for Ministers. Therefore, there is a tendency to want to move it along and say that your legislation is ready when it might not be.

**Sir Richard Mottram:** In my experience, getting the slot is a very big deal for Ministers. Rather like airlines, once you have the slot you certainly do not want to give it up. Therefore, there is a serious issue about how far the bidding and policy-making process in government is effectively constrained so that when legislation is brought forward—we can all think of lots of examples of this—it is not brought to Parliament half-cooked at best, and then the Government race around trying to cook it properly, and they can keep changing it. I am not a great cook myself, but they can add new ingredients as they go along. That is an issue. That is why, certainly from my perspective, it would be a very good idea if there was more discipline in the process through which Bills get into Parliament, and that it be a requirement to establish, by mechanisms we can discuss and that are in the paper we sent to the Committee, that the Government know the purpose and why they have chosen the legislation as the means by which to achieve it, and can show later that it has or has
not achieved that purpose. These are very straightforward, simple things, but I think we would all agree they are not necessarily always followed.

**Dr Fox:** I would agree with that to a large extent. We have always said, although we concentrate very much on the parliamentary end of the process, that you can design the perfect architecture for scrutiny and, if the policy-making process upstream has some fundamental flaws, that process should reveal those flaws. There can be a discussion, debate and partisan battle about it, but, ultimately, if the Government have a majority for it, it will go through. So, designing a perfect process and procedure does not resolve that problem.

We have argued—to some extent the Better Government Initiative has also put forward this case over the years—that part of this is an attitudinal approach upstream in government and a culture of taking initiative. Bills are a sign of ministerial virility; you must have a Bill; you do not want to lose your slot. There are issues about how time is used, which raises questions about whether, particularly in a fixed-term Parliament, if you want to be really radical, a sessional approach is helping, because it creates a cliff-edge approach to the management of time. I know that raises issues for this House in respect of legislation and its powers, but there might be possible solutions to that.

We have argued that part of the problem is that, because there is nothing in Whitehall through the Cabinet committee system, in terms of the way the Parliamentary Business and Legislation Committee operates, to act as a brake on Ministers who want to push their Bills through and get the parliamentary time, and because the culture of competition does not in any way seem to relate to whether or not a Bill is ready, in effect Parliament has to take from government whatever it throws at it whenever it decides it is ready to throw it. Government will say, “We have won the election; we have a mandate; we have a right to get our business through”. Yes, but not in any form they choose to send it down to Westminster from Whitehall.

We have argued that, if the Government are not willing to take steps to improve the culture and attitudinal approach upstream, Parliament could try, ideally on a bicameral basis, to take some of those steps to create what you might call hurdles, or a legislative chicane, at the beginning of the process of introduction through something like a legislative standards committee. We do not want to turn it into a tickbox exercise, but, on the other hand, government should not be able to bring forward a Bill that does not have the impact assessments ready and accompanying it at the time it is brought forward. It should not be able to bring a Bill where the consultational aspects of it are still going on. Some minimum standards could be agreed so that a Bill cannot get past that stage and come forward unless those tests are met. Alternatively, you could do it through a Minister having to lay a motion to bring forward a Bill and there would be questioning, but I do not think that is as substantive as a bicameral committee that would look at legislative standards and consider it Bill by Bill to try to push upstream Whitehall to act.

**Sir Richard Mottram:** If I may make a very quick comment on what Ruth said, for those who have worked in government what is interesting about the process is that there is always a committee, usually chaired by
the Leader of the House. The Leader of the House and those who support
that individual do try to inject some discipline into this process. We have
all had experience of this. You can get to a situation where your Bill is
about to be chopped because parliamentary counsel have said it is such a
mess and so on.

When we suggested there should be such a mechanism that would be
vested in the committee, usually chaired by the Leader of the House of
Commons, the Lord President or whatever title they carry at the time, in a
way we were saying this would be helpful to you, because it would
empower you still further to be much stricter with your colleagues. If you
are the Leader of the House, the problem is that you are often outranked
by some very big beasts. The Prime Minister, in my experience, is never
that interested in this subject, so the big beasts will do you over and their
Bill will head to Parliament, and then the Government will do Parliament
over, to put it crudely.

Therefore, the argument is not that there is no mechanism, but that the
people operating it within the framework of government—this is not to
disagree with Ruth; it just adds a qualification—are always at risk of being
outgunned by the very big players, who just say, “Thanks very much”.

Lord MacGregor of Pulham Market: I was Leader of the House for
some time, but it is a long way back.

Sir Richard Mottram: It does not bear any resemblance to your
experience?

Lord Hunt of Wirral: He is a big beast.

Lord MacGregor of Pulham Market: Not particularly. I do not think it is
the “big beast” thing, but very often it is the general feeling that this is a
political priority. Somebody who is coming forward with even a minor
piece of legislation that has suddenly hit the fan has a better chance of
getting stuff through. I remember one example of exactly that, which I
will not mention. It all went wrong. It would be very helpful to have some
examples from your more recent experience of a particularly bad process
leading to bad legislation, and how it should have been put right. I throw
that out to you in the hope you can provide some for us. The first Session
of a Parliament is a very interesting one, because there is huge impetus in
implementing the major manifesto issues. In your experience, does that
lead to insufficient preparation of legislation in that first Parliament?
Later, one sometimes has a much longer time to prepare it and so on. If
that is the case, how would you deal with that?

Dr Fox: In terms of implementing the manifesto in the first term, it has
always been the case that the Government want to make their mark with
a rush to get an early Bill into Parliament. It is partly about managing
time and not wasting too much up front. If you look at the previous
Parliament and the coalition, the Academies Bill came forward incredibly
quickly and was brought forward with very limited consultation, and there
were all sorts of procedural issues around that as a consequence. We did
quite a lot of work on the Public Bodies Bill. That, too, had that sense of
being rushed. Whether you regard it as an example of bad legislation
emerging is a subjective matter and depends on your perspective, political views and partisan approach. If you look at the Public Bodies Bill, they ended up with a Bill bringing forward the legislation and they were still consulting on what was going to happen with the public bodies. They were offering consultation as part of the bartering—the horse-trading—particularly with this House, about powers in that Bill as to what would happen to bodies that were already winding down. How could you consult on bodies that were already going almost into hibernation?

Some elements of the impact assessments were not ready and available. As a result, you ended up with horse-trading on all of this. The Government were seeking wide powers that the delegated powers in this House tried to constrain. You end up with a new strengthened scrutiny procedure that takes so long to utilise that the Cabinet Office has not brought forward anywhere near the number of public bodies orders they expected. In some instances they take longer than primary legislation. You get into the position of thinking, “If they had just taken a little longer, they would have saved themselves and both Houses an awful lot of time and resource”.

**Baroness Dean of Thornton-le-Fylde:** Talking about explicit standards, we are wandering away from the first question and there is a lot to cover. Talking about the political realities or the mood of the moment with a piece of legislation, one thing that surprised some of us in recent years is an almost “Christmas tree” effect where a Bill might deal with a specific area, but when we see the final Bill to go before Parliament it has all sorts of bits within it that do not actually directly relate to the original intentions of the Bill. One could argue that, therefore, it detracts from the Bill and requires much more time in Parliament than a Bill to deal with the initial issue would have done. We are looking at explicit standards. How would it deal with that? It may well be that part of the knobs and knockers in the Bill are there because of the political reality or the mood of the nation at the moment and it is the only area where government can feel it can get some changes.

**Sir Richard Mottram:** Let me deal with a number of these points in turn. Going back to the question of first Session legislation and so on, two questions arise. First, how do things get into the manifestos of the political parties? If you are thinking about evidence-based policy, what we now have is a sort of system that says that what is in the manifesto will be implemented, and there is now huge machinery in Whitehall to ensure that every commitment in the manifestos is shown to be implemented, to show that the Civil Service is doing it, or whatever. Yet there is a very interesting question about the process, which we will not spend time on today, by which things get into manifestos.

There is an issue about the evidence behind the policy. There is another serious issue, which is that Governments want to get on with things. The mantra now is that you must do a lot in your first term. I think that came from a previous Prime Minister. Therefore, we have argued, for example, that, if you have fixed-term Parliaments, there is a case for giving the Opposition help in the run-up to the election in thinking about what it is they are seeking to do and giving them support. This is obviously
sensitive because of the political impartiality of the Civil Service, parliamentary counsel and so on, which is vital, but could there be mechanisms whereby they are given more assistance? This is what they do in Scotland, and we think there is a case for doing that. If you are rushing things in, at least in the period before you come into power, you would have extended the process, which already exists and is familiar to a number of people round the table, of shadow Ministers being able to consult senior civil servants and giving them a bit of help so the process of rushing is less risky.

On the question whether I can think of recent examples of not great legislation, the Health and Social Care Act might merit a lot of attention. I think it is a very interesting case of legislation that probably was not strictly necessary, and the ostensible purposes were probably not the ones that lay behind it. It is also a good example of the tensions that arise—we may not have a coalition Government for a while, but I do not know—when you have an agreement in a coalition, also done in a rush, and you are trying to introduce things, as Ruth said, very quickly. We need to recognise these problems and think about some of the mechanisms that are driving them.

On the “Christmas tree” question, this is the dynamics of departments. Departments often have lots of stuff lying around that they have been dying to get into a Bill for ages. Again, this will be very familiar to the former Ministers round the table. They will say, “I have this thing. I can never get it to the top of the list, but now I have a Bill”, as Lord MacGregor said, “that has real political imperative behind it, so I am definitely going to get it in”, and then civil servants come along and say to the Minister, “Why not add these few clauses about this? It is sort of related”. Then some awkward person says, “You have to change the title”, and so it is changed. This is very bad practice, is it not? A Bill should be about something that has a defined set of purposes and everything not related to it should not be in the Bill. But it is a bureaucratic dynamic.

I would argue that there needs to be more discipline in the process. I can think of examples, which of course I will not quote to you, of Bills when I was Permanent Secretary of a department. They grew and grew because we kept thinking, “Look at that. We can at last get that done”. It is often very meritorious. It never quite made it across the hurdle and now you can get it over the hurdle, but it is very unsatisfactory for Parliament and the public, in so far as they are watching these things.

The Chairman: I think it is the “et cetera” syndrome, is it not?

Sir Richard Mottram: Yes. They are not just baubles; they are valuable things.

Q4

Lord Maclellan of Rogart: I wonder how the role of parliamentary counsel is discharged. Are they brought in early in the process, or do they go through the end results? I remember having civil servants in my department who were lawyers, but I do not quite recall how the parliamentary counsel feed in.

Sir Richard Mottram: My experience is now a little out of date because I left the Civil Service quite a few years ago. When I was a Permanent
Secretary there was a very significant change in the way all this was done. There used to be a time when parliamentary counsel were considered to be incredibly austere figures to be consulted only when necessary, and they were themselves slightly separate from others, and so on. Departments also worked with policy civil servants. They would feed the legal civil servants, who would feed parliamentary counsel and so on.

In my experience, all this changed. We created joint teams that were working on policy development with the lawyers, who would still have their own separate hierarchy in terms of maintaining standards, how they were managed and so on, but the lawyers were integrated into the joint teams and often parliamentary counsel would be consulted at a very early stage informally. I suspect, although Ruth probably knows a bit more about how this works now, that that is the process we have now, which is a very good process. I am not in any way criticising parliamentary counsel; quite the reverse. You obviously have to watch, because they are a very scarce resource, how they are used, but I think they are now more willing to be involved in that way.

**Dr Fox:** When we did our research on delegated legislation we looked at a number of legislative case studies in the previous Parliament. We were trying to find out how they get their instructions and where the decision about delegation and scope of powers comes from. It varied from Bill to Bill and depended upon the willingness of draftsmen to want to engage at ministerial level and be willing to sit around a table with Ministers, the Bill team and departmental lawyers and thrash it out. Some liked that; some really did not. In some instances, the Bill team get the policy instruction from Ministers and they will relay it to the government lawyers on their team. The government lawyers would convert it into legal instruction. That would then go to parliamentary draftsmen, and there would be a back and forth over a draft. A lot of that would be electronic. In some instances there were very few meetings and personal face-to-face discussions and debate.

Parliamentary draftsmen have a major problem in terms of the limitations of resource and the pressures on time when suddenly a Bill is demanded. They can produce a good draft only if their instructions are clear. If a Government are at mid-consultation on an aspect of policy, it is very difficult for the draftsmen to draft accordingly. As a consequence, in terms of delegated legislation that is where you sometimes get the inclusion of powers in quite broad scope, because the Government have not quite decided what they want to do. It is not policy ready; it has not properly completed its consultation processes, and draftsmen have to take account of that in how they approach the work. They are, however, the nearest thing to policing precedent.

**Lord Maclellan of Rogart:** Would you argue that parliamentary counsel should be brought in at an early stage and a structure for asking them might be formed?

**Dr Fox:** It certainly would not be harmful to the process. I think there would be a resource issue from their perspective about the use of their time and their injection into the process.
It is interesting that in a couple of instances in our legislative case studies there were clearly tensions the other way, where Ministers felt the draftsmen were being too conservative in their approach to the way in which they were drafting, and there were suggestions from Ministers that they wanted to bring in external drafting assistance to put pressure on draftsmen to draft more in the direction they wanted. That is a big tension about what Ministers see as their role. The perception of counsel was that Ministers wanted to draft their own legislation, like senators and congressmen, and perhaps did not understand the legal realities of the way in which our legislation is drafted. Therefore, there are tensions in that relationship. Bringing them in earlier might help address that, but it would have resource implications.

**Baroness Taylor of Bolton:** We can probably all agree that we do need some discipline in terms of policy-ready legislation, to use your phrase, coming forward. Before we blame Ministers too much, what Lord MacGregor said about political priorities and realities has to be taken into account. When Ministers say to civil servants and parliamentary draftsmen, “We have to do this and we have to do it quickly; we are not quite ready, but we are going in this direction”, to what extent do parliamentary draftsmen and civil servants say, “No, you cannot do that”, or do they just say, “Yes, Minister”, and then try to do the impossible? That is a dynamic that needs to be there.

The other point I want to raise is about outsourcing parliamentary drafting work. I know that a few years ago there was a lot of pressure to outsource more. If you do not have the relationship that was being talked about, surely that is the time it is more likely to cause problems as well.

**Sir Richard Mottram:** Perhaps I should do the “Yes, Minister”, having spent a lifetime in that position. There will always be this argument. In the departments where I worked where there was a very significant legislative programme—a lot of my time was spent in defence, which obviously was not in that situation—very close relationships developed between the Ministers and the people who worked on a Bill. There were often very close relationships between Ministers and the civil servants working on policy. I am certainly not saying this is the fault of Ministers, or that politics and political considerations are a bad thing in a democracy. That is just ridiculous. The reality is that this is the system we have, and quite right too. I do not think that is a big problem. There are sometimes issues about quality of staff. I think Ministers are frustrated about whether the staff are good enough. We need not spend time on that today, but obviously that is a serious issue for the Civil Service; it is very well attuned to the need to get on with things.

Parliamentary counsel have a resource issue. In my experience, they can say things to Ministers that civil servants in the department are not willing to say, which may or may not make them popular, for example that the Bill is a complete mess, dressed up in parliamentary counsel language, and it cannot be sorted out in the next two weeks, or whatever. Of course, parliamentary counsel do have a line to the Leader of the House, which is also something that makes Ministers nervous, but parliamentary counsel turning up to say that the Bill is a mess is not in my view an
argument for outsourcing the work of parliamentary counsel. There were experiments along those lines and they were not very successful for all sorts of reasons that the lawyers in the room can explain. This is highly technical work, and parliamentary counsel need to be resourced properly to do it. That is always a big consideration inside government.

**Dr Fox:** In terms of the interviews we have done for our research, civil servants and parliamentary counsel always say that their responsibility is to deliver what it is Ministers want, within reason. For example, parliamentary counsel see themselves as the guardians of the statute book. They would not draft in such a way that they thought was fundamentally wrong, and if they were pushed by Ministers to do so they have the same recourse that accounting officers have in registering a concern and effectively seeking ministerial instruction to do it, even if they do not wish to.

There is an important issue about Civil Service corporate knowledge on legislation, which goes to training. There is a lack of training when they start and an enormous amount of movement. We found there were very few heads of Bill teams who had worked on more than one Bill. We found one who had worked on two and had expressed an interest in a third and had been told that that would be career suicide. Legislation is something you tick off on your career path; it is not something in which you specialise. I think that is wrong, because we are losing a lot of experience and memory.

**Sir Richard Mottram:** It is completely wrong. I should have said that the way parliamentary counsel think of their role in Whitehall has changed very significantly. They are now much more open and proactive in championing the importance of good law-making. When I started off as a civil servant they were very remote and quite terrifying. They are now the people out there championing the importance of these issues, which I think is very constructive. They champion them in public as well and work with people like Ruth. This is all very positive stuff.

**The Chairman:** You have painted a broad canvas for us. I hope we can fill in some of the specific details as we press on with 13 more questions, which, at the current rate, will take us to about 2.30.

**Lord Norton of Louth:** I want to tease out some of the things you have said. In so far as there is a tension between what Ministers want to achieve—the political imperatives—and the process of delivering good legislation, how extensive is the problem? We have identified examples, but they could be the exception. How extensive is it quantitatively, and from a quality perspective how important is it? Is it producing significantly bad law? I take it from what you said that you see the problem not so much in terms of process but attitude. Therefore, the starting point has to be an attitudinal change. If that is so, who is responsible for achieving that?

**Sir Richard Mottram:** It depends on your criteria. If your criteria are that all of us as citizens can comprehend the framework in which we are meant to live our lives in a society dominated by the rule of law, I would say there is quite a serious problem, because the law changes too quickly.
It is almost impossible for anyone to keep up. In certain areas this is all very familiar stuff, but that does not mean it is not important.

In certain areas, such as tax or the one I was responsible for a few years ago when I was Permanent Secretary of the Department for Work and Pensions, the frameworks established are incomprehensibly complicated, often for good and well-motivated political reasons to do with trying to treat citizens in a very fine-grained way. We have produced a framework that is far, far too complicated. It changes too much and it is too complicated, and then you have extraordinary cases that strike you as very poor legislation. Then we have the issue, which we will probably come to, about the Government being very keen on giving themselves very wide powers to do things for which they should not, in my view, be given such powers. Therefore, I would say there is a big issue.

**Dr Fox:** In terms of quantification, nobody has been able to do that. We have been having similar discussions since at least the 1970s with the Renton Committee and Hansard Society’s Rippon commission on *Making Better Law*. We keep going over the same ground all the time. The reality is that qualitatively we have clear examples; quantitatively, it is very difficult to assess.

It might be helpful if at this point I say that we at the society are developing a new project called Westminster Lens to try to look at some aspects of this by collecting data not yet collected through sessional returns or individual committee reports. The scale of it is too great for us to do it as comprehensively as one might wish. To give just one example, how many Henry VIII powers are there in Bills? Nobody actually counts. We know they are an issue, but nobody can give us an exact number, so we are going to count. We will be able to make a comparison Bill by Bill, Session by Session and Parliament by Parliament over time as just one example of how one might start to quantify these things.

**Baroness Taylor of Bolton:** It is not just the number—

**Dr Fox:** Yes.

**Sir Richard Mottram:** How many clauses in legislation have not been commenced? I have old data, but why is that not regularly reviewed?

**Dr Fox:** Our hope is that by doing this kind of work it will, if nothing else, at least shine an annual light on some of the issues and problems in the process more regularly and put a figure on it. When you put a figure on it, you might start to make a little bit of progress.

A related question is that at the point a decision is made to press forward with legislation, in whatever form, there is huge debate about use of time and so on. Part of the problem in terms of the cost-benefit analysis is that the people who were around making decisions at the start are not there at the point at which the results are experienced, whether that is Ministers or civil servants. For example, a huge amount of parliamentary time is being expended, frankly wasted, debating huge clauses of Bills that never commence and move forward. There is no test.

**Q5 Lord Maclennan of Rogart:** How effectively do the Government use research and evidence in the formation of policy and subsequently
legislation? Do they initiate policy because of research, or do they consult after it has been politically initiated?

**Sir Richard Mottram:** This is an area where there has been significant improvement over the years. There is still an issue about the policies that appear in the manifesto and what drove them. Some of them are driven by and grounded in experts outside government, and are very well founded; some may not have a research base. As to the dynamic of what government keeps coming back to, although in resource terms it is probably being cut back, there is a very significant capability and strong drive towards more evidence-based policies.

To give you two quick examples of that, we have all the initiatives the Government have taken over things called What Works Centres to try things out and so on. There has been a very significant shift in those departments that are concerned with policies that might be informed by science and technology, with, for example, there has been a very significant shift with the introduction of government departmental chief scientific advisers. Therefore, we could detail for you the very significant improvements that have been made under successive Governments, not just the most recent ones, in thinking about how we inject more consistent research and evidence-based policy.

**Dr Fox:** I agree there has been a lot of progress. I would just counter that with some concerns that, very often in the consultation processes of government, the research base upon which it has reached its conclusions is not published or available in a transparent way that people or, indeed, sometimes that Parliament can access. That is problematic. The actual consultation processes, in terms of the traditional Green Paper and White Paper, appear to have gone by the board, although the Prime Minister has indicated she would like to restore that approach. When there are consultations, often the Government’s own best practice guidelines around timescales for consultation, analysis and so on are breached, and obviously there are no penalties as a consequence.

**Lord Macleod of Rogart:** Would you wish to structure the publication of the evidence that has been obtained by the Government?

**Dr Fox:** When you say “structure”, what do you mean?

**Lord Macleod of Rogart:** Would you make it a requirement?

**Dr Fox:** Unless there are very clear reasons why it ought not to be or cannot be published, for example if there are security issues and so on—I have reservations in relation to commercial confidentiality, because often that is applied as a reason for not publishing things—if the Government are bringing forward a policy and proposing legislation and basing it on an evidence base it has collected, they ought to be required to subject that evidence base to public scrutiny. Simply providing a footnote saying, “This was where we got our evidence from”, which none of us can access, is not good enough.

**Lord MacGregor of Pulham Market:** I think you said that huge parts of Bills are passed and never used. Can you provide us with examples, not
now?

Dr Fox: I can. I know that a huge part of an education Act in a previous Parliament was not implemented or not brought forward by commencement orders. I believe Lord Norton collects commencement order information through PQs regularly.

Lord Norton of Louth: Various questions have been put down about all the measures that have not been commenced, and it is a rather substantial list.

Lord Beith: Is it not the task of Select Committees to question Ministers and civil servants as to whether a policy is evidence based, and this applies to legislation as much as to policy in general?

Sir Richard Mottram: Yes. Obviously, this is a much broader issue. Departments invest quite a lot of money in research. Should the assumption be that that research will be published? What are the guidelines that operate on, for example, expert committees and so on? There have been controversies around this, which are very familiar to those round the table, but the general principle should be that this information should be made available. The reason why it is not made available, or people try not to make it available, is that, funnily enough, it is embarrassing; it does not actually support the policy.

When you come to some of the later questions about the public, they are paying for this stuff. When I was a Permanent Secretary, my general principle was that—leaving aside security, which is a narrow point, and commercial confidentiality, which is often abused—the information generated through this process should be published. If you look at, say, the Department for Work and Pensions, they published tons of research about the areas in which they were engaged, some of which was, to be honest, quite embarrassing for us, in that it suggested our policies did not necessarily work.

The Chairman: I think Lord MacGregor’s question has been covered to a large extent.

Q6 Lord MacGregor of Pulham Market: I think it is really a matter of pulling together the threads. What changes would you make to the development and drafting process to improve the quality of legislation introduced in Parliament?

Sir Richard Mottram: I would introduce the process that we, Ruth and others, including a Committee of the House of Commons, recommended, namely there should be a whole process of more discipline on both the Government and Parliament. It is in our paper, and I think it reflects the report of the Select Committee of the House of Commons. It is very interesting that both the Government and Parliament did not want to go down that path, but that would be a simple, straightforward step that would improve discipline inside government and Parliament. It is very interesting that neither party wanted to do it.
In the case of government, they said it was not necessary. In that case, why not pilot it and see whether it is or is not necessary? If it is not necessary, you would still have an interesting question about whether it was not necessary because you had at last injected the discipline, but at least you would be there. I have no idea why Parliament did not pursue the recommendation of its own Select Committee in this area.

Dr Fox: We recommended the same. Our approach is a legislative standards committee, coupled with something akin to a legislative standards document, not dissimilar to an impact assessment, which would require Ministers to explain and confirm why they are bringing forward this in legislative terms rather than by some other mechanism; that they have checked there are no other criminal powers on the statute book that could be utilised so you are not creating duplicative criminal powers, which has been a problem; and that more preparation is required in terms of consultation. It would require the Minister of the day formally to confirm to Parliament that that process had been gone through.

I am not suggesting for a moment that it will be a panacea, but even if it was done only on a trial basis—that might be the best we could hope for—it would at least make people in government stop and think and confirm it. Then it would be for the Committee to question Ministers if it did not feel that the information that had been provided was adequate, or, if Ministers were saying, “We have an exception here for political reasons. This is why we need to proceed; we cannot meet these standards”, the Committee could reach a view on that. That might not stop the Bill going forward; the onus might still be on the Government to proceed, but at least there would have been a discussion and Ministers would have been held to account for that need to step away from standard practice.

Lord Morgan: It is very fascinating. It seems to me that much of the discussion would fit naturally into a model of single-party government. We had a coalition in 2010 where the policy-making ideas and processes were not merely distinct but in some cases—for example, in Europe and that particular Government—opposed to each other. Does that make the process of legislation you have described, where incidentally the Government did not have a manifesto because a coalition was not anticipated, more difficult?

Sir Richard Mottram: Potentially, it does make it more difficult, and it has a set of benefits. There was a clear framework for the coalition’s programme. I have forgotten what it was called technically. It was put together in a rush for a mixture of reasons, many of them good. It was put together without advice and support from civil servants, for a mixture of reasons, some of which were good but some of which perhaps turned out to be not so good. Therefore, you ended up with a programme, which had been agreed, and a mechanism for driving it forward, which I think worked quite well. I do not think there is any evidence that the coalition’s legislative programme was, as a whole, more shambolic than some of its predecessors.

The plus point of the coalition is that I think there was a lot more discipline inside the Government, as we would see of benefit, in relation to Cabinet Committees working in a highly structured way and decisions
being taken in a proper way. That would be the plus. The issue would be, “Did we, for good reason, go too fast with the programme? Did it need to be worked out more?” Perhaps the example I gave earlier might be one where the coalition itself tried to skate over fundamental differences, produced a dog’s breakfast and then legislated on it.

**Dr Fox:** One advantage that perhaps arose out of it, in comparison with prior Labour Governments, was ministerial tourism and reshuffles. The reach for a Bill by a new Minister was arguably less of a pressure because Ministers stayed in post for longer. That was arguably a good thing. There was an issue about how, with the coalition, you could see the way in which the legislative programme developed. You always get a significant output at the beginning because Governments want to make their mark, but it was very clear towards the end of the Parliament that it ran out of steam because of the differences, and there were great swathes of time when no legislation was going through, despite the fact that earlier upstream you had had a lot of big pieces of legislation going through, in some instances with limited scrutiny.

**Lord Beith:** That was because the House of Lords reform was dropped from the programme.

**Dr Fox:** Yes. There is an issue about how to manage time across the Parliament. With a fixed-term Parliament that should be easier and more manageable, but for all the political reasons and the sessional cut-off the system we have makes that difficult.

**Q7 Baroness Dean of Thornton-le-Fylde:** Reading as many of the papers as I can—your submission is very straightforward and easy to read—there is very little reference to the potential support and impact of new technology. With the demise of Green Papers and the help that that brought, referring to the earlier question about the publication of research, in your considerations—because it is not there in the written submission—have you had any thoughts about how technology could help, for instance, in the drafting process to begin with, and the subsequent public consultation process that takes place?

**Sir Richard Mottram:** In the submission of the Better Government Initiative we did not get into this because we were basically talking about what we have already set out for the Committee about injecting more discipline. The underlying assumption in what we said—this bears on the point Ruth made about how government now makes policy—is that it is all done internally in government, obviously relying on digital technology and so on, which has both benefits and disbenefits of a kind that are very familiar to all of us.

On the public consultation process, there are issues for departments and Parliament about how far they are at the leading edge of using digital technology to communicate with the public, and that raises a whole set of very interesting issues, which we did not discuss, about how the thing called “the public” responds to consultation, because the thing called “the public” is a number of different sorts of publics and the process of consultation is open to manipulation of various kinds, which I agree we did not touch on. This is fundamental to how Parliament thinks about how
it will work in future, and—I do not know whether we will come to it later—the way in which the whole legislative process is framed, the language used, how it is introduced and so forth. These seem to be charming in themselves but quite out of kilter with the way in which the mass of the population now conduct their lives and think about things. So, there might be an issue there about whether the whole process is one that people will comprehend.

Dr Fox: The House of Commons has piloted a Public Reading Stage with mixed effects. Some of the Bills were arguably small and very technical, and attracted interest from lawyers. When we talk about the public, whom do we want to engage? The issue is one of audiences. If you present a Bill in draft form and expect ordinary citizens to engage with that, given the way in which we draft legislation, its technical nature, the way in which it cross-references to other legislation and so on, it is very difficult for ordinary citizens without a legal background to understand and engage with it. In a sense, it would have to be rewritten in plain English to get to that.

I would like to highlight one matter, which I would be happy at a later date to demonstrate to any Committee members who are interested. We are involved in a research and technology development project with colleagues from Southampton University, the Open University in the UK, Stockholm University, the Leibniz Institute in Germany, an NGO in Brussels and the University of Koblenz. It is funded by the European Commission and is looking at how digital tools could be utilised and developed to support the consultation and scrutiny process both within government departments and Parliament.

To give just a couple of examples, if you get a huge number of responses to consultation, very often close to the deadline, for a parliamentary committee it is a huge burden on the clerks to analyse all that in a rigorous way in a very tight timescale, which is often a matter of days. The question is: can that be done effectively and rigorously when all you have is basically a manual eye-balling of the information and you are trawling through it? There are digital tools that would allow for text analysis, structuring and ordering of information to help make that process quicker and more accessible, particularly in a policy area with which clerks in a new Committee might not be familiar.

The second example is social media conversation sentiment analysis. There is a huge potential for that, but at the moment most of the sentiment tools give you a positive or negative interpretation of the conversation. Tools that have been developed at the Open University would allow you to dig down into more detail about why discussion on a policy issue is positive or negative. There is also linked open data. For example, Committees always want to reach beyond the usual suspects—people like us—to engage broader organisations and citizens in consultation processes, but, as we know, that is quite difficult to do. Through linked open data tools, it may be possible to do that much more effectively and quickly in the future. There are also things such as policy simulation models. Tools for that are a developing area on which colleagues at Stockholm University are working.
We have some tools in prototype form that we think will help. We are about to engage with staff of both Houses and government departments in user-testing some of that over the next few weeks. If perhaps the clerks want a demonstration of that, I would be happy to bring in my laptop and show them what we have.

The Chairman: Thank you.

Q8 Lord Norton of Louth: I know that a particular interest of the Hansard Society—I declare an interest as a member of the advisory council of the society—is the relationship between Parliament and the public. You have just indicated that technology might be a means by which the public and stakeholders gain a greater awareness of the process and what is going on, but that by itself would not necessarily produce engagement, particularly coming back to Sir Richard’s earlier point about the way we do legislation, because you have to have a prior understanding of what is going on to be involved in the process.

What are the impediments to public engagement and stakeholders getting involved? Is it process? Is it the timing of the process? You mentioned that Green Papers and White Papers, which went out of fashion, were a means by which one could get some input fairly early on. What is the impediment at the moment? What should we be addressing, apart from technologies as a means of engagement? What else would assist?

Sir Richard Mottram: Green Papers and White Papers may have gone out of fashion, but they may be making a comeback. I think it is a jolly important thing that they do make a comeback, and that brings in the point we touched on earlier. Ideally, you would have a process whereby Green Papers and White Papers were looked at by Select Committees, which in turn could advise and so on. Therefore, we need to think about the process through which Select Committees also engage with the public. The ones I deal with are also thinking about it. Do they have effective means of communication when they are going about their evidence, and how do they get round the problem of the usual suspects—people like us? I have no magic bullet for this.

The Chairman: Dr Fox, do you have any magic bullet?

Dr Fox: I am afraid not. Clearly, time in processes is a problem if you are talking about ordinary citizens and small organisations. Take the Hansard Society as an example. We will be asked by a Select Committee of either House on anything remotely to do with constitutional or parliamentary issues. If we get five or six requests at very short notice to provide evidence, that is a significant drawdown on our limited resources. If you take a community group, for example somewhere outside London, that is asked to provide a submission to a Committee, it has to be in a particular format, which I think can be inhibiting. It is very often on quite a limited timescale, say five or six weeks. Even 12 weeks for some organisations will be a struggle if they are quite small scale and they want to amass evidence to support their arguments, and you want to get anything beyond opinion.
I think the process is intimidating if you are not used to the committee environment and you are asked to come to Parliament and give evidence. With the best will in the world, this is not a normal experience for most people. People are motivated by issues they care about or that they are affected by. They are not going to engage with a legal text, so it is a question of the format in which the information is presented and the way in which you reach out. If Parliament wanted to advertise its Select Committee consultations or seek evidence, things should be going up in GP surgeries, the post office and supermarket—the places where people are. You should not expect people to come to you. That does not work. You have to get to where the public are and where they live their everyday life. We have argued that a Committee of the House could experiment with working with institutions in the communities to get information out there more than they do. Outreach teams for both Houses are very effective, but an awful lot more could be done.

**Lord Norton of Louth:** That involves a time aspect and quickly wanting to get legislation through. How do you get the information out there? This comes back perhaps to Sir Richard’s point about the value of reverting to Green and White Papers and getting input earlier. There has been experimentation with the use of social media by Select Committees. You mentioned the Public Reading Stage experiment.

**Dr Fox:** On new technology—I cannot imagine it in these rooms—for example, it is possible to have video-conferencing facilities, Skype, Zoom or whatever, which are the ways in which young people particularly communicate these days. In the context of restoration and renewal, both

**The Chairman:** Let us move on to a battlefield that is familiar to this Committee.

**Q9 Lord Judge:** Dr Fox, before I start, I want to record how valuable I have found so many of the things you have written on this subject. My question is fairly simple. Where, if anywhere, do we find a clear identification of the principles that identify when Parliament should or should not delegate power to the Government?

**Dr Fox:** I would say nowhere in terms of clear principles.

**Lord Judge:** Sir Richard, do you take a different view?

**Sir Richard Mottram:** I do not.

**Lord Judge:** In that case, should there be and how should we achieve it?

**Dr Fox:** I think there should be. However, I do not underestimate the difficulty of getting there. Certainly, in the book we produced, we tried to move in that direction and struggled with the people we were engaging with, both in government and Parliament, to get any kind of consensus on what those principles would be. Therefore, I do not underestimate the difficulty of it.

It is easy to argue, on the one hand, about detail and administrative convenience versus policy principle, but, on the other hand, you can see where Bills, which require a huge amount of technical detail, arguably
could and perhaps should be delegated, and where for readability purposes it would be best to put them through the delegated process. For political reasons, they may well be things that Members want to debate and discuss and, therefore, perhaps ought to be on the face of the Bill. We have struggled with this question.

There may also be a case that in certain areas of legislation it is easier to reach a view. Certainly, in our discussions, anything that involved algebra was given as an example of the defining of the line between primary and secondary, if it had a number, but, as we saw in the debate on tax credits, that is not an easy line to tread. If it is anything that involves moving something on a form, is that something Members really want to debate? One parliamentary counsel put to me, “Is this something that would justify a stand-part debate by Members? Can they use that as a justification to decide on which side of the line it should fall?” At the moment, partly because of the problem of finding a definition that would work, the reality is that for most parliamentary counsel and those working on Bill teams it is a matter of gut instinct.

**Lord Judge:** In that case, if we do not have principles, is not the inevitable consequence that Parliament will delegate more and more powers to government?

**Dr Fox:** I do not think it is an inevitable consequence, because they can choose not to.

**Lord Judge:** How is it to be avoided?

**Dr Fox:** Part of it is the House taking a view on powers, perhaps not a line of principle but what it views as acceptable and unacceptable elements of delegation, and utilising the body of work that has been done by the Delegated Powers Committee to inform that process. At the moment, part of the problem with where we are is that so much of the horse-trading is around the ratcheting-up of the scrutiny procedure to constrain the power. That is where the focus of debate is, rather than on whether the House is content that the powers should be there in the first place. I accept there is a problem. How you decide that without resort to foundational principles is very difficult.

**Lord Judge:** Does the House of Commons effectively scrutinise the delegation of power?

**Dr Fox:** Not at all.

**Lord Judge:** Does the House of Lords?

**Sir Richard Mottram:** More.

**Dr Fox:** Yes—much better than the House of Commons.

**Lord Judge:** Has it been very much better?

**Dr Fox:** But not perfect.

**The Chairman:** We had to drag it out of you, but we got there.
**Dr Fox:** We have made very clear in our work that the House of Commons procedures are utterly inadequate. In part, it is also about Members’ resources in terms of time to devote to it and the very technical nature of it. This House has responded over the years in reforming some aspects of its scrutiny procedures for delegated legislation; the Commons has not. Its procedures have remained largely as was. Delegated legislation committees are wholly inadequate. For an MP, getting on a delegated legislation committee is regarded as a punishment. They are actively encouraged by Whips to turn up and do their constituency correspondence.

**Lord MacGregor of Pulham Market:** It is a question of time.

**Dr Fox:** Absolutely.

**Q10 Lord Pannick:** It is good to hear that we are doing a better job in this respect than the other place. How could we improve our procedures?

**Dr Fox:** I would take a step back. Part of the difficulty in getting to grips with it is taking a single-House approach to it. I would much rather have a bicameral approach in which there is recognition of complementary scrutiny procedures and tackle it from both sides.

If you wanted to look simply at the House of Lords, although it would not necessarily improve the House of Lords procedures but would improve the legislative process overall, it would be beneficial if the point at which a Bill was introduced was the point at which the Delegated Powers Committee considered the Bill and the powers within it. If it is a Bill that starts in the Commons, the Commons does not have access to that information and commentary until much later in the process, whereas that is clearly beneficial to the debate in the Lords. That is not to say MPs will engage much with it and take much notice of it, but some will. That would be useful, although I recognise that would cause some resource issues for the House. I think that would be a huge help to the process of debate and understanding powers at the outset.

**Sir Richard Mottram:** I make one point that goes back to one of the questions Lord Judge asked. One interesting thing about the way government works is that it is a sort of doctrine-free zone. Both Ministers and civil servants, compared with other professions in society, even other bits of government, such as the military, the police or whatever, are not too strong on doctrine. Accepting all the points that Ruth made, which are obviously right, about the difficulty of framing a perfect way of thinking about this problem, it is extraordinary that parliamentary counsel and government lawyers do not have a set of doctrine about what it is they are trying to do when thinking about how legislation should be framed in this way.

That would be an interesting question to ask the Government. Do they think it is odd, or do they have such a doctrine that perhaps they have not quite got round to sharing with Parliament? I can think of lots of other examples, which I will not give now, where government is a doctrine-free zone, partly because the Civil Service and Ministers quite like to operate like that. But is it good enough? You would expect there to be a set of doctrine and standards against which Ministers could absolutely explain
why in a particular case they decided to do X rather than Y, and civil servants and parliamentary counsel would be expected on Bill teams to apply all of this consistently. Have I missed something here?

**Dr Fox:** There is a minimum amount of guidance in the Cabinet Office Guide to Making Legislation. There are some criteria.

**Sir Richard Mottram:** Are they good enough?

**Dr Fox:** It refers to matters that may need adjusting more often than seems sensible; rules which may be better made after some time experience rather than at the start; precedent and powers may be uncontroversial; transitional and technical matters, which would go to things like algebra and matters that change over time; and the draftsman’s test. Will it work technically so the Bill and powers achieve what you want?

**Sir Richard Mottram:** Is that enough?

**Baroness Taylor of Bolton:** If all those are covered and properly applied, we would not have the problems that we have.

**Sir Richard Mottram:** It might be enough.

**Lord Beith:** It is broad.

**Sir Richard Mottram:** It is too broad perhaps. Here is the starting point. An interesting question is why it is in this slightly thin, broad form when it is a fundamental part of what government is doing.

**Q11 Lord Judge:** What is the principle that leads us to say that in relation to delegated legislation we either take the whole or lose the whole, so that, if there are 67 provisions that everybody thinks are admirable and one that everybody thinks is a complete disaster, we either lose the 67 we want or we have to put up with the 68? What is the reasoning behind that? What is the process? It is a parliamentary process, but why does this happen, and what should we do about it? I am genuinely seeking information.

**Dr Fox:** I am not sure I follow. Do you mean that there are 67 powers within a Bill that you are content with?

**Lord Judge:** No. We are now in the delegated legislation.

**Dr Fox:** I am sorry.

**Sir Richard Mottram:** The only thing you can do is strike it all down.

**Dr Fox:** It is the amendment issue. The argument has always been that, if you have the power of amendment, you undermine the principle of delegation in the first place, and, politically, it has always been resisted on the grounds that it would risk reopening the prospect of relitigating the earlier primary legislative stage debate about what you are doing. There is a good argument for having an indicative amendment approach. You have a delaying instance where you say, “We are not rejecting it, but we want you to come back taking into account these concerns”. Therefore, it
is not a formal amendment process but a conditional amendment indicator.

I think there is a danger. This House has tried to adopt that third-way approach to SIs. That was tested in the debate on tax credits. The tax credit SI was withdrawn. Whether or not the delay has any real standing as far as the Government are concerned has not been tested. There was an earlier SI when a delaying motion was tabled in relation to a welfare regulation. The Government indicated they would come back to the House and consult. We do not think they have. We are trying to track this at the moment, but we think they have gone ahead and implemented it. That would suggest that the Government do not accept the standing of a third way of a delaying element to an instrument. We will have to see.

**The Chairman:** I think now is the time to move on. We will come back to you, Lord Beith, under the next question on Brexit, which Lord Pannick will ask.

**Q12 Lord Pannick:** A substantial proportion of our legislation, primary and secondary, derives from Brussels. I, and I am sure the Committee, would be very interested to hear your views on what will be the impact on the legislative process of this country leaving the EU.

**Sir Richard Mottram:** Please answer in five minutes, in one sentence. I will ask Ruth to respond to this.

**Dr Fox:** It is what they call a hospital pass. The Government have indicated that there will be a great repeal Bill in the Queen’s Speech—it will not be called a great repeal Bill because, apparently, you cannot call something “great” in the short title—which will re-enact the European legislation so that we do not fall over a cliff edge, and there is a question mark about what then. There will have to be a review process, as the Government have indicated, to repeal, amend or improve the legislation, but it is not clear what form that review process will take and how it will be done. It is inconceivable to me that, given the pressure of dealing with statutory instruments under existing procedures, the House of Commons in particular, but also this House, will be able to deal with a significant review of that much legislation, even over an extended period of time. I think that with the procedures and time constraints it will collapse under it. I do not think we have heard anything from the Government yet about how they might resolve that.

As to options to think about, first, there will be a whole debate about the great reform Bill, which will be a skeleton Bill, seeking no doubt Henry VIII powers. There will be a whole debate about whether there should be a strengthened scrutiny procedure to constrain that and what it might look like. We get into a debate, therefore, about adding further complexity to the process and scrutiny of these things. But there is the issue of whether the review process is done purely by Parliament, or does Parliament need help? What might be the options for external support in terms of technical assistance?

For example, the Social Security Advisory Committee advises on welfare legislation. We had a Banking Liaison Panel that advised on Bank of England instruments in terms of the legislation after the financial crisis.
They report to government—not to Parliament. There is a good case, depending on how this goes, for Parliament to think about whether it wants a mechanism or mechanisms for providing it with expert advice and capacity to do this work, or at least to support it in doing some of that work, perhaps modelled on the way the NAO supports the Public Accounts Committee, looking possibly at the Law Commission and what its role will be. However, its resources are constrained, so, unless there is to be an increase in resourcing, it will not be able to do some of this work. There are some very significant challenges ahead.

Sir Richard Mottram: It is almost worthy of the Civil Service to say there are some significant challenges ahead. I would have thought the answer to this question is that either the process of changing the legal framework for most of the activities of government will be a very slow one or there is a high risk that the process of parliamentary scrutiny will be massively abused. I agree with everything Ruth said about thinking about ways in which you can underpin Parliament in providing better scrutiny, but there must be a massive risk that the Government will try to come forward with a whole series of changes that impact very directly on people and all aspects of their lives, cloaked under a rather more generalised formulation. This must be the biggest issue that Parliament has faced for a very long time.

Lord Pannick: Do you think the Civil Service is adequately resourced, particularly in those areas? In many of them, such as telecommunications, competition and aspects of taxation such as VAT, our law is almost exclusively based on EU law. Therefore, for some time there has been no domestic legislation in this area. Are the resources there to tackle these topics?

Sir Richard Mottram: We have had a capacity inside the Civil Service, leaving aside negotiating trade deals and so on, which we were not doing, to think about and negotiate with a process through which all the Brussels-based legislation came about, and how it would then be expressed in British law. That capability exists. It is more a question of thinking about the pace at which you can possibly change all of that. How much of it are you going to change, and over what sequence? That is a massive sequencing issue. No doubt it has been thought about, but the parliamentary scrutiny bit is crucial.

Q13 Lord Beith: I declare an interest as someone who has participated in Better Government Initiative conferences in the past, although for obvious chronological reasons we did not discuss this. I have also been involved in the Hansard Society. Surely, given the impossibility of proceeding on the basis of one-and-a-half-hour debates on the basis of take it or leave it for statutory instruments, in all the areas of law covered currently by European law, as you said, there is a sequencing issue. You would be saying to a Minister, with words stronger than, “This is challenging”, if he told you, “We are going to review every aspect of two-thirds of our law that covers this area over the next Session of Parliament”, that it would be a ludicrous thing to do. Even if just a little of it is attempted, does it not make it very difficult to have much else of a legislative programme? Would you have to have a Queen’s Speech that said, “Hardly any other
measures will be laid before you”?

Sir Richard Mottram: “All the measures laid before you will be measures to change a framework that we have inherited and have just repealed”, although technically we have not repealed it. I would have thought that was right. The Government will have a set of immediate priorities that are politically salient, and presumably they will be about controlling immigration and so on. Then you would, surely, just put off whole swathes of the rest. I am speaking in a politics-free zone, so I will just finish my sentence. You would put off dealing with all those things that do not need to be changed to do with the environment and aspects of agricultural policy—well, you would have to deal with agricultural policy and fisheries. I am already generating a list, and then you have all the politics of the people who thought that through this big change they would be able to change everything we have legislated in the past 40 years. It is an absolutely massive issue.

I am not a civil servant any more, but the Civil Service will be thinking about how it can sequence it so it can get the Government’s priorities and put to one side, because it does like to prioritise, all those second-order things that can wait. In my experience, if you are a Minister in one of those places dealing with second-order issues, you do not necessarily see them like that. If you were a passionate Brexiteer and you are now in charge of one of these departments, are you going to be told by civil servants, “Sorry, there is a sequencing issue here, and we are just going to stay with what we have, because people are generally comfortable with it”?

Q14 Lord Brennan: Under the Constitutional Reform Act Parliament has the ultimate decision in ratifying treaties. First, if we leave the European Union, at the very least there will be a transitional treaty arrangement made that will require parliamentary supervision and agreement. Secondly, if we have to change WTO arrangements, that may involve quasi-legislative changes to deal with those commitments. Thirdly, if we enter into free trade agreements with different and new countries, that will definitely require Parliament to approve them. All of that is going to happen. You can sequence and push back the social and political stuff, but the economic stuff will happen.

Do you agree with the idea that there should be a bespoke Brexit treaty and legislation team, involving lawyers, economists, diplomats, experts and parliamentary draftsmen, starting now to prepare for this? This is following up Lord Pannick’s point about the technicalities of everything. You can negotiate the content of a tariff arrangement, but its ultimate effectiveness depends upon whether you change the tariff legal system around the percentage or price you have agreed. At the moment—I have checked it—the only unit in government dealing with treaties, if it still exists, is the Foreign Office treaty section. There is no other unit dealing with it.

What do you think of the idea? If it were put into practice, would it not become limited by your suggestion about Parliament having reports made to it by expert panels, and your sequencing points, Sir Richard? These
three things—Europe, WTO and new free trade agreements—all interlock and require sequencing, and, without proper management, this could be a disaster.

Sir Richard Mottram: What you say is very interesting. I am now at the limits of my knowledge, to be honest with you. My guess would be that the FCO’s treaty section is the custodian of all the treaties the Government have entered into. If you think about the government machine as a whole, it has lots of people in it who have a great deal of experience negotiating internationally in their own little bits. For instance, when I was the Permanent Secretary of the Department of the Environment, Transport and the Regions, or whatever it was called—it kept changing its title—we were the experts; we had the biggest experts in international environmental law sitting in our department, and we were the people capable of doing all that stuff. In so far as there were treaties and so on, we always worked with the Foreign Office in a very amicable and constructive way.

My guess would be, absolutely, that the whole government machine is currently being addressed—but I am not the person to answer this question—precisely to meet the point you make. Individual departments will be gearing up to think about the political sequence in which their Ministers are interested. You can already see some of the tensions within government about this. How might we bring all those things about? You absolutely need to think about the legal aspects of this, but first you have to formulate our negotiating position and then no doubt the Government will turn to what would be the sequencing. It is just the politics of it that is so interesting. I think you can organise the machine, although it will probably require significantly more resource. You will need a lot more civil servants and lawyers. Every legal firm in London now is encouraging government to think how marvellous it would be to employ them, and they will have to be employed. I can see how you would organise that bureaucratically.

The interesting question would be the much more political one: what does it mean if we leave in 2019, and what will the Government put into the Queen’s Speech that year? Is there a great risk that they will essentially want to be given a lot of free choice as to the changes they make?

What is interesting about the European Union is that it impacts directly on the day-to-day lives of the population in a way that lots of other government policies do not always do.

Dr Fox: I want to throw the management of this issue back on Parliament, which is also my area. What is the mechanism in this place, in both Houses, for figuring out a route to deal with this, when today, staring us in the face, we know that the Commons procedures are utterly inadequate? Even though the Lords is better, both Houses will struggle to manage the volume. There is the question of external expertise. Has either House enough lawyers as a resource to support them in this process? What is the mechanism by which Parliament is going to get its act together in time to put in place a system to deal with it? It is not clear to me at the moment how that could be done. The Procedure Committees of both Houses going off to do their own inquiries separately will make some progress, but that will not be an ideal solution. We have lots of
Select Committees looking at Brexit with a mind-boggling number of inquiries, but nobody is getting to grips with the management and procedural issues that are already problematic under existing legislative programmes; so they will certainly not be able to cope under a much greater burden. It is certainly not the time to be reducing the number of MPs in the House of Commons. That is a bigger question about reducing the capacity of the Members.

**The Chairman:** Let us not get drawn into that. We will have a very short supplementary from Lord Brennan.

**Lord Brennan:** It will be very short. If we have to come to an agreement by 2019 without an agreement under Article 50 to postpone it, there is every incentive on the side of the European Union to wait to the end to come up with final positions, whereas we want to have it earlier. If we do not do the kind of thing I was suggesting, all this will collide in a very unhappy way.

**Sir Richard Mottram:** Unfortunately, having spent 39 years or so in the Civil Service, I tend to have a capacity to see the downside in things. I would have thought there was a very strong and high probability that it will all collide in a very difficult way for us. The idea that in a two-year period we can successfully establish a new framework with the European Union, where every country can veto that framework and no doubt is looking, in a very excited way, at its benefit from doing us down in various ways, is a mind-bogglingly difficult thing to negotiate. I have not yet quite seen, although this is not an area of my expertise, how we can get from the position we are in now to a position where we can successfully trade with lots and lots of countries in circumstances where we are not permitted to strike any trade deals with any country, because that is a competence of the European Union of which we are a member.

There are no doubt lots of people cleverer than me in the Brexit department and elsewhere who have already figured this out. Parliament is busily setting up frameworks, such as the new Select Committee on Brexit and so on, which are all very constructive things. I do not quite know what this House is doing, but no doubt you will think about the same sorts of things.

The fundamental issue is: when it comes to the crunch, is Parliament going to be willing to give the Government the power to change lots and lots of things that really do need proper scrutiny? Therefore, the choice for Parliament is either not to live up to its obligations, in my view, or put a big road block in the way of lots and lots of change happening very quickly following our exit from the European Union.

**The Chairman:** I am very conscious that we are overshooting our time, having overdone it with you, but Lord Hunt has been waiting patiently to ask one final question.

**Lord Hunt of Wirral:** To draw back from the focus on Brexit for a moment to look at parliamentary involvement generally, to what extent is Parliament or are parliamentarians involved in the development of legislation before it is introduced in Parliament, both formally and
informally?

Dr Fox: It will differ from case to case, but you can see Members working through things like all-party groups developing policy proposals that sometimes are picked up by government departments. Select Committees are a key mechanism where that is picked up. An interesting gap in the process is the extent to which there are effective mechanisms to pick up the experience of individual Members as constituency representatives early enough and feed that into the policy process, rather than as committee members on thematic departmental committees and so on.

Lord Hunt of Wirral: Before Sir Richard replies, I sense that we are within grasp of a disciplined process that could be introduced: consultation papers, Green Papers, White Papers, draft Bills and Bills. With a five-year Parliament it should at last be possible to measure that. I keep meeting Ministers who say, “We now have a Bill in the fourth Session”. There is adequate time, so how can we take advantage of that?

Sir Richard Mottram: Without going back over everything we have discussed, we can take advantage of that by pressing now for Parliament and the Government to agree a more disciplined process, with all the things that we have recommended, and that would definitely have benefits for the quality of legislation. We can exploit the fact that we have five-year Parliaments; we can exploit different rules about the Opposition having the capacity, in thinking about the next Parliament, to draw on the resources of government and so on. We could change the system, make it more disciplined and produce a better result.

Dr Fox: If you are talking about greater streamlining of Bills and Bills in the third and fourth Sessions, you have the opportunity to consider pre-legislative scrutiny, which would have benefits at a later date. That does appear to have dried up.

The Chairman: Thank you very much. I am so glad that from the windswept high peaks of Brexit and delegated legislation we have managed to get down to the sunlit uplands of pre-legislative scrutiny. But, seriously, thank you both very much indeed. Both of you have been unsparing in your very helpful answers and have given us a huge amount of material to chew over and think about. It will undoubtedly influence the direction in which we steer our inquiry. Thank you again for being with us for so long, as well as the forthcoming answers you have given us. Now we say goodbye to you.

Sir Richard Mottram: Thank you, Chairman.
Elizabeth Gardiner, First Parliamentary Counsel—Oral evidence (QQ 89-101)

Transcript to be found under Rt Hon. David Lidington MP, Leader of the House of Commons
Summary and Recommendations

1. To summarise our findings:
   - Greater involvement of Parliament can be highly beneficial to the legislative process
   - There are a number of mechanisms available to facilitate the greater involvement of Parliament in the legislative process but these are rarely used
   - The most beneficial forms of Parliamentary involvement are early/upstream (i.e. before First Reading) and take place outside of the main chambers, within the Committee structures.

2. We recommend:
   - That government ought to actively seek opportunities to involve Select Committees in the early stages of scoping and drafting legislation both before and immediately after the White Paper stage
   - That Select Committees ought to attempt to align their agenda more closely with the government’s legislative plans
   - That government seek opportunities, or establishes a formal process, to allow consideration of draft bills by Joint Committees comprised of members of both the House of Commons and House of Lords
   - That some process of pre-legislative scrutiny with strong parliamentary involvement either through Select Committees or Joint Committees ought to be the default setting for new legislation and the pathways for such scrutiny ought to be formalised.

Basis of the evidence and recommendations

3. Our interest in this inquiry is as academic researchers who specialise in the study of Parliament. The evidence submitted is based on a series of studies of Parliament that have been published in peer-reviewed academic journals. In particular, we draw on an extended study we conducted on the legislative process for the 2008 Human Fertilisation and Embryology Act (HFEA 2008). The passage of this piece of legislation involved a series of non-standard stages, both informal and formal. Taken as a whole, from inception to conclusion, the case presents an unorthodox, but in our view, successful, legislative journey that might serve as a model for future legislation that produces stronger stakeholder and public engagement, strengthens democratic scrutiny and, ultimately, produces better law.

4. The key features of this case were:
A very high degree of engagement by Parliament before the Bill reached its First Reading – what we term ‘upstream engagement’ by Parliament

- Extensive use of the Select Committee system to investigate key issues likely to be included in the Bill as part of this upstream engagement
- The use of formal pre-legislative scrutiny of a draft Bill by a Joint Committee of members of both the Commons and the Lords
- The introduction of the Bill into the Lords, rather than into the Commons
- The division of the Committee stage of the Bill to allow key clauses to be debated by the whole Commons

5. These processes produced significant changes to the legislation that reached the statute book. We found that parliamentarians and members of HM Government were both overwhelmingly positive about the process, and the resultant legislation. It is our view, based on this research, that these mechanisms have potential to improve the legislative process, particularly as regards preparing legislation for formal introduction into Parliament.

6. Our principal finding is that Parliament as an institution can constructively contribute to better legislation, but that the chances of realising this are enhanced when Parliament is engaged earlier. We found that there was something of a mismatch in expectations between Parliament and government whereby ministers experienced the introduction of legislation into Parliament as the end of a process, with formal legislative approval coming as a kind of ‘rubber stamp’ on legislation that had been some time in the making, while parliamentarians experienced the introduction of new Bills as the beginning of a process wherein they ought to be playing a key role in scrutinising and improving legislation.

7. Our study indicated that Parliament may be most effective in the legislative process where it engages with legislation in its early developmental stages (‘upstream’), and where it engages outside the formal processes conducted in the main legislative chambers (‘extra-cameral engagement’). Once legislation reaches the floor of the Commons or Lords, we found that pressures of time, and the more adversarial, less consensual style that predominates in the main chambers restricted the degree to which Parliament and parliamentarians could add value to the process. Our research suggests that Parliament is able to contribute most effectively to the legislative process in the early stages of problem-definition and drafting before the subsequent Bill had reached First Reading.

8. The case study of the HFEA2008 provides a model of the type of parliamentary involvement that we recommend. During the passage of the
HFEA2008 (see Table 1 below), parliamentarians actively engaged in developing the content of the legislation long before the Bill was formally introduced at First Reading. By the time the final Bill was introduced for First Reading in the Lords in November 2007, Parliament (or rather, that small sub-set of Parliament that served on the key committees) had had multiple opportunities – often successfully taken – to intervene in and shape the development of the proposed legislation. As Table 1 shows, the Commons Science and Technology Select Committee (STC) undertook a review of the law relating to human reproductive technologies in 2004-2005 which substantially laid the foundation for the final Act, and subsequently produced two more related reports making recommendations on the content of the legislation prior to its formal introduction.

9. Both academic analyses and parliamentary reports have found that the engagement of Select Committees can enhance parliamentary influence over legislative outcomes and thereby improve the quality of legislation (Liaison Committee 2000; Modernisation Committee 2002; Hindmoor, Larkin and Kennon 2009, Russell and Benton 2011). While these analyses often acknowledge the difficulty of demonstrating causation in the relationship between committee recommendation and legislative revision, there is clear evidence from both the pattern of legislative change and from our interviewees that the government position on key elements of the case studied was revised due to contributions from both the select committee and the committee on the draft bill. Members of government regarded these revisions as major improvements on the legislation as initially proposed. The early, proactive involvement of the Science and Technology Committee appears to have strongly influenced the policy outcome. The synchronisation of STC timetables with the legislative timetable was important in this.

10. The HFEA2008 also underwent an additional phase of formal pre-legislative scrutiny prior to its introduction at First Reading. In the case of the HFEA2008, a specialist ad hoc committee comprising nine MPs and nine peers was convened to examine the government’s draft Bill. The use of pre-legislative scrutiny in this case was principally a matter of the content of the Bill which was regarded as both highly technical and ethically contentious. The government was keen for the scientific expertise of the Lords in particular to be brought to bear on these issues, as well as the experience of scientists in the Commons and veterans of the debates around the Bill’s 1990 predecessor. A number of scholars have recognised the potential for pre-legislative scrutiny to serve as a vehicle for parliamentary influence on legislation and an important supplement to the limited scrutiny capacities of Parliament once Bills reach the main chamber (Smookler 2006, Kalitowski 2008, Korris 2011). In the case of the HFEA2008, the pre-legislative process produced a core of cross-party expertise among members who had served
on key committees, and reassured the rank-and-file that the issues had been fully discussed and debated on the basis of evidence.

### Table 1: Passage of HFEA2008, pre-legislative and legislative phases

<table>
<thead>
<tr>
<th>Pre-Legislative Phase</th>
<th>Legislative Phase</th>
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<tr>
<td><strong>2005</strong></td>
<td>March</td>
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<tr>
<td>August</td>
<td>Department of Health public consultation on review of the Human Fertilisation and Embryology Act 1990</td>
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<td><strong>2006</strong></td>
<td>December</td>
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<tr>
<td><strong>2007</strong></td>
<td>March</td>
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<tr>
<td>August</td>
<td>Report of Joint Parliamentary Committee on the Human Tissues and Embryos (Draft) Bill</td>
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<tr>
<td>November</td>
<td>Report of the Commons Science and Technology Select Committee on <em>Scientific developments relating to the Abortion Act 1967</em></td>
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<tr>
<td><strong>2007</strong></td>
<td>November</td>
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<tr>
<td>November</td>
<td>Second Reading – Lords</td>
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<tr>
<td>December</td>
<td>Committee Stage – Lords</td>
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<tr>
<td>January</td>
<td>Report Stage – Lords</td>
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<tr>
<td>February</td>
<td>Third Reading – Lords</td>
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<tr>
<td>February</td>
<td>First Reading of the Human Fertilisation and Embryology Bill (Lords) in House of Commons</td>
</tr>
<tr>
<td>May</td>
<td>Second Reading – Commons</td>
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<tr>
<td>May</td>
<td>Committee (whole house) – Commons</td>
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<tr>
<td>June</td>
<td>Public Bill Committee – Commons</td>
</tr>
<tr>
<td>October</td>
<td>Report Stage – Commons; Third Reading – Commons; ‘Ping-Pong’</td>
</tr>
<tr>
<td>November</td>
<td>Human Fertilisation and Embryology Act receives Royal Assent</td>
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*October 2016*
The Office of the Parliamentary Counsel has given a description of “good law”, with which I think you are probably familiar. They say it is “necessary; clear; coherent; effective; and accessible”. Do you think that is accurate in general at present, at the point at which it reaches Parliament?

Daniel Greenberg: I popped into your Printed Paper Office the other day to pick up three Bills, pretty much at random, to see what the answer to that question was likely to be. The Policing and Crime Bill, which at 361 fairly packed pages is clearly too big for you to scrutinise properly, is largely referential legislation, which makes it very obscure. It contains, just in case 360 pages were not enough, one of those wonderful new powers for the Secretary of State to go off by regulations and do anything that he thinks appropriate in consequence of the Act, including repealing and revoking primary and subordinate legislation—so there are a few more pages to come. It makes it very difficult for you to scrutinise if you do not know what it will look like when he has finished doing things. As I flicked through, I found a lot of very long sentences. We are looking for clear and coherent legislation, but a lot of sentences were more than 100 words long. That should not be happening today and I cannot see the point of it. It is not very clear and not very coherent.

That is a big Bill. It is very difficult because drafters are under a lot of constraints and they have to produce pages and pages of stuff, so what about a really nice tight small one such as the Small Charitable Donations and Childcare Payments Bill? Is it clear and coherent? The first proposition: “In section 2 … in subsection (1) for the words from ‘if—’ to the end substitute ‘if it is not an excluded charity for that tax year (see subsection (3))’”. There is no real chance that you or other readers have the foggiest idea what is going on. There is no reason why it could not be
introduced with some kind of explanation. Is there an attempt to make it clear and coherent? No.

Then there is the National Citizen Service Bill. Legislation will be necessary. What does it do? It sets up a body corporate with the following primary functions “to provide or arrange for the provision of programmes for young people ... for the purpose of ... enabling participants of different ...”. If you want to do it, just do it. You do not need a Bill. I cannot find a legislative proposition in that Bill. I cannot see anything that needs to be done by legislation that cannot be done in other ways.

I have not found evidence that the necessary, clear and coherent criteria are being applied in a rigorous way to the legislation that comes to your House. It seems to me that they may be targets or aims for the Government, but I cannot see evidence of rigorous application.

As for whether they are effective, you do not know and you will not know, because you do not properly benchmark. When you have Committee, you do not take assurances from a Minister, benchmark them, note them down and say, “Right, this is what it is going to do and is meant to do”. You do not come back in a year’s time, have post-legislative scrutiny as an absolutely regular thing, going through line by line the assurances you were given in Committee and bringing in expert evidence from the victims of the legislation to run with it—the stakeholders: “Was this assurance backed up? Did this happen? What does the Minister say? If it did not happen, we have a sunset clause to get rid of it because it was not in fact justified”. There is no evidence of a mechanism for determining whether or not it is effective.

Is it accessible? This is not the day to deal with that, but, as you know, the United Kingdom has an appalling record on accessibility of legislation for citizens. Most countries provide free online updated databases of legislation. I declare an interest, because I am an editor of a commercial database. For those who can afford a commercial database it is fine, but the citizen does not have access to a fully updated database. The legislation.gov.uk website is not fully up to date for primary legislation, and for secondary legislation it is fair to say that it has not even set itself the target of becoming fully up to date. On accessibility, we have a very poor and worrying story to tell for a country that is a rule-of-law democracy.

The Chairman: Thank you. That is an encouraging scene setter. Let us try to break into the various subsidiary clauses.

Q50 Lord Morgan: They are profound and serious criticisms. You have had long experience in this area. Do you think that things have got worse? Was there more clarity and effectiveness in legislation 10 or 20 years ago?

Daniel Greenberg: I need to declare an interest there as well. I was a member of the Office of the Parliamentary Counsel for 20 years and I left, so anything I say you need to take with a pinch of salt—a “This is a disgruntled former employee” sort of thing. In a way I am a bit nervous of telling you that everything has got worse. I would say that: I am not in the office now, so everything has got worse.
I do not think everything has got worse in every respect. There is a lack of evident rigour. The evidence is partly the fact that the stated aims of the Government in the “good law” project do not seem to be applied rigorously, and there is no mechanism for applying them. The other thing the Committee might like to look at is this. Under the Inco Europe rectification rule, judges have now decided that we are not going to defer to the legislative drafter and assume that he or she necessarily got it right—that sometimes they make a mistake. That is used increasingly. I feel the judges have less deference to the form and wording of the statute than they used to. I may be wrong, but that is what I feel from reading judgments such as Inco Europe. I suspect that is because judges feel that they are dealing with a less quality product than they used to, but I encourage you to take all that with a pinch of salt for the reason I gave.

Lord Morgan: One of the things we experience in the Lords is that we have a very large number of what you might call portmanteau Bills, in which a number of subthemes are yoked together and then given some grandiose title. Do you think that is part of the problem?

Daniel Greenberg: I do not know whether it is a symptom or a cause, but it is certainly a very big problem. You criminalised trespass with a provision that was tucked into a Bill. I think it was brought in on Report in the second House. I might have got that slightly wrong, but it was certainly at a late stage. It is fair to say that it got no serious scrutiny because it was too late in your House for a proper vote to be held and a proper discussion to be had. You reversed a massive common law tradition pretty much as an afterthought. You could only do that because we had such a huge Bill that it could be tucked in as Clause 7,352 and nobody really could afford to notice, because you needed to get the Bill through to Royal Assent. It certainly would not have happened if it had been Clause 2 of a previously one-clause Bill.

Q51 Lord MacGregor of Pulham Market: To what extent are parliamentary counsel responsible for ensuring the quality of legislation, as opposed to departmental lawyers, policy officials and Ministers, or, to put it the other way round, as opposed to Ministers and departmental lawyers?

Daniel Greenberg: I compute very roughly that when you write legislation you can reckon that less than 1% of what you write will be read seriously by anybody else before enactment, and quite possibly after enactment as well. We are the front line. I am not talking only about a huge portmanteau Bill. Inevitably, our stuff is not going to be read very carefully, and many of the people who read it are not really equipped to understand what it does and does not do anyway. We always saw ourselves as the front line in maintaining the rule of law.

Lord MacGregor of Pulham Market: “We” meaning parliamentary counsel.

Daniel Greenberg: Parliamentary counsel. When I draft around the world I still see myself as responsible. Let me give you an example. Long before the human rights statement under the 1998 Act, we regarded ourselves as responsible for checking that things such as powers of entry
were appropriate. If we thought they were not, if we thought they were improper, our job was to alert the Attorney-General, and the Attorney would then take it up in Cabinet Committee or potentially in Cabinet. It was our role to flag that up. Good departmental lawyers might do it themselves, but might not, not through wickedness but because that was not their primary role. They often relied on us. In fact, sometimes we got coded instructions from really good departmental lawyers: “I am instructed to ask you to do this ridiculous thing; please reply that you are not going to”. It was not in quite those words, but it was pretty obvious that that was what was going on.

We must be responsible for ensuring the quality of the legislation—we as legislative drafters—because, if we do not, no one else is in a position to. Are we able to? Again, feel free to say this is rose-tinted spectacles and all the rest of it. When I started, we were encouraged to stand up to Ministers. Good Ministers wanted us to stand up to them. They expected us to say no if they were doing something that we thought was improper. Over the 20 years that I was in parliamentary counsel, I certainly sensed less invitation to say no to Ministers.

Lord MacGregor of Pulham Market: What sanctions, recourse or other action do parliamentary counsel have in a situation where they are very unhappy about something? We were just talking to each other, and we cannot recall an occasion as Ministers when one of these things came up to us. Where is the sanction and where is the best recourse?

Daniel Greenberg: Parliamentary counsel, in that sense, is a dog with rubber teeth, but quite often the bark can be effective. You will not get to hear about it because we will see it off at the instruction level. There will be things that Ministers are never troubled with, because we will have had a discussion at official level and said, “We are not sure that is a really good idea” and we would see it off.

You may not have seen arguments when the Attorney intervened, but other Ministers will have seen them. It did happen, and the fact that the dog had the ability to bark to the Attorney and say, “There is something here you need to look at” was taken very seriously by departmental lawyers. How often did I have to do it? Certainly no more than once or twice a year on average, and even that may make it sound a bit more often than it was. It was rare, but it was not never, by any manner of means.

Lord Hunt of Wirral: You referred to your relationship with Ministers. Those of us who used to instruct you were always told we had to do it at arm’s length. I cannot ever recall during my 16 years as a Minister that I came face to face with you or one of your colleagues as parliamentary counsel. Can you remind us of all the protocols that were inserted between Ministers and parliamentary counsel?

Daniel Greenberg: There were no formal protocols. It depended greatly on the Bill, on the Minister and on the parliamentary counsel. “Often” may make it sound too frequent, but on a number of occasions I asked to see the Minister and I certainly never remember being told no.
Lord Maclennan of Rogart: Many aspects of a political process militate against good legislation. Could you indicate what you think are the key factors that influence the quality of the drafting of legislation?

Daniel Greenberg: Clear policy and proper training. If the policy is not clear, no drafter can produce a decent piece of legislation; and very often the policy is not clear. Our primary role in drafting legislation is to help them go back and unpick what they are really trying to do, and rewrite the instructions, in effect—clear policy.

Lord Maclennan of Rogart: Who should judge the clear policy in the department?

Daniel Greenberg: It is fine for them to leave that to parliamentary counsel. That is the role of parliamentary counsel. It is the person at the end, who actually has to write down the words, who can tell whether it is flowing right. If the policy is clear, the words just flow themselves on to the paper. When the words do not flow, it is always because I do not yet know what I am trying to write. I have no difficulty with the department leaving that to parliamentary counsel, and then parliamentary counsel come back and say, "I do not think this is clear; help me". What departments have to do is engage constructively at that stage and be prepared not to defend what they have produced. It is not personal. We are not criticising them in any sense. They have to be prepared to engage, in shared humility and constructively, in getting the policy right, and then the words flow.

Lord Maclennan of Rogart: Who in the department should take the initiative in answering questions about the unclearness?

Daniel Greenberg: The departmental lawyer, who is the conduit between the drafter and the policymakers. One of the bits of added value that a good departmental lawyer brings to the process is that they understand exactly what counsel is worried by. They get the point, and they know who to go to in the department to resolve it at policy level.

Lord Pannick: In many of your criticisms, you spoke of lack of clarity and verbosity. It seems to me that the real question is whether that is because of a failure by parliamentary draftsmen to do the job properly or whether the lack of clarity and the verbosity is a consequence of inadequate policy. I am interested in your experience when you were performing that role and the extent to which you were unable to get clear instructions from departments to enable you to do your job properly.

Daniel Greenberg: You almost always did. You almost always could, once you went back to them and you batted it backwards and forwards. I do not want to make it sound too extreme, but sometimes everybody knew that counsel were under huge pressure, that the policy was very difficult and that Ministers wanted huge numbers of things done in an amount of time. Occasionally, I think that is used as an excuse for not trying hard enough. I do not want to overpitch it. I am not saying that that is generally the case, but I think that on some occasions people could have done better.
Lord Pannick: You have the experience and I do not, but I would expect that, if a parliamentary draftsman at a senior level sent back a memo that said, “You have asked me to draft whatever Bill this is and we are having difficulty because we do not actually understand”, there would be political consequences and it would be taken note of. I am just interested in your experience as to whether that is right.

Daniel Greenberg: There are two things. First, I do not think there should be those consequences. As I said before, that is the way it ought to work. Things have not gone wrong when the drafter looks at something and says, “Hold on, I do not understand this”. That is working right, and it is fine. That was my answer to Lord Maclennan. That is the way the balance of the work is meant to run.

As I said to Lord Maclennan, a situation when a department does not play ball properly, and is not interested in getting a good product or helping you to get a good product, is when there should be political consequences. I think there would have been political consequences had that happened to me frequently when I started. There would have been fewer, or softer, political consequences towards the end. That is something, again with all the caveats I gave before, you might want to discuss.

Q54 Lord Norton of Louth: What is the relationship between parliamentary counsel and the Leader of the House as chair of the Parliamentary Business and Legislation Committee? Do you think the role of the Leader could be strengthened in ensuring that Bills fulfil the various criteria you mentioned? One of the problems that was put to us by Sir Richard Mottram was that quite often big beasts in the Cabinet who outranked the Leader would try to steamroller their Bills through. Is there something more that could be done to strengthen the Leader’s role?

Daniel Greenberg: The Leader needs to be a big beast. Many of the best leaders were. I remember working with Tony Newton, who was a Member of this House latterly. Many of you will remember him. He really got drafting. He got the importance of legislation. He got the rule of law. He was a very effective spokesman for us and a very effective player in committing to improving the rule of law and the quality of legislation. Other Leaders did not really get it in the same way and therefore did not do it.

What you say about the relative size of beasts in the Cabinet is certainly one of the changes you may want to look at, not only between the Leader and departmental Ministers but, for example, between the Attorney and departmental Ministers. The dynamics change, and I completely agree with the implications of your question; those dynamics are critical to ensuring that people care about the quality of legislation. If people care, it will happen; if people do not care, it will not.

Lord Norton of Louth: Do you think there is an institutional way of ensuring that? If not, you are dependent, as you imply, on the individual appointed to the office, and that a big beast is appointed. Is there anything else that could be done in a more structured or consistent way?
Daniel Greenberg: I do not think there is. I have one suggestion, but it does not come in response to your question. On your question, I think this is politics. If I do not care about the quality of legislation, I appoint a small beast as Leader of the House. If I care about it, I appoint a big beast. It is that way round. There is nothing you can do to prevent that.

The Chairman: Would you like to give us your small suggestion anyway because we are running short of time?

Daniel Greenberg: That is very kind. It is on the question of bringing in outsiders. Occasionally, there were attempts to bring in outside help to draft legislation. It did not work. A lawyer can be a fantastic lawyer, but most fantastic lawyers are not experts in legislative structure and process. At the moment, to put it as a sketch, we have a system whereby people drafting legislation know all about legislation but they do not know very much about the law that they are dealing with. We have tried bringing in people who know all about the law but do not know about legislation. That does not work very well either. You need to look for serious collaboration, and I do not just mean consultations. We are killing the cat with cream on consultations. There are billions of consultations. I do not mean very kindly allowing them to attend a Public Bill Committee in the House of Commons and being graciously allowed to say what they think. I mean involving them, a bit like an intervener status in a case. It seems to me that you might like to think about giving intervener status in the legislative process to key stakeholders—people who are going to have to make this stuff work and live with it—and find a way to give them a place at the table so that their contributions at drafting level, policy level and enforcement level are not just one more consultation response, but are actually treated as key components of the legislative process as it takes place as you scrutinise the Bill. It is just a thought in my mind, but I think it is something you should consider.

Lord Pannick: Do parliamentary counsel talk to outsiders while they are drafting the Bill?

Daniel Greenberg: Yes, sometimes we do, but it is quite rare and it normally does not work brilliantly in my experience. It is not like when you do a Private Peer’s Bill or a Private Member’s Bill, where you are collaborating with the organisation behind it. They are basically lobbying and they are very cagey about what they can tell you, and you cannot tell them everything. It did not happen often, and it was never as productive as I would have liked.

The Chairman: I must interrupt. We have three questions left and we want to ask them. I am very sorry that time is so short. It is because so many witnesses have been keen to come to talk to us.

Q55 Lord Beith: Is your suggestion not what the Public Bill Committee is supposed to do? I recall in the first incarnation of Public Bill Committees the late Lord Mayhew saying he had taken a Bill through the Committee and had become convinced that not only did it not succeed in carrying out its objectives but it could not even have been made to do so. That is a
rare case, but is that not what should happen in the Public Bill Committee?

**Daniel Greenberg:** Yes, but at the moment they have the consultation bit; they take oral evidence; they let the organisations come and say their piece; and then it is, “Now we will go and do the traditional Committee” and the organisations have gone. You need to have them there in the room when you are doing your line-by-line scrutiny, so that they feed in at that level.

**Lord Beith:** Rather than simply passing notes up.

**Daniel Greenberg:** Yes, that is a joke.

**Lord Beith:** I have one other point. When Sir Richard Mottram gave evidence to us, he spoke of a change at about the time that he was a Permanent Secretary. Prior to that, parliamentary counsel were considered to be incredibly austere figures, to be consulted only when necessary. He spoke about the lawyers in the department being more integrated in the team and parliamentary counsel consulted at an earlier stage. Was there really so much of a change?

**Daniel Greenberg:** There was a bit of a change. There is less of an ivory tower. That is good, and not necessarily good. We were always approachable but with a bit of distance, because we always reminded ourselves that we were the front-line guardians of the rule of law in certain respects and, therefore, there had to be a bit of distance between us and the department. Breaking that down is not necessarily a good thing.

**Lord Beith:** Talking of change, do you think the role of the Attorney-General has changed over the same period in relation to this?

**Daniel Greenberg:** Yes.

**Q56 Lord Judge:** By whom is it decided that provision will be made in primary legislation for delegated legislation? What principles, if any, are applied to the decision?

**Daniel Greenberg:** The choice may be suggested by the department in the instructions. The balance may be initiated by parliamentary counsel. Quite often it is a bit of both. The parliamentary counsel now publish a manual, or a drafting manual sort of thing, which I imagine has stuff in it about the balance between primary and secondary legislation. It is really something where you get a feel with experience about what is right and what is wrong. If you look at things like the public law project case recently, you can tell that the right balance is not quite struck at the moment. That is one of the many things where, if there was real involvement of practising lawyers and stakeholders in the process, I would like to think they would not let you get away with a broad delegation of power of the kind I referred to earlier.

**Lord Judge:** Where will that have come from?
**Daniel Greenberg**: I will tell you what happens with that. It is a bit like civil penalties. You try it once in a Bill where it does not really matter because it is the only thing you can do, and you get away with it because it is appropriate then. Somebody will say, “Oh, that is a good idea. That saves us a lot of trouble. Let us do it”. The problem is that you are all very precedent driven. When it has happened once, the Minister can stand up and say, “I do not know what you are making a fuss about because we did it last week”, so suddenly it is, “Okay, fair enough, we cannot object to that”. Then you find it has become routine. That is a provision that you might very occasionally reckon was the only sensible way to run a piece of legislation. You have now allowed it to become routine, and I think you need to think again.

**The Chairman**: Mr Greenberg, the time available does not do justice to your experience and your wisdom, but let me assure you that your message has come through loud and clear. Thank you very much; we are most grateful.
Dr David Halpern, Behavioural Insights Team—Written evidence (LEG0028)

Summary

- Legislation should be based on the best possible evidence, including exploration of whether there is a better non-legislative approach. There is more scope for asking- and answering - ‘is the best course of action’?
- We have made great progress in improving the use of evidence in policy and practice, through specific initiatives like What Works, and showing in practice how this can work in the Behavioural Insights Team. The UK is increasingly seen as a world leader with respect to the practical empiricism of the What Works approach (and Behavioural Insights).
- However, we could do more to ensure incentives in the system are stacked towards evidence use, for example welcoming rather criticising departments and Ministers when well-constructed evaluations demonstrate something is not working. We should also encourage and welcome Departments and Ministers openly acknowledging areas of uncertainty in our knowledge (and laying down the challenge for the wider research community to help plug these gaps).
- There are major opportunities to extend the What Works approach utilising administrative data, subject to public and political comfort levels, and innovation and evaluation funding.
- Central to a more empirical approaches is the exploitation of natural and deliberate variation in policy design. This is itself premised on policymakers having the requisite skills in methods, hence current efforts to strengthen these through the new capabilities framework for the policy profession, to build a better pipeline of evidence on what works.
- Legislation can support this approach if it allows – or even encourages – testing of variations in its application.

Detail

Rise of experimental Government

1. The idea of evidence-based or evidence-informed policy is not new. Many organisations inside and outside of government have for years been pushing the use of high quality evidence to inform policy and practice.

2. Recent years have seen a massive expansion in the sources of accessible useable evidence available to policymakers and practitioners and the use of experimental methods to help develop and implement policy and practice.

3. At the heart of this shift is the ‘What Works’ movement. The idea is simple: driving better spending by putting clear evidence into the hands of public service professionals and commissioners. This includes: evidence generation and synthesis; translation of evidence into accessible forms, such as summary ‘toolkits’ and guides; and supporting adoption, through increasing the ‘absorptive capacity’ of professionals and policymakers to tell the difference between good and bad evidence.
4. At the core of the What Works movement are seven (and growing) independent What Works Centres. NICE is the oldest and best known, providing guidance on the efficacy of medical treatments. The rest were all created over the last five years, covering education, crime, local economic growth, and broader cross-cutting themes like early intervention, wellbeing and better ageing. More centres are planned, such as one currently being commissioned by the Department for Education on children at risk (with a strong focus on social work and protection).

5. The movement goes beyond external evidence centres to build in an increasing drive towards a broader ‘What Works’ approach. As well as supporting the What Works Centres, the Cabinet Office team lead work to do policy in a fundamentally different way by enabling civil servants to deliberately test variations in approach, robustly evaluating, and identifying areas where ministers can cut things that don’t work. The Cabinet Office also supports the newly created ‘trial advisory panel’.

6. The work has been well received by civil servants, academics, and practitioners. It has also been recognised internationally, with many individual governments and organisations (e.g. OECD) keen to explore how the approach can support better decision-making.

7. Evidence-based approaches are not only well-received but they are delivering. The What Works Centres are being used to drive more impactful spending. Recent examples include:

- Roll out of Body Worn Cameras by police following a What Works Crime Reduction Randomised Control Trial that showed \(\frac{1}{3}\) reduction in allegations against police; fewer complaints; and, 92% of London residents also felt it improved police accountability;
- Drawing directly on the What Works Early Intervention Foundation report on the damaging impact of inter-parental conflict on children’s mental health and long-term life outcomes, the DWP have announced plans to commission £15m worth of evidence-based targeted support for families of the most disadvantaged children. This forms part of a bigger programme of work being developed on relationship support over the life-time of the Parliament.

8. The value of the What Works network is not just borne out in on off results. The institutions are changing the face of professions. For example, the Education Endowment Foundation, was set up to provide advice to headteachers on effective ways to spend the £2bn of Pupil Premium and other discretionary spend. It is a genuinely world class institution with more than 127 large scale trials conducted since 2011 involving more than 7,500 schools (almost 1 in 3 schools) and a toolkit that is used by over 60% of headteachers.

9. Beyond the specific evidence centres, other organisations are building up the evidence base. To give an example in the same educational context, Behavioural Insights Team has recently run some of the largest trials ever
run in Further Education Colleges, showing that small shifts in practice (rather than big legislative changes) can potentially have a big impact. Examples include findings that regular text messages designed to encourage learners to keep going increased attendance by 20 percent and pass rates by 12 per cent, and the ‘Study Support’ trial, in which learners nominate two people to help them, increased College attendance by 11 per cent.

10. This progress has been made on the basis of pull rather than push methods - evidence is put into the hands of decision makers and they can choose whether to use it or not. This is intentional - decision makers are in a far better position to understand the complexities of their operating environment and evidence with universal relevance is rare. Moreover, evidence is only one element of the decision making process - effective evidence-informed policy sets evidence complementary to values rather than in conflict.

11. However we have not been entirely passive in driving the use of evidence, and the Cabinet Office What Works team focuses on how we can shift the incentives towards evidence use within the current systems. One example of the ways we are doing this include working with HM Treasury and others to build in questions on efficacy and evaluation alongside a dialogue on efficiency with departments. There is scope to go further here, routinely building in tests of efficacy evidence into the spending process.

12. Transparency in policy making is another key way we can change the incentives in the system. Assessing the evidence built into policy highlights those who use evidence and build in evaluation as best practice and ensures they have cover and support for this approach (as a counterbalance to the risk of criticism if their ideas are not shown to pay off). We supported the Institute for Government ‘Show your Workings’ framework, which Sense about Science are currently using to assess departmental transparency on evidence. We welcome efforts from within Government to increase transparency too.

**Going further and faster**

13. The current context raises questions for Government on whether we push harder and faster on evidence and experimental based approaches. The rapid pace of technological change means evolution in policy and practice can often outpace the evidence landscape. This is an opportunity rather than a challenge - Online services offer some of the greatest potential for trials and experimentation. There is currently not enough rigorous testing of our digital proposition, even though examples from the private sector show that the scope for this is enormous.

14. The complex environment and pace of change in themselves provides an opportunity. The rise of evidence and experimental approaches depends fundamentally on embracing humility and doubt that we might not know all of the answers. As we enter un-chartered territory, through technology but even more so through the UK’s withdrawal from the EU, this allows for a re-set. We have a chance to fundamentally rethink what is best for UK across many issues and choices, why we have the framework we do and whether
there could be a better way of achieving the same objectives. Nowhere can this be seen more starkly than in Defra, where there is an opportunity to reset the policy landscape and ask questions like what would drive a more effective system, and ask fundamental questions like whether subsidies have delivered the market we think works for the UK or would taxes provide more effective incentives. There is a risk we just shift legislation from EU context to the UK context without testing if there are alternative ways to deliver the change we want to see for post-Brexit UK. The more that we can include the power to trial new approaches the better.

15. Traditionally, legislation has been devised by experts according to an educated guess at how people will respond. That guess is not always right, and unexpected and perverse outcomes are frequent. Opportunities are also missed to achieve a policy end without the need for writing new law. We are also arguably neglectful of the importance of drafting legislation that can be directly understood by those who it is supposed to affect. In some areas this may matter greatly, such as consumer law or regulations aimed at business. The complexity of the language may obscure the ultimate intent, and also create a layer of intermediaries and associated costs to help 'interpret' what the legislation intended.

16. The experimental approach presents a deep challenge to how we design legislation and what its purpose is. Would it have made a difference if the law or the power had been specified in a different way? Traditionally we think about law as applying as applying at all time and to all people in the jurisdiction, not least for reasons of 'fairness'. The empirical, literally experimental approach embodies a profoundly different paradigm of thought. Let an experimenter loose in Parliament, and they might urge the deliberate introduction of variations of a law – ideally on a random basis – across geographical areas or populations. Though this might seem unthinkable, softer versions of the approach are possible. One can look at thresholds at where a law bites, to see the impact it has over this boundary (a so-called 'discontinuity design'). We can allow deliberate variations, within a certain range, that enable experimentation and learning, and rapid adaption in secondary legislation or operational practice. In short, we don’t have to kid ourselves that the legislation is perfect first time, because we have built in mechanisms for variations on it to be tested and refined.

17. Another, related alternative is to seek to adopt forms of rapid experimentation that can be folded into Parliamentary processes and timetables, especially around implementation details that can matter greatly but that legislation is often inattentive too or inadvertently squeezes out subsequent flexibility (for example, right-to-buy legislation literally specifies the forms that are to be used, leaving little room to test whether a simplified or alternative version would encourage take-up). A nice example of real-time experimentation to inform legislation in the USA is the work of Harvard researcher Christiana Roberto on the subject of food labelling. As options were being debated in Congress, she and her team set out to test the options being discussed in real-world contexts, generating results fast enough to feed back directly into the legislation itself (for example, the impact of calorific labelling in restaurant settings turns out to be strongly affected by
whether the numbers are put on the left or the right!). We need to reach a position where there is flexibility to build in this kind of nuanced testing of approach to every policy choice. Some departments and ministers have gone further and faster than others to build in powers of experimentation, but the role of the Lords in providing the right challenge but also the right vision of how policy could and should operate are clearly critical here.

18. The assumption that policy makers and Government are best placed to face this challenge alone is misguided. **Public engagement** with policy and legislation could address some of the disengagement and feeling that the system has not delivered which was clearly signalled by the referendum. And, quite simply, it can drive better policy. We can learn from examples like the Victoria Health deliberation forum on obesity. The initiative brought together a sample of the public with experts, policymakers, community groups and industry to learn and deliberate – and resulted in 20 citizen led ‘asks’ of government, industry and civil society. Closer to home, the UK’s Red Tape Challenge incorporated a lighter touch version of this, but at a larger scale, exposing large volumes of existing regulation to phased scrutiny by the public, interest groups and policymakers. There is scope to take this idea further in many ways, from abrogative referenda (allowing regulations and laws to be post-hoc challenged) though to formal incorporation of small deliberative forums in the legislative process (a ‘people’s parliament’).

19. Finally, there is still scope to go further to ensure that the exploration of the evidence is more routinely built into our systems and practice across Whitehall and Westminster. International examples give a sense of how this could be achieved on a bigger scale:

- A shift towards directly linking funding to initiatives that are proven to be effective. A precedent here is the ‘Obama fund’ $650m with small grants available for promising ideas, medium sized grants to validate and large grants to scale What Works
- Canada has been ring-fencing budgets for experimentation to build the evidence base. They are linking a fixed proportion of funding (proportion tbd.) to experimentation and ministries will need to demonstrate that they have been actively experimenting.
- The creation of more internationally based What Works platforms that enable legislators and others draw on the most cost effective and impactful interventions across the world.

*November 2016*
Dr David Halpern, Behavioural Insights Team, Cabinet Office—Oral evidence (QQ 16-28)

Dr David Halpern, Behavioural Insights Team, Cabinet Office—Oral evidence (QQ 16-28)

Transcript to be found under Jonathan Breckon, Alliance for Useful Evidence
Mr Martin Hoskins, former Specialist Adviser to the Joint Committees on the Draft Investigatory Powers Bill and the Draft Communications Data Bill—Oral evidence (QQ 76-88)

**Mr Martin Hoskins, former Specialist Adviser to the Joint Committees on the Draft Investigatory Powers Bill and the Draft Communications Data Bill—Oral evidence (QQ 76-88)**

Transcript to be found under The Rt. Steve Webb, former MP and Minister of State for Pensions
Immigration Law Practitioners’ Association—Oral evidence (QQ 36-41)

Alison Harvey, Immigration Law Practitioners’ Association, and Peter Jorro, Barrister, Garden Court Chambers

Wednesday 16 November 2016

Watch the meeting

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 Maclellan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

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Examination of witnesses

Q36 The Chairman: You will have heard me say to the outgoing witnesses that we have a packed programme today. It is the story of our lives these days, for reasons that you will understand. There is a lot of constitutional stuff going on at the moment. That does not in any way diminish our gratitude to you for coming to see us. You both have enormous experience in the immigration field, and we are keen to learn more about it. Thank you, Ms Harvey, for the paper that you produced. I said to the Committee that it was one of the most depressing papers that I have read for a while, but that in no way detracts from its quality and value. We are very grateful.

We have a number of questions to put to you. I will start with the first one. Ms Harvey, your association has been forthright in criticising immigration legislation. Do you think the criticisms spring from lack of clarity or consistency, or could it be disagreement with the objectives of legislation? How would you define the way in which your criticisms emerge?

Alison Harvey: We disagree with many of the objectives of legislation, but after so many years there is a whole separate vein of frustration about the quality and clarity of legislation. The clause whose content I like least, in any Bill, is the ouster clause of 2004. In drafting terms, it is my favourite. It gave the Government of the day exactly what they wanted—the death of the rule of law—and did it so clearly and lucidly that no Parliament could ever have passed it.

The Chairman: That is the sort of criticism we were expecting to hear from you. Mr Jorro, would you like to add anything as a general view?
**Peter Jorro:** Yes. Part of the issue is that immigration law is peculiarly political, so you are immediately taking a side. A lot of policy that becomes legislation is effectively announced at party conferences.

Aside from that, there is also the business of the constant changes. A particular issue for me, as a practitioner, is the appeal rights. Back in the days when I started practising in the area, appeal rights under the Immigration Act 1971 were quite limited. Legislative changes brought in more and more appeal rights—merits appeals—and then legislative changes took them away. That kind of approach, with constant changing, makes it very difficult, for example, for practitioners to advise people on how things will be in the future.

It is incredibly abstruse. We now have a large number of Acts of Parliament dealing with immigration. By some calculations, there are 14 or 15 of them. There is a very strong case for consolidation, and for less regular changes to it all. It is so driven, from such a strong political point of view, that we have major Acts of Parliament dealing with immigration every two years. Before that, it was every three years. For a long time, there did not seem to be that need. Between 1971 and 1988, there were just two Acts. Since then, through the 1990s and the 2000s, the Labour Government, the coalition Government and now the Conservative Government have kept changing the law, often by giving something—appeal rights are of particular interest to me—and then taking it away, with no obvious policy benefit or anything else for that.

We need consolidation and clarification. There is now the problem that senior judges in the Court of Appeal, in a recent case involving a particular piece of legislation about extending the right to remain while appeals are going forward, are criticising how abstruse the law has become in this area and are crying out for clarity. A lot of people—litigants—need to know what immigration law is without having to go to expensive lawyers, who themselves have to go through huge numbers of different provisions in order to advise them, often on a provisional basis, because it might change next year.

**The Chairman:** That echoes other criticisms that we have heard.

**Lord Beith:** Am I right in thinking that one of the reasons for this very frequent legislation is that the Government lose so many cases that they are therefore constantly firefighting, trying to put law into what they thought they or their predecessors had done in the first place? That probably arises because when the law was originally drafted not enough thought was given, for example, to interaction with the European Convention on Human Rights or other international rights. The law was inadequate in the first place, so the Government constantly return to it as a result of cases that they have lost, which undermine their policy objectives.

**Alison Harvey:** That can be true, but the case to which Peter has just referred was one where the Government argued a position we would have agreed with. The Court of Appeal disagreed. The case is now pending before the Supreme Court. During the passage of the Bill, we brought forward amendments to give effect to the position the Government had
argued for, but they said, “No, we have decided that we can live with what the Court of Appeal has done”. The confusion and the abstruse nature of the law therefore remain.

There are a number of examples where, if there was a problem in court cases, it was very often a problem that Committees such as this one described when the legislation was going through. They said, “You are going to come under attack. That is not going to stand up to challenge”. It was passed none the less, and, lo and behold, it comes back to court. Often, the solution is not to take stock of that. We have a huge amount of legislation since the early 2000s drafted to say, “Do X, do Y and do Z, unless to do so would be a breach of human rights”. Rather than trying to make your legislation human rights-compatible in the first place, you put in that human rights longstop. The only way you sort out what the longstop means is by litigating.

Q37 Lord Judge: You have described a nightmare situation. Let us have a happy dream. Tell us, shortly if you can, what good immigration law would look like.

Peter Jorro: Obviously, there will always be people who do not like the effect of it. We will put that aside, because I take your point.

The Chairman: Forgive me, could you speak into the microphone? The acoustics are not good in this room.

Peter Jorro: I am sorry. Obviously, there will always be people who object to the effect of good immigration law, but that is a separate issue. We accept that. The starting point for good immigration law is a consolidated statute. That is now increasingly imperative, so that you can look to one thing: an immigration and nationality Act that incorporates all the current provisions in the current levels of law and sets out the basis of powers for those who control immigration and the rights of individuals affected by it, so that it is all set out as much as possible in statutory form.

With immigration law, you have to understand that you have the statutes—multiple—and numerous statutory instruments putting them into effect in various ways. You also now have this enormous thing called the immigration rules. A few years ago, you could set the immigration rules in a document this big. Now it is like this—entirely prescriptive. All of that is problematic from the point of view of good administration. Clearly, what you want is for people who are affected by immigration law to be able at least to see the basic provisions and to find them reasonably easily on the internet, without having to go through enormous research levels. Good immigration law would be consolidated, preferably in a single statute—obviously, you would have to have statutory instruments and immigration rules—and would set out the broad powers and rights. I would also like proper merits appeals provided for in that statutory scheme.

Q38 Lord Maclellan of Rogart: The existing complexity of immigration law and the frequency of changes make it difficult for applicants to know where they are. What changes would you propose in the Government’s
approach to immigration legislation?

**Alison Harvey:** Consolidation would be the big one, because you do not know what you do not know. That would make a huge difference. The rules are a tremendous problem. Every time you change the rules, you have to deal with people already in existence, so every layer of primary and secondary legislation is complicated by transitional provisions. People read things and think that they apply to them, but they do not. Simplified versions of explanations on the Home Office website simply mislead people. They read that they have to put in their bank statements. Only by going through several appendices of the immigration rules will they learn that printing off their bank statements from the internet, if they only have an online bank, is not satisfactory; they have to have a letter from the bank to validate them or they will be rejected. Ordinary words turn out to be terms of art.

We are in the place we are in with the immigration rules because a Supreme Court judgment said that you cannot have mandatory grounds for refusal in guidance; they must be in the rules. Overnight, the immigration rules grew by hundreds of pages. They have continued to grow ever since, as the Home Office spots more and more mandatory grounds for refusal. If it merely gave itself the discretion to exercise judgment, none of those things would need to be in the rules, because they would not be mandatory. Instead, the only provision for the exercise of discretion in the rules is for discretion to be used against you—extra grounds on which, even though you tick all the boxes, you can be refused, rather than extra grounds on which, despite not ticking a box, you can be accepted.

**Lord Maclennan of Rogart:** Who do you suggest should initiate the consolidation?

**Alison Harvey:** We have asked the Law Commission. We have sought repeatedly to interest it. I have just sent off our briefing for its 13th programme of law reform, to try to tempt it. In the first instance, there has to be a pure consolidation, because I do not think there is parliamentary time to deal with something that is not a consolidating Bill. Despite all the flaws in the current legislation, step 1 is to put it all together and get it into one Bill. We can then work towards the second stage, which would be a simplification and producing the Bill that Peter described. We will only get parliamentary time if we do a consolidating Bill.

**Lord Pannick:** Do you think that clarity and other objectives might be achieved if the Home Office no longer had a power to make rules but had to produce a statutory instrument that went before Parliament, or would that make no difference?

**Peter Jorro:** It is an interesting proposal. There is a very interesting debate, of which my Lord will be very aware, on the exact role and legal status of the immigration rules. On one level, they are Home Office policy to be applied. Obviously, the Home Office will say that it is doing a good thing by showing in its rules what the policy is. It will always have the point that there is provision to go outside the rules, under the primary
powers in Section 3 of the Immigration Act 1971, which will still be there. As to whether it would make much difference if it had to go through statutory instrument, the main point is that, hopefully, that would provide for greater scrutiny of changes by Parliament, and that can only be a positive thing. I would support a greater scrutiny role through secondary legislation rather than rules.

Alison Harvey: Within the immigration rules, there are provisions of different importance. There are the incredibly banal statements about bank accounts and some big, thick concepts. At the moment, they all sit on the same level. Because they are so massive, when they are laid before Parliament—they can be opposed through debates in Parliament—there are so many different things that you end up homing in on just one. There are pages and pages of legislation that never get scrutinised, and will cause all sorts of problems.

Baroness Taylor of Bolton: I want to follow up what you said about discretionary powers. I can see why you said it. If we are trying to have clarity for applicants, yet there is more discretion, the clarity ceases to be as clear.

Alison Harvey: That was probably the idea of the points-based system. It was trumpeted as a big simplification—people would be able to go on to the website and work out whether their application would be accepted or refused before they submitted it and spent their £1,000 on putting it in. It has not worked like that. It is so technical and complicated. We mostly see people who have been refused because they failed to understand those rules, which are incredibly difficult to understand.

Peter Jorro: The idea of the points-based system was to take discretion away from decision-makers, because people simply score points or they do not. The problem was that, to an extent, it made it easier for people who were trying to play the system to know what they needed to do to score the points. People who had a genuine application to come here that was beneficial economically to the country could be refused because of some minor failure in the point-scoring, whereas somebody who was trying to play the system, but knew exactly what they were doing with the point-scoring, could score the points. The Government realised that, of course, so they reintroduced discretion, whereby there was the business of refusing, for other reasons, the people who had scored the points, with the result that the thing went around in a great big circle again.

Baroness Taylor of Bolton: That is discretion for refusing, not discretion for accepting.

Peter Jorro: No—

Alison Harvey: There is none of that.

Peter Jorro: There is an overriding discretion. The Secretary of State for the Home Department can grant anyone leave to enter or leave to remain in this country, on any basis she chooses. That is provided for by the Immigration Act. It would be a mistake to try to take that away. The overriding discretion is a good thing. That is a separate issue from the
sort of clarity that we want from the point of view of people seeing what they need to be able to show the immigration determiners, in order to be able to gain entry or to stay.

Q39 Lord Beith: To round off the parliamentary point, in your paper you gave us a very helpful history of the sad story of the 2008 simplification Bill. You are firm in your view that a consolidation Bill should be attempted in the first instance and that any attempt to change the law by way of that would sink the project.

Alison Harvey: Yes. That is the main reason why that one sunk. There was a desire to change the law at the same time as consolidating it. That is what killed it.

Lord Beith: Would it make a significant difference to the quality of immigration law if there were greater policy, legal or drafting expertise in the Home Office?

Alison Harvey: There is some tremendous expertise in the Home Office. There are people who have been doing this for many years and they know an incredible amount. There are simply not enough of them for the volume of legislation. Some of it is being done by people who do not have that expertise. When you are turning out secondary legislation and rules to the extent that the Home Office is, you could do with a drafting team who have the same skills as parliamentary counsel.

So much has been devolved to statutory instruments. In the most recent Immigration Act, the policy on asylum support, for example, which was changed in the course of scrutiny, was not fully worked out by the time the Bill completed its passage. You therefore have this incredibly portmanteau legislation, to leave room to go in different ways. That will happen in statutory instruments, and much will depend on how well they are drafted. Either parliamentary counsel’s time has to be found to draft the Home Office’s statutory instruments, which is probably not possible given the number it produces, or it must have that kind of expertise in-house.

Lord Beith: Primary legislation can be amended in either House, and regularly is. Secondary legislation, in almost all cases, cannot. Does that make a difference to the quality, and to dealing with potential drafting errors in secondary legislation?

Alison Harvey: It makes a huge difference. If you look up the immigration rules on the website, you find that nearly all of them have erratum slips, and some are very lengthy indeed. With secondary legislation, the problem is that we see it only when it is laid before Parliament. We get in touch with the Home Office, as we did on the commencement order for the 2016 Act, and say, “You have made a mistake. You are going to turn this cohort of persons into criminals on the day that comes into force”. It had to scrabble around and produce a separate transitional provisions order. If you had been able to amend it, you could have slotted a clause into the commencement order and solved the problem we had identified. It was not controversial.
Peter Jorro: There is obviously a case for greater consultation at an early stage, with the Practitioners’ Association, for example. I accept the point that was made earlier that there is a tendency for people who oppose legislation to reply more readily to consultations. If there were a greater channel between the Home Office and, for example, Alison and the Immigration Law Practitioners’ Association, things could at least be set out. The Government have to make policy, and that is understood, but if there was greater consultation at an earlier stage of the drafting with those who, after all, practise in the courts and advise people who are affected by it, it could be very helpful for all concerned, without surrendering any of the policy considerations to such an organisation.

Alison Harvey: We generally try to meet the Bill team, or open channels of communication, as soon as we see a Bill, to raise anything that we think is a technical problem. Rather than going through the Chinese whispers of someone tabling an amendment and a Minister responding, we go direct to the official and say, “We think you have got that clause wrong. We think it should say this”. We get a fair amount sorted out in that way, but it only starts when we see the Bill.

Lord Beith: It only works with Bills. It does not work so well with statutory instruments.

Alison Harvey: No. With statutory instruments, we do not usually see anything until they are there. We just have to wait. Of course, we do not always spot them. There are so many that you can come across one at a very late stage, or even when it has gone through.

The Chairman: Despite the difficult issues you have to deal with, are your relations with the Home Office satisfactory, from your point of view?

Alison Harvey: They vary from bit to bit of the Home Office. With Bill teams, they have always been fine. We have always had very good communication. They have taken time, even when they are incredibly busy, to answer our points, even when we have got it wrong.

Q40 Lord Norton of Louth: In a way, my question builds on what you were saying about consultation. What more can be done to ensure that there is greater engagement with stakeholders and those outside? In your paper, it is quite clear that you are not enamoured of the consultation process. When it takes place, it is rushed, you say. I get the impression from what you say that it is not really consultation; sometimes it is a selling exercise. What more could be done, and at what stage, to engage with those outside?

Alison Harvey: I would like to see some process of scrutiny of consultation documents, so that they are not allowed out when they are spin and misrepresent the evidence, and they are exposed to some quality control. Last night, I spent hours going through the impact assessment of the Ministry of Justice consultation on accelerated appeals in detention. It is a disgrace. It simply is not evidence. Those are not numbers. There is more discussion of why there is no evidence than of evidence.
Leading questions ought to be challenged. In my paper, I gave the example of the health charges consultation, where the Department of Health and the Home Office plainly could not even agree on the degree of spin and produced different consultations, of which the Department of Health paper was a vastly superior beast. I would like the opportunity to see drafts and be consulted on them.

Earlier, you talked about technology with the previous witnesses. The SurveyMonkey approach to consultation, where government count responses, has led a number of people outside to think that the more responses they make, the better. That completely overwhelms the civil servant wading through responses from 50 organisations saying nearly, but not quite, the same thing. If we could all get together and accept that less is more, we could get out of that headcount habit.

**Peter Jorro:** My personal experience of responding to consultations on behalf of Garden Court Chambers, for example, is the one that Alison described: we are all doing it separately because of the feeling that somehow more is better. In all the ones I have ever done, there is also the feeling that, whatever you say, the Government will go ahead with what they were going to do in the first place. That may be unfair, but my personal experience of a number of responses to consultations is that you feel that you are going through the motions. Whatever points you make, however good you think they are—that is obviously an issue—it will not make any difference, as they are going to do what they are going to do: most recently, for example, to raise significantly the fees for appeals. I have not had a happy experience of consultation.

**Lord Norton of Louth:** Is there more that could be done? There is your point about evidence and greater transparency in what government brings forward. You also make the point that, when there are consultations, you should look for quality, rather than quantity, in the responses. Is there more we could do on process to ensure that there is greater openness, more consultation and greater engagement with stakeholders, so that it is not just a case of, “Oh, we had better hold a consultation for the sake of having one”?

**Peter Jorro:** For example—I do not know this; it is something all of you will know much more about than me—when the Government put forward a proposal that is then put into a statutory instrument, they consult, so people such as Alison and, sometimes, me put in our view of it. To what extent is that then shown to the legislators? Do they get the benefit, if that is the proper word, of the views of the consultees, or does it effectively mean that the Government do their consultation, that they themselves decide, “We have read everything that everybody else has said, but we are going to do it anyway”, and then they put what they were going to do anyway through the legislative process? Would it be beneficial if those who were legislating had sight of all the consultation?

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109 Mr Jorro contacted the Committee later to add that on 25 November 2016, the government announced “that it had decided to take stock, and review the level of fees payable for lodging immigration and asylum appeals, in light of representations made” see [http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-11-25/HCWS284](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-11-25/HCWS284)
responses, of what other people out there were saying? I do not know, but it seems to me a sensible thing. In other words, it would not simply be between the consultees and the Home Office.

**Alison Harvey:** I would particularly pick out the devolved Administrations. When immigration legislation starts to overlap with, encroach on and discuss areas within the competence of the devolved legislatures, generally everyone gets the England model. For example, in the latest Act, there was an extension of powers to give immigration officers multi-entry search warrants. Multi-entry warrants are not permitted in Scotland. Someone realised that at a late stage of the Bill and in went what I call the "Oops, we forgot Scotland" amendment. The job of looking for that is now shared among more people; it used to be Lady Carnegy of Lour, virtually on her own, going through every Bill to spot where Scotland had been forgotten. It would be much more sensible to say, "In England and Wales, we have multi-entry warrants. In Scotland, we do not. Which is most suitable for immigration officers? Which model should we follow?" because it is a power across the whole of the UK. That is never done. We should draw on those different experiences. The legal aid legislation did not look at the very different Scottish model, which was the best pilot we had to consult. It is not only groups such as ILPA; other government experience is not being drawn on to the extent it could be.

**The Chairman:** We have just enough time to squeeze in one last question.

**Q41 Lord Brennan:** If we are leaving the European Union, what is your view of the effect of that on legislation about immigration?

**Peter Jorro:** It is interesting. Basically, the current approach is that, because of provision in the Immigration Act 1988, people who are exercising treaty rights vis-à-vis the European Union are exempt from current immigration controls. On one level, one might say that, to the degree to which that starts to disappear, current immigration legislation will apply to more people. On the most simplistic level, it will not have a significant effect, because it will all be about transitional provisions within the European Economic Area regulations.

There are obviously issues to do with how you will have border control in Ireland, which, after all, is a large part of the Brexit issue. There are devolved issues between Scotland and Ireland. Will you have border control between Northern Ireland and the Republic of Ireland? What will the legislative effect of that be? There could be issues. In overall immigration legislation, the provisions about the European Union will be taken out, in a sense.

**Alison Harvey:** The latest European regulations are consolidating—they are wonderful from that point of view—but we have seen provisions in them that, on their face, we simply think are unlawful. There are provisions on the abuse of rights that run directly contrary to the judgment of the Court of Justice in Akrich. We simply anticipate that the sums have been done that we will not get to the Court of Justice to
challenge those provisions before we have left the EU. That is a worrying
tendency and exaggerates an existing trend.

Again, the devolution aspect is relevant. The Government in Westminster
say, “If it is immigration, it is reserved”. The Administrations in Scotland,
Northern Ireland and Wales say, “Hang on, this is housing. This interferes
with law on housing or children. That is devolved. It is us”. Peter
described the simple version, but if the rights of European nationals are
not simply that they are treated as third-country nationals after Brexit,
and an attempt is made to give special privileges either to those already
here or to those already here and those who will come, the question of
the division between Westminster and the devolved Administrations may
determine who gets to decide whether they keep special privileges. Does
Scotland decide whether they are not treated as third-country nationals
for housing purposes, or does England and Wales?

Already we see Brexit occupying a huge amount of Home Office time and
energy, and siphoning off a lot of its talent, because it is the most
interesting thing to work on that anyone has seen. If we seek to give
European nationals special privileges, the task will be massive.
Potentially, we face documenting 3 million people in a process that will
involve deciding their applications. We will have to have a simple process
to do it, but if we have a simple process, we will be revisiting it later
saying that people got in who should not have. The scale of the chaos
that it could cause is immense.

Lord Brennan: What steps are your organisation and people like you
taking better to inform government and the people about what is going to
happen and what is involved?

Alison Harvey: Before the referendum, we commissioned a series of
papers from experts—people such as Professor Elspeth Guild, Professor
Bernard Ryan and Nuala Mole. Those are on our website. We have built on
those and on that group of experts to reply to some—alas, not all—of the
Select Committees consulting on immigration and Brexit. For example, we
have done a paper on the Irish border issue and papers for the EU Select
Committee. I have a paper for the Justice Committee. We are really trying
to get those papers out.

The EU position papers were deliberately written for non-lawyers and
deliberately kept to four sides in length, so that they introduced people to
the issues. We have tried to provide some information. For example,
Professor Guild has just written a paper for us on the common
immigration policy, which will set the floor for British citizens’ rights in the
EU following Brexit. It may not set the ceiling, but it will be the minimum:
your rights on long residence, your rights to family reunion and your
rights to move as a skilled worker or student. Because of the common
immigration policy, British nationals in the EU have a degree of certainty
that EEA nationals in the UK do not have. Because the UK, with Ireland
and Denmark, opted out, it is not well known in the UK, so people
presume that everything is up for grabs in a way it is not.

The Chairman: That is where we must draw things to an end. It has
been an enormously helpful session. You have been very informative and
you have shared your experiences and frustrations with us. As witnesses, you complemented each other very well, so we have had some really good answers from you. Thank you very much.
Introduction

The Immigration Law Practitioners’ Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

ILPA has been closely involved in the passage of immigration legislation since the organization’s inception. Its legal director, Alison Harvey, has worked on every piece of immigration legislation in parliament since the Asylum and Immigration Act 1996. ILPA’s involvement has included:

- Responding to government consultations, whether in writing or through attendance at meetings at the green paper and white paper stages of legislation and before;
- Proposing to government changes that it might wish to introduce through legislation in the field of immigration and asylum;
- Providing written briefings to parliamentarians on Bills introduced;
- Meeting with parliamentarians, in groups and individually, to discuss Bills introduced;
- Proposing amendments, drafting these and providing briefing
- Coordinating NGO and other work on Bills;
- Liaising directly with the Bill team to raise concerns and make suggestions, including commenting directly on drafts proposed to address problems identified.
- Advising from the opposition advisors’ box during debates

ILPA contributed to the Hansard Society’s 2008 Report Law In the Making and has worked closely with the House of Lords’ Delegated Legislation and Secondary Legislation Scrutiny Committees to draw to their attention failings of the legislative process.\(^\text{110}\)

It is difficult in the field of immigration to make a meaningful distinction between the pre-legislative and legislative stages of a Bill because of the extent to which wholly new matters are introduced into Bills, by government, not to mention by the opposition amendments, during its passage. Some of these are measures

government fully anticipated, when first it tabled the Bill, would be added to the Bill during its passage.

The proposals for tackling exploitation in the labour market were the subject of a consultation which ran from 13 October 2015 to 7 December 2015 in parallel with the passage of the Act through parliament. ILPA responded to the consultation and was among 93 agencies, including statutory organisations, trade bodies, labour providers, trade unions and non-governmental organizations to do so. The Bill as introduced to parliament on 17 September 2015 contained only outline provisions about the new role of Director of Labour Market Enforcement with many provisions introduced, following the consultation through government amendments to the Bill, in a 54-page document, for consideration at the first sitting of the House of Lords’ committee, with 100 further government amendments at House of Lords’ report stage, drawing criticism from parliamentarians about the reduced opportunity for scrutiny. Amendments to Part 5 of the Immigration Act 2015, dealing with asylum support, were introduced during the passage of the Bill. Parliamentarians, and those outside parliament, struggled to make sense of the cumulative effect of successive waves of amendments. Much of the detail of the support provisions is left to regulations and the impression was that this was in large part because the policy had not been fully worked out. A further consultation is expected. Yet we identify no practical imperatives why the Bill could not have waited for the matter to be resolved.

While in what follows we have sought to choose examples from recent legislation, the pain of which is more likely to be fresh in people’s minds, we do not consider that the problems we identify are in any way particular to one (or more) political parties being in government and every point we make could be made in respect of any immigration act since 1996. We are happy to provide further examples if the committee has the stamina to hear them.

1. **How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?**

   In the field of immigration, they are not. It is to that field of law that we confine our remarks.

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114 See e.g. HL Deb 8 Jan 2016: cols 524-5 per Baroness Hamwee.

115 A number of which, following trenchant criticism by the House of Lords Select Committee on Delegated Powers and Regulatory Reform, are made subject to the affirmative procedure, see Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2015/16: Immigration Bill, HL Paper 73, 22 December 2015 at: http://www.publications.parliament.uk/pa/id201516/idselect/iddelreg/73/73.pdf.
Consultation
Problems start early, at the consultation stage. The process of ‘green paper’ then ‘white paper’ has largely been lost. No coherent proposal for a piece of draft legislation is produced. Instead there are one-off atomised consultations on elements of such legislation which is no longer conceived of as forming a coherent whole, as the short titles (pre-amendment) of the Bills which became the Immigration Acts of 2014 and 2016 attest:

Bill 110 of session 2013-2014 (subsequently the Immigration Act 2014):
  Short title
  Make provision about immigration law; to limit, or otherwise make provision about, access to services, facilities and employment by reference to immigration status; to make provision about marriage and civil partnership involving certain foreign nationals; and for connected purposes.

Bill 74 of session 2015-2016 (subsequently Immigration Act 2016):
  Short title
  Make provision about the law on immigration and asylum; to make provision about access to services, facilities, licences and work by reference to immigration status; to make provision about the Director of Labour Market Enforcement; to make provision about language requirements for public sector workers; to make provision about fees for passports and civil registration; and for connected purposes.

The shape of these ‘baggy’ bills changes during their passage through parliament as new provisions, some not consulted on, are added.

In the final version of the short title of the 2014 Act the words “to make provision about the acquisition of citizenship by persons unable to acquire it because their fathers and mothers were not married to each other and provision about the removal of citizenship from persons whose conduct is seriously prejudicial to the United Kingdom’s vital interests” were inserted, reflecting a radical change to the Bill during its passage through parliament. During debates at Committee stage of the Bill, it was accepted by Ministers and opposition that citizenship was not within the scope of the Bill; when government wanted to introduce deprivation of citizenship provisions at report stage, suddenly that was not the case. There was scare any chance to raise the question of the scope of the Bill. Drafts of the Home Secretary’s proposals were circulating by early December 2013 but the amendment was tabled at the eleventh hour, the day before the Commons report and third reading. Mention is made on the parliamentary record of ILPA’s having briefed through the night to inform that debate.117

In the 2016 Act the words “to make provision about the enforcement of certain legislation relating to the labour market” were substituted for ‘to make provision about the Director of Labour Market Enforcement’ in the short title, reflecting a broadening of the scope of the Bill to matters only tangentially related to immigration.

To have targeted consultations on parts of draft legislation it not an ill in itself, but it would be helpful to have a consultation that placed these within a (preferably coherent) whole. Meanwhile, the content of those atomised consultations is of

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117 30 Jan 2014: Column 1055.
concern. A good consultation process will set out the evidence and propose alternatives. It will often be the fruit of research. It is hard to find recent examples of this, but an older one would be the Cabinet Office’s Identify Fraud: a study of July 2002.

Increasingly Home Office consultations are designed to sell a policy and include ‘spin’ and leading questions designed to allow the Government response to the consultation to say “X% of respondents agreed with the statement”. ILPA responses to such consultations are frequently peppered with "This question does not admit of a yes or no answer."118 The use of forms and drop down menus means that only the most determined of respondents can avoid answering ‘yes’ or ‘no’.


ILPA had already protested during the research at the very small number and narrow range of persons selected for interview, expressing particular concern at the lack of representation of those outside London and at the quality of the interview with the ILPA’s Legal Director, Alison Harvey, where the interviewer had appeared rushed and disinterested. The dominant trophy in the final report is apophasis: while claiming not to draw conclusions as to the effect of the Legal Aid Sentencing and Punishment of Offenders Act 2012 from a cohort of cases, the majority of which are not proceeding under the funding regime established by that Act, the document repeatedly does so. Other errors included making no attempt when describing represented and unrepresented applicants in the tribunal to identify how many of those applicants had representation funded by legal aid and how many were privately paying.

It is instructive to look at the parallel Department of Health119 and Home Office120 consultations on immigration health charges. It would appear that the two departments could not agree on the presentation of the evidence and questions to be asked and therefore had to issue separate consultations. The Department of Health Paper is a more careful and measured presentation of the evidence, the Home Office paper is more politicised, and peppered with leading questions, as demonstrated by ILPA’s responses, for example

1. Should all temporary migrants, and any dependants who accompany them, make a direct contribution to the costs of their healthcare? (Yes / No / Don’t know) [Equivalent to Department of Health Question 6]

118 See for example ILPA’s 14 April 2008 response to the Path to Citizenship green paper. The problem is not confined to immigration; see for example ILPA’s 24 January 2013, Response to Ministry of Justice Consultation on Judicial Review.


120 Home Office consultation, Controlling Immigration – Regulating Migrant Access to Health Services in the UK, July 2013.
The question does not admit of a yes/no answer because it is misconceived. The category of "temporary migrant" is misleading: large numbers of persons with limited leave are on a route to settlement. Such persons, along with other migrants whose stay is temporary, already make such a contribution through the payment of taxes: on income and Value-Added Tax, etc. and payment of National Insurance contributions. Income from taxation in the UK is not hypothecated and in such a context the language of a "direct" or "indirect" contribution is misleading.

Consultation papers often come at a very short notice, with tight turn-around times and results that appear too late. The loss of the Cabinet office guidance requiring a 12-week consultation period is lamented. All the more so because rarely, if ever, are we given advanced notice of consultations with a short turn-around time. Instead we are expected to drop everything when they appear. It is necessary to be very selective in the responses attempted, to avoid the risk that responses become as thin as the consultation papers themselves, full of opinion not evidence. There is a view among many respondents to consultations that because government will count responses and set out the percentage of respondents in favour or against a certain measure, more is more and many, separate responses are desirable. This leads to officials wading through a mass of, all too often similar but sometimes contradictory, responses rather than a smaller number of better pieces of work to which they would then have time to respond. Government has, we fear, made a rod for its own back.

We draw special attention to the Ministry of Justice consultation Immigration and Asylum Appeals: consultation on proposals to expedite appeals by immigration detainees of September 2016, which closes on 22 November 2016. The detained fast track was suspended following a series of judgments that it carried an unacceptable risk of unfairness, including that the fast-track procedure rules were ultra vires the powers of the Tribunal Procedure Committee, which has the power to make procedural rules ensuring that justice be done and that the tribunal system is fair. By “allowing one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision”, the rules were not securing these objectives and the Committee was acting out with its powers.

Pressed, very hard, by the Home Office, the independent Tribunal Procedure Committee, which makes rules for tribunals, including, following a battle with the Home Office, the Immigration and Asylum chambers, consulted on whether it should make rules for appeals in a new detained fast track. It concluded that it should not and Mr Justice Langstaff wrote to the Home Office to this effect on 12 February 2016. The Ministry of Justice consultation bears a striking resemblance to the submissions the Home Office put before the Committee. It purports to be

121 Written Statement made by: The Minister of State for Immigration (James Brokenshire) on 2 Jul 2015.
to ‘gather additional evidence to help Government formulate policy and...to be able to assist the T[ribunal] P[rocedure] C[ommittee] by providing a considered Government Policy position which has taken consultation responses into account.’

Do you agree that the Government should take power in primary legislation to introduce and vary time limits for different types of immigration and asylum appeals?

In other words, do you agree that the Government should continue to arrogate to itself the role of the independent Tribunal Procedure Committee? This is consultation as threat.

**Drafting**

We see no reason why organizations outside government such as ILPA, with relevant expertise, should not be consulted on first drafts of proposed legislation, not just on policy principles. We often have technical comments to make which are only possible to identify when we see the legislation. We are also in a position to spot problems. This can be illustrated by comments on drafting we have made during the passage of Bills.

During the passage of the Bill that became the Immigration Act 2014, ILPA spotted that the way in which the Home Office had drafted its appeals provisions meant that it would not be possible to bring an appeal against a decision to refuse entry to the UK on human rights grounds, and thus it would not be possible to bring such an appeal at all, given that out of country appeals were to be limited to human rights grounds, if the Bill came into force.

While we did not agree with the loss of appeal rights, we had no wish for our clients, ourselves, judges, tribunal judges and the Home Office to have to grapple with defective legislation. We raised the matter with the Bill team, who confirmed that it was the Government’s intention that the Bill provide for an appeal against a refusal of entry (e.g. to join a spouse, partner or parent) on human rights grounds. We proposed an amendment for the Public Bill Committee; the

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125 Paragraph 12

126 See the Immigration Act 2014, s 7, which enjoins upon the Tribunal (and the Special Immigration Appeals Commission – see Schedule 9, Part 2, paragraph 10) to make rules to prohibit repeat bail hearings within 28 days, unless there is a material change. The prohibition is re-enacted in paragraph 12 of Schedule 11 to the 2016 Act but with a difference. While section 7 of the 2014 Act implicitly allowed a bail application to be heard since all that is prevented is ‘release’ on bail within 14 days from the date on which bail has been granted, paragraph 12(2) provides instead that a person must not be ‘granted’ immigration bail by the First-tier Tribunal without the consent of the Secretary of State. This appears to be designed to achieve that the case not be listed for hearing at all, not the approach the Tribunal Procedure Committee had taken in making rules.

127 New s 82 of the Nationality, Immigration and Asylum Act 2002 inserted by the Bill imported the definition of a human rights claim contained in s 113 of the that Act. That read

“human rights claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful 2 under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights."

We could see that other parts of the Bill did envisage out of country human rights appeals.
government subsequently tabled an amendment to address the problem we had identified.

More recently, when the first commencement order for the Immigration Act 2016\textsuperscript{128} appeared, we spotted that in commencing s 34, making it a crime to work without permission so to do, the Government had failed to make provision for persons on temporary admission given permission to work (in almost all, if not all, cases, persons seeking asylum who had waited for a decision on their initial application for over 12 months).\textsuperscript{129} The drafting would have left a person on temporary admission who works in the position of committing a criminal offence by so doing regardless of whether they had Home Office permission so to do. ILPA raised this with the Home Office and received confirmation that it would address this. On 5 July 2016 The Immigration Act 2016 (Transitional Provision) Regulations 2016 (SI 2016/712) were tabled. These provided for a person at large by virtue of paragraph 21(1) of Schedule 2 to the Immigration Act 1971(b) (temporary admission or release from detention) to be treated for the purposes of the new s 24B(2) of the Immigration Act 1971 as if the person had been granted leave to enter the United Kingdom and for any restriction as to employment imposed\textsuperscript{130} to be treated for those purposes as a condition of leave.

ILPA was sighted on successive drafts of what became s 65 and Schedule 9, part 9 to the Immigration Act 2014, amending nationality law as far back as there are persons living to provide rights to register as British citizens for those born illegitimate. This was a response to amendments, sponsored by ILPA, tabled at a late stage during the passage of the Act\textsuperscript{131} and presented a challenge to the most skilled of draftpersons. Very different approaches were tried in different drafts. We spotted some matters that needed to be corrected, for example that a reference to the Human Fertilization and Embryology Act should be to the 1990 Act and not the 2008 Act. Other corrections were spotted by parliamentary counsel and/or officials, of which our favourite was the need to provide that the applicant’s parents were married “to each other”, rather than just ‘married’.

Amendments to the Nationality Immigration and Asylum Act 2002, effected by s 17 of the Immigration Act 2014 permit the Secretary of State to certify cases as clearly unfounded, as cases in which the appellant should be returned to a safe third country and under s 94B of the 2002 Act, the “appeal first; deport later” which will be expanded to a “remove first appeal later” regime on 1 December 2016.

\textsuperscript{128} The Immigration Act 2016 (Commencement No. 1) Regulations 2016 SI 2016/603 (C.44).
\textsuperscript{129} The offence of illegal working (inserted by s 34) was brought into force by SI 2016/603(c.44) on 12 July as was the offence of employing an illegal worker (s 35). Section 24(9) of the Immigration Act 1971 inserted by s 34(3) of the Immigration Act 2016 ensures that those on immigration bail within the meaning of Schedule 10 Part 1 who have permission to work are not committing a criminal offence and by operation of that section nor is an employer under s 21(1A) of the Immigration, Asylum and Nationality Act 2006 inserted by s 35 (assuming for the sake of argument that the drafting is not defective in this respect). But Schedule 10 part 1 was not brought into force. The transitional provisions pertaining to the transition from temporary admission to immigration bail can be found at paragraph 13 of Schedule 10 to the Act.
\textsuperscript{130} Under paragraph 21(2) of the 1971 Act.
\textsuperscript{131} 19 Mar 2014 : Column 179, amendment 79A in the name of Lord Avebury.
2016 when s 63 of the Immigration Act 2016 comes into effect. The Secretary of State can issue the relevant certificate after an appeal has been brought in-country, but rather than bringing the appeal to an end it suspends the appeal such that it may only be continued after the appellant has left the UK. This novel suspension of an appeal, initiated in-country, does not sit easily with s 78 of the Nationality, Immigration and Asylum Act 2002. Section 78 is not amended by the 2014 Act or by the Immigration Act 2014. It prohibits the removal, or requiring to leave, of a person who has brought an in-country appeal. The effect of a certificate after the bringing of such an appeal may be frustrated by the prohibition on removing or requiring the appellant to leave the UK.

It is our understanding that at least some primary legislation, and a considerable amount of secondary legislation, is prepared by the department rather than by parliamentary counsel. While officials may have detailed knowledge of the detail and workings of the provisions, they are less likely than parliamentary counsel to have the drafting skills required in such a complex field. Ideally, their drafts would always be reviewed by parliamentary counsel.

2. Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

Failure to consolidate

The complexity that has developed in UK domestic law is readily attested to by the presence on the statute book of fourteen Acts on immigration law (discounted from this are Acts relating exclusively to nationality law) as well as significant amendments to immigration law in other statutes such as the Crime and Courts Act 2013 and the Justice and Security Act 2013. Each Act amends ones that has gone before and adds new freestanding provisions. Every rule change generates complex transitional provisions. Immigration law is encroaching on other areas of law with immigration status relevant to social welfare entitlements, housing, licensing etc. An extra level of complexity is added where these other matters are devolved but are being amended from Westminster on the grounds that immigration is reserved.

The result is that in immigration, consultees struggle to understand what they are being asked; Parliament does not understand what laws it is passing and parliamentary counsel struggle to get complete and adequate instructions as evidenced by the number of corrective government amendments that have to be made as Bills go through parliament. Those who do not subscribe to costly commercial legal support services are unlikely to be able to read the law in its consolidated form. In areas such as powers of entry, seizure search and retention, enlarged (again) by Part 3 of the Immigration Act 2016, immigration officers now have multiple overlapping powers and it is extremely unlikely to be clear to those on whom such powers are used under which

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132 The Immigration Act 2016 (Commencement No. 2 and Transitional Provisions) Regulations 2016 SI 2016/1037 (C 74)
133 See, for example, Lord Bates described in his 1 March 2016 letter to Baroness Fookes, the Chair of the overworked Select Committee on Delegated Powers and Regulatory Reform, as "yet another" Delegated Powers memorandum on the Bill which became the Immigration Act 2016.
particular provision the immigration officer is acting at any given time. Cases are
denied legal aid, wrongly, because abstruse points of law are not understood by
those deciding the applications for funding.

In June 2007, the then Border and Immigration Agency launched a consultation
on simplifying immigration law. That same month, during the passage of the UK
Borders Bill, Baroness Scotland of Asthal, Minister of State at the Home Office,
said\textsuperscript{134} (Hansard,):

\textit{This Bill is the last part of a jigsaw and, after it is complete, there will be an
opportunity for us to look at the issue of simplification. It is for that reason...
that last week the Border and Immigration Agency launched a consultation on
simplifying the immigration laws, something for which both Houses have been
calling for some time... the simplification project is designed to hone existing
legislation and eradicate duplication.}

The summer of 2008 saw the publication of an incomplete draft of such a Bill
entitled the draft (partial) Immigration and Citizenship Bill. Ultimately, however,
no simplification Bill was introduced and instead parliament was presented with
the Borders, Citizenship and Immigration Bill in January 2009. During the passage
of that Bill, Lord West of Spithead, Parliamentary Under-Secretary of State, Home
Office, said:\textsuperscript{135}

\textit{The simplification Bill, which is heading rapidly towards 400 clauses—this is a
complex and serious Bill on which people are working very hard all the time, so
it cannot be rushed forward—will cover all immigration legislation since 1971
and will not cover the ground again on citizenship.}

He also announced that later that year, the Government would publish a draft
immigration simplification Bill. This it did, although this draft Bill, while building
on the previous year’s draft (partial) Bill was also incomplete. Moreover, given the
parliamentary timetable and then then forthcoming election, and perhaps a degree
of ‘fatigue’ at the failure to present a full Bill in 2009 following scrutiny of the 2008
draft Bill (by the Home Affairs Select Committee and the Joint Committee on
Human Rights), the 2009 draft Bill received far less parliamentary attention than
its subject matter deserved.

The draft Bill was not consolidating legislation. It proposed to change and augment
the law at the same time as consolidating it. ILPA predicted that the result of this
would be that the Bill would collapse under its own weight and this it did. The
project has not been revisited and the impossibility of adequate pre-legislative or
legislative scrutiny grows.

Successive waves of legislation provide opportunities for Governments to extend
their powers with little scrutiny. It was said in debates on the \textit{Maritime
Enforcement} provisions of the Bill which became Part 8 of the Immigration Act
2016 that the provisions were unobjectionable because similar powers had been
taken in the Modern Slavery Bill\textsuperscript{136} and the explanatory notes to the Bill highlight

\textsuperscript{134} HL Deb, 13 Jun 2007: col 1749.
\textsuperscript{135} HL Deb, 11 Feb 2009: col 1207.
\textsuperscript{136} E.g. Immigration Bill Public Bill Committee, 13\textsuperscript{th} sitting (afternoon) \textit{Hansard}, col 475
(10 November 2015) per the Rt Hon James Brokenshire MP ‘The provision permitting
powers to be exercised by accompanying officers reflects existing powers under other
the specificity of the offences and the targeted nature of the provisions. The argument that maritime enforcement powers are unobjectionable because similar provision has already been made in other legislation appears in the explanatory notes to the Policing and Crime Bill. Each time, the scope of powers is extended, considerably, from powers in respect of three separate offences in the Immigration Act 2016 to powers in respect of all offences in the Policing and Crime Bill.

The current system is one which produces injustice because persons cannot become aware of, or exercise their rights. This injustice is exacerbated because there is no legal aid for immigration (as opposed to asylum) cases and yet those affected by it are in many cases denied permission to work or access to other than subsistence support, so there is no prospect of their paying for it themselves. They cannot get assistance from non-lawyers because, under s 84 of the Immigration and Asylum Act 1999, it is a criminal offence to give immigration advice if not a solicitor, barrister or legal executive or registered with the Office of the Immigration Services Commissioner.

Legal aid is spent on asylum cases and judicial reviews to clarify the law. These cases also take up court time. The complexity of the law makes it more difficult to scrutinise the Home Office or to know what to expect of it, which leads to a lack of accountability and a failure to root out costly poor practice or to implement the law as parliament intended.

Portmanteau legislation
Increasingly, portmanteau legislation looks to have been produced due to lack of time or because policy has yet to be thought through rather than because it is appropriate. We provided the example above of the provisions of Part 5 of the Immigration Act 2016 on support services.

A particular concern is provisions that say ‘in particular’ and then provide a very detailed, but non-exhaustive list of powers that could be taken in secondary legislation. Parliament ends up focusing on the details of these provisions and ignoring that the powers are at large. Examples are the Immigration Act 2014 s 38(3) (Immigration Health Charge) and the provisions on marriage and civil partnership in Part 6 of that Act which include, but by use of ‘in particular’ obscure, very broad information sharing powers.

Failure adequately to consider the devolved administrations
The Immigration Acts 2014 and 2016 are riddled with “Oops we forgot Scotland” amendments made during the passage of that Act. For example Schedule 8 paragraph 2, inserts a new s 28D(2A) into the Immigration Act 1971 to provide that provisions for multi-entry warrants for immigration officers do not extend to Scotland, where such warrants are not permitted to the police. This section typifies the approach: the Act makes provision which reflects the situation in England and then separate provision is made for Scotland, rather than the situation being reviewed across the UK as a whole and a decision take as to which, the English or the Scots’ (or other devolved administration) approach, to prefer.

legislation—most notably, the powers recently considered by the House in the Modern Slavery Act 2015.’

137 Explanatory Notes to HL Bill 179 of session 2016-2017, paragraphs 413-415.
Devolution featured heavily in the report on the Bill by the House of Lords Select Committee on the Constitution\(^\text{139}\) and was extensively debated in the Lords. Lord Hope of Craighead proposed amendments to provisions of the Bill dealing with illegal working in licensed premises, residential tenancies and support under Part 5, saying:

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\text{It is a feature of the Bill that the provisions which apply to England and Wales are set out in full and we are debating them, line by line, as we ordinarily do; but although the Bill applies to Scotland, Wales and Northern Ireland, it does not set out the measures which deal with certain devolved matters relating to those Administrations. That has three consequences. First, this House - or, indeed, this Parliament - is not able to debate the detail of the legislation. ... Secondly, as I understand the purpose of these provisions, it is not intended that the devolved legislatures should legislate on these matters either... Thirdly, the measures which seek to apply these provisions in relation to Wales, Scotland and Northern Ireland are to be contained in a statutory instrument.}\(^\text{140}\)
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\[
\text{Here the Minister is proposing to take measures in relation to Scotland with regard to devolved matters. If he was not to seek the consent of the Scottish Parliament, there may be really considerable consequences.}
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The then Minister, the Rt Hon Lord Bates, said in reply

\[
\text{I concur with the view that these are very important issues: they are not trivial issues but are very substantial. ... In respect of illegal working in licensed premises, to which the noble and learned Lord referred, we have not had time to amend the Bill but have published draft regulations so that our method and intent are clear. ... As with the right-to-rent scheme in the 2014 Act, we believe that the extension of these provisions to the whole of the UK has only consequential impact on devolved legislation and remains for an immigration purpose. We have not sought to put the residential tenancies provisions for Scotland or Wales in the Bill or to publish draft regulations. This is because both the Scottish Parliament and the Welsh Assembly have been legislating in this space. ... With the law in flux in Wales and Scotland, we had to decide whether it was worth amending the law only to need to re-amend it a few months later, and we thought that once was better. ...the dispersal of migrant children is not an area in which Wales, Scotland or Northern Ireland have competence to legislate, and their consent is therefore, in our opinion, not required for the UK Government to legislate in this area.}
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The use of secondary legislation to implement certain provisions in the devolved administrations means that where provisions are found to be incompatible with the Human Rights Act 1998 the regulations will be able to be struck down, whereas provisions of primary legislation can only be declared incompatible. Add to this the question of the borderline between devolved and reserved matters and we can


\(^{140}\) Hansard, HL, cols 1754ff (15 March 2016).
anticipate litigation, in particular in Scotland. The UK Government has indicated that it does not consider that legislative consent motions are required for these extensions. See for example the letter of the Rt Hon James Brokenshire MP, Minister for Immigration and Security, to Margaret Bruges MSP, Minister for Housing and Welfare in the Scottish government, on the residential tenancies provisions.\footnote{141} The question of how devolution is handled in immigration is all the more pertinent in the context of Brexit. As Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper for ILPA’s EU referendum series,\footnote{142} while immigration is a reserved matter, matters affected by immigration status, for example welfare entitlements in Scotland, are devolved Devolved matters on which there is immigration legislation in Northern Ireland include:\footnote{143}

- health and social services
- education
- employment and skills
- social security
- housing

Further devolution could bring aspects of the rights of EU/EEA nationals within the legislative competence of devolved administrations. Without clarification of which matters are within the competence of the devolved administrations, or require legislative consent, the scope for the devolved administrations to reach their own settlement on the scope of, for example, rights of EEA nationals post a Brexit, is reduced despite the potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations.\footnote{144} Devolution adds considerably to complexity not only in drafting but in implementation. For example, the provisions of Part 7 of the Immigration Act 2016 requiring public sector workers in customer facing roles to speak English extend across the UK but only in respect of reserved matters, although it would be open to the devolved administrations to make similar identical provision for matters within their competence.

**Drafting**

Acts such as the Immigration Acts of 2014 and 2016 show evidence of very different drafting styles by different parliamentary counsel (and/or the department?) Some parts appear more skilfully drafted than others. As an example of area where we think the drafting not as clear as in others are the

\footnote{141} 13 October 2015, at: \url{http://data.parliament.uk/DepositedPapers/Files/DEP2016-0300/2015-10-13_JB_to_Margaret_Burgess_MSP.pdf}

\footnote{142} EU Referendum position paper 12: The implications for Scotland of a vote in the EU referendum for the UK to leave the EU, 1 June 2016, see \url{http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the}

\footnote{143} Cabinet Office and Northern Ireland Office, *Devolution settlement: Northern Ireland*, 20 February 2013.

\footnote{144} See for example the discussion in George Kerevan’s *It’s complicated, but Scotland can stay in the single market, here’s how* 31 October 2016, available at \url{http://www.thenational.scot/comment/george-kerevan-its-complicated-but-scotland-can-stay-in-the-single-market-heres-how.24207}
provisions of s 45 and Schedule 7 on bank accounts and Part 7 on Language requirements for public sector workers.

**Poor explanatory memoranda**

It is of concern when explanatory memoranda and other government materials are used to obfuscate rather than to clarify the purpose of legislation. The Constitution Committee picked up on this in the drafting of what became s 61 of the Immigration Act 2016. It drew attention to what became subsections 61(3) to (5) of the Act under the heading ‘retrospective legislation’.

When it published the bill that became the Immigration Act 2014 the government published with it a number of factsheets. These were broadly factual, albeit with a little light spin, and provided a way for non-lawyers to read into the proposals. Fact-sheets were also produced for the Bill which became the Immigration Act 2016 but by this time spin predominated over substance and they were not documents to which we could usefully direct NGOs.

ILPA highlighted in its 2011 response to the consultation on family migration which preceded the writing of immigration rules addressing Article 8 of the European Convention on Human Rights that the presentation of the case of Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34 in the consultation was misleading. Despite this, the presentation was also misleading in the Human Rights Memorandum which accompanied the Bill which became the Immigration Act 2014, s 18 of which addresses Article 8. The case is cited in the context of a discussion on precariousness without explaining that the applicants in da Silva were successful, despite Ms da Silva’s having remained unlawfully in the Netherlands and having established her private life and family life when her status was ‘precarious’, a term used in the Bill. The Supreme Court describing the Rodrigues case in ZH (Tanzania) [2011] UKSC 4 at 20 as

.. a relatively recent case in which the reiteration of the court’s earlier approach to immigration cases is tempered by a much clearer acknowledgment of the importance of the best interests of a child caught up in a dilemma which is of her parents’ and not of her own making”.

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145 See e.g. the two uses of the term “disqualified person” : for the purpose of s 40A and generally s 40A(3), person in the UK who requires leave to enter and remain but does not have it and for whom the Secretary of State considers that a bank account should not be provided (Schedule 7 para 2 inserting s 40A(3)) into the Immigration Act 2014). But, for the purpose of s 40D, a person who, following a check under s 40C(1), was determined to be such a person (s 40D(9) inserted by Schedule 7 para 2).

146 For other legislation and rules see e.g. ILPA’s evidence to the Secondary Legislation Scrutiny Committee on statement of changes in immigration rules HC760 of 4 December 2012 at [http://www.ilpa.org.uk/resources.php/16435/ilpa-briefing-for-house-of-lords-secondary-legislation-committee-on-consultation-practice-4-december](http://www.ilpa.org.uk/resources.php/16435/ilpa-briefing-for-house-of-lords-secondary-legislation-committee-on-consultation-practice-4-december). The explanatory memorandum to Statement of Changes in Immigration Rules HC887, laid before parliament on 3 December 2016, despite being very detailed, made no mention of a change to when a person would be treated as a refugee’s unmarried or same sex partner, requiring two years cohabitation (not an easy requirement for many refugees to fulfil) rather than a relationship subsisting for two years.

147 House of Lords Select Committee on the Constitution, 7th Report, Session 2015-16, HL Paper 75, paragraphs 29 to 34.


150 HC 194, 13 June 2012.
The House of Lords’ Select Committee on the Constitution has grappled with misleading explanatory memoranda in its work on the Bill which became the Immigration Act 2016. In *R (B) v Secretary of State for the Home Department (No 2)* (2015) EWCA Civ 445, currently pending before the Supreme Court, the Court of Appeal held that while it is accepted that the power to impose bail conditions also extends to someone who could be detained even if they are not actually detained immediately prior to the grant of bail, the powers conferred by paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971 should extend only to individuals who are or could be lawfully subjected to immigration detention pending deportation. The Court further held that where, as in the case it was considering, there was no realistic prospect of the person’s deportation taking place, subjecting them to immigration detention pending deportation would not be lawful. Once the legal basis for detention falls away, so does the legal basis for imposing bail conditions; the power to impose such conditions being dependent upon the possibility of lawful detention. The effect of the Court of Appeal’s judgment was to make the imposition of bail conditions unlawful in circumstances in which the person concerned could not lawfully be subject to immigration detention.

This is addressed by Schedule 10 which provides that bail conditions can be set in relation to individuals who are either ‘detained’ or ‘liable to detention’ under relevant immigration powers. A person is liable to detention if they could be detained were it not for the fact that a ‘legal issue’ or practical difficulty presently precludes or impedes their removal from the UK (Nationality, Immigration Act Asylum Act 2002, section 67).

Pending the coming into force of Schedule 10, s 61(3) provides that the 1971 Act powers can be used ‘even if the person can no longer be detained’ provided that they are ‘liable to detention’. Section 61(5) provides that: ‘The amendment made by subsection (3) is to be treated as always having had effect.’ This means that the provisions will have retrospective effect, as is acknowledged in the Explanatory Notes to the Bill:

> 'This clause is retrospective in its effect because it is intended to clarify the law following a recent Court of Appeal judgment … on when immigration bail conditions can be imposed. The Court of Appeal judgment disturbed previously settled case law in this area. If the Court of Appeal's judgment stands (it is under appeal) then it will have a significantly limiting impact on judges' and the Home Office's ability to impose bail conditions and manage individuals, including those who pose a risk to the public where deportation is being pursued'.

The House of Lords Select Committee on the Constitution questioned the use of the word ‘clarify’:

> 34. The statement that these provisions ‘clarify’ the law is questionable. The Court of Appeal has determined what the relevant provisions of the Immigration Act 1971 mean—and what, in law, they have always meant. The Government now wishes to revise what those provisions mean. The effect of clause 32(5) [now 63(5)] will therefore be to change the law and to do so retrospectively. ... the rule of law requires government to act according to law, and from that perspective the retrospective provision of a

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151 Explanatory Notes to the Immigration Bill, Bill 79, 2015-16-EN, paragraph 168.
legal basis for executive action is constitutionally suspect and calls for a clear justification. To the extent that such a justification is provided by the Government, it appears to turn upon considerations of administrative convenience and to rely upon the fact that the Court of Appeal’s judgment disturbed what the Government considered to be a settled understanding of the legal position. We recognise that the Government was acting in accordance with its understanding of the law, but once that action has been judged to be unlawful we would expect a greater justification for changing the law with retrospective effect than simple administrative convenience.

35. As we have previously stated, there needs ‘to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable.’ ...The House may wish to assure itself that sufficient justification has been advanced for the use of retrospective legislation in this instance. 152

In the event, the House took little interest in the point. 153

Paragraph 5 of Schedule 1 to the Immigration Act 2014 amended s 146(1) of the Immigration and Asylum Act 1999. Prior to amendment this licensed the use of force by immigration officers in exercising powers under the 1999 Act or the Immigration Act 1971. Paragraph 5 would amended this to license the use of force by immigration officers exercising powers under “the Immigration Acts”, comprising ten Acts – including the 1971 and 1999 Acts, the Bill and any future legislation included in the definition of the immigration acts. 154 The explanatory memorandum to the Bill stated this was mere clarification. 155 This is incorrect. An extension of statutory license for the use of force is not mere clarification.

Confusing statements can also mislead the Home Office itself. In the case of Kiarie, currently pending before the Supreme Court, the Court of Appeal found that the Home Office had been applying the wrong legal test in the “deport first; appeal later” cases for which provision is made by s 17 of the 2014 Act, inserting s 94B into the Nationality, Immigration and Asylum Act 2002. The Home Office had made a mimetic substitution of the test of “serious irreversible harm” if removed, one example of a breach of human rights, for the legal test, a breach of human rights. The first-tier Tribunal judge in the case had fallen into the same error. In the Court of Appeal, Lord Justice Richards despairsed at the complexity of the commencement provisions pertaining to the new appeals regime, saying that he was “appalled by the complexity of that legislative jigsaw.”

Pepper v Hart [1992] UKHL 3 has arguably increased the extent to which Ministerial statements are made to obfuscate rather than to illuminate the content of legislation. Ann Dummet raised the concerns as early as 2001 in her introduction to her Ministerial Statements: - The Immigration Exception in the Race Relations

152 House of Lords Select Committee on the Constitution, 7th Report, Session 2015-16, HL Paper 75.
153 See the debate at Hansard, HL cols 1649-1659 (1 February 2016).
154 Clause 66(5) of the Bill includes “the Immigration Act 2014” (i.e. the current Bill) among the Immigration Acts as listed in section 61(2) of the UK Borders Act 2007
155 Explanatory Notes to Immigration Bill as brought from the Commons, HL 84, paragraph 49
156 At [2015] EWCA Civ 1020.
(Amendment) Act for ILPA. Ministers are speaking for future judicial reviews and endeavouring to place on record what they want the legislation to mean.

3. Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

**Better quality consultation**
See comments above. It would be helpful to have guidelines as to quality and we should view with interest proposals to ensure that consultations could be reviewed prior to publication and challenged where evidence had not been collated, or was poorly presented.
Government should be urged to cease counting and publicising numbers of responses to consultations and to encourage organizations to collaborate on responses or to endorse all or part of each other’s responses where possible. It is indeed of interest to know that scarce any respondents agreed with a proposal, as in the recent consultation on fees in the Immigration and Asylum Chambers of the Tribunal.

**Better work with the devolved administrations**
See comments above.

**Consult specialist organizations on draft legislation, not just on policy.**
See comments above.

**Provide helpful tools**
Keeling Schedules are essential where immigration legislation is concerned. They were helpfully produced for the Appeals provisions of the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. The Bill team shared them with ILPA and they were subsequently made publicly available. Tracked changes versions of Bills are also an incredibly useful resource and were produced for the 2016 Act.
We have long lobbied the parliamentary website to attach Ministerial letters to the pages dedicated to bills and not to have them only in the depositary. The late Lord Avebury also advocated this. It has now been addressed. It is of tremendous importance as very often what is said in letters is just as important as what is said in the debates, including in the context of Pepper v Hart.

**Constrain the powers of Government**
Use can be made of recommittal procedures where large numbers of amendments are presented at a late stage, as was done during the passage of the Bill which became the Nationality, Immigration and Asylum Act 2002. It might be helpful to

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157 http://www.ilpa.org.uk/pages/ilpa-publications-ministerial-statements.html
158 Tribunal Fees, The Government Response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) Lord Chancellor and Secretary of State for Justice, Cm 9325, September 2016.
160 See e.g. for Bill that became Immigration Act 2016 http://services.parliament.uk/bills/2015-16/immigration/documents.html
have guidance for the Houses of Parliament on when recommittal would be required. Government could be required to identify to parliament, or to relevant committees, whether a Bill was complete before it was presented to parliament, or whether it was likely to need amendment during its passage, and parliament could then have powers to decide whether an incomplete Bill should proceed or wait. It would also be helpful to have guidance as to when government amendments would require a bill to be paused, for example until particular committees were able to report.

Loathe as we are to increase the workload of already stretched committees, there is potential for committees to be asked to review consultations the questions ask, on matters likely to result in legislation and to identify any misleading presentation of the evidence, or spin.

The allocation of more time for Bill, and longer periods between different stages of Bills, would also be helpful. During the passage of both the Immigration Acts 2014 and 2016 we were working round the clock to keep up during committee stage, and needed more time to scrutinize the legislation properly.¹⁶¹ Timescales for Bills should be such as to allow time to submit comprehensive evidence to the Public Bill Committee and for this to be published and considered by those giving oral evidence.

11 November 2016

¹⁶¹ See our briefings on the Bills, and on previous bills, links from left hand column at http://www.ilpa.org.uk/pages/parliamentary-briefings-submissions-and-responses.html
ICAEW welcomes the opportunity to comment on the Call for Evidence in the House of Lord’s Constitution Committee inquiry into The Legislative Process published on 16 September 2016.

This response of 21 October 2016 has been prepared on behalf of ICAEW building on the input of the Business Law Committee and the Tax Faculty. The Business Law Committee includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

**A welcome and urgently needed inquiry**

1. We welcome the Constitution Committee’s inquiry into the UK legislative process. Clearly drafted, proportionate legislation that has been through appropriate due process is essential to ensuring that businesses and individuals can operate, and transact with each other, with certainty and confidence. Good legislation supports economic growth. Good tax legislation secures the tax base as well as giving confidence to taxpayers.

2. The inquiry is particularly timely as we prepare for a UK exit from the European Union. Although the proposed ‘Great Repeal Bill’, which we understand would grandfather existing EU law in the UK, reduces the urgency of the task of dealing with the legislative consequences of Brexit, it is not a panacea. The grandfathered law will need maintenance; key policy and competitive initiatives arising from the UK’s future as an independent nation will require legislative action; and keeping pace with international compacts we remain committed to will require our legislation to be able to react to developments in these. It is fundamental that a structure be put in place now to address these pressures.

**Principles for effective consultation**

3. Having an effective process in place for consultation is fundamental to the production of good legislation. In our opinion, consultation should be:
   - **Time Sufficient** - We recommend a minimum of 12 weeks for major consultations. Much shorter recent consultation periods have given too little time for representative organisations to adequately consult their membership.
   - **Targeted** – Consultations will often include many technical aspects. The comments of those best able to address these appropriately should be proactively sought. This would entail more than a publicly accessible web page. Prior to this (perhaps at the pre-consultation policy formation stage) the net should be thrown much wider.
Consequences of ineffective or inefficient legislation

4. For several years now ICAEW has been tracking the length of successive Finance Acts in our popular report, Big Ben’s Statutory Tax Burden, a copy of which is being submitted to accompany this evidence. At 649 pages long, Finance Act 2016 is the second longest ever, and adds to a tax code that by 2009 had already been reported to have surpassed the length of India’s as the world’s longest. In our opinion this unduly lengthy and complex legislation is partly a reflection of it having been rushed through parliament with a lack of scrutiny. For example, the recent provisions regarding entrepreneurs’ relief as originally released were poorly drafted. Much post-enactment consultation and hard work was then necessary to get the law amended back to where it should have been in the first place.

5. It seems that government is sometimes unable to keep up with its own initiatives and this results in inconsistency and more inefficiency. For instance, the 2008 charity accounting regulations applicable in England and Wales have still not been updated to refer to the new charity SORP (Statement of Recommended Practice), leaving the Charity Commission in the unenviable position of explaining to charities why it might be acceptable to apply the new SORP in apparent breach of the requirements of the regulations. By contrast the regulations in Scotland were amended to refer to the new SORP.

6. These shortcomings place an incremental burden on business and consequently addressing them would provide a positive benefit to the economy. That is good news in ordinary times. But in preparation for Brexit a more efficient, higher quality, legislative process is imperative. In this evidence we set out some initial thoughts in response to the specific questions posed in the Inquiry. The short consultation period of four weeks, coupled with the lack of a single recognised source of reference for Parliamentary Calls for Evidence which might have brought it to our attention sooner, has meant that we ourselves have not been able to consult as widely as we would normally do before responding to an important Inquiry. This response is based on the views of our Business Law Committee, and our Tax Faculty in relation to tax legislation. ICAEW, and in some instances our members themselves, also engage in the process of statutory development in other contexts. We look forward to engaging with the Inquiry as it progresses and to having sufficient time in the final three stages of the Inquiry to consult more widely with our stakeholders.

RESPONSES TO SPECIFIC QUESTIONS

Creating good law

Q1: How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

7. As might be expected, they vary. Well received and effective legislation has been enacted in recent years in some areas. Some radical and very welcome
changes to the legislative framework have been made – for example we would highlight the Bribery Act 2010 which we consider to be exemplary. That Act was initially drafted following a Law Commission inquiry. We believe that the work of the Law Commission has in general been very effective and suggest this as a model for improving the process.

8. In other areas much is left to be desired. In particular we might highlight tax legislation. ICAEW has been tracking the length of the Finance Acts for some years now, illustrating their increasing length and complexity. At 649 pages long, Finance Act 2016 is the second longest ever, and adds to a tax code that by 2009 had already been reported to have surpassed the length of India’s as the world’s longest. These lengthy documents highlight the increasing complexity for taxpayers of an ever expanding tax code. In our opinion this unduly lengthy and complex legislation is partly a reflection of it having been rushed through parliament, with an unfortunate lack of scrutiny.

9. It is also unfortunate that the lessons of the Tax Law Rewrite project have not been remembered. For a short period, legislation was drafted in better English, making it more manageable. Lack of resource is presumably why this is no longer happening, but the consequences for those who seek to apply it, accountants, lawyers and the general public who are governed by it, are that it takes longer to work with and interpret, and mistakes are made.

Q2: Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

10. It may be rather that good mechanisms, processes and practices are forgotten or ignored, when the need to respond to political issues takes priority over careful consideration and research. In terms of tax legislation, a framework for good legislation has already been agreed and has been in place since 2011 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf). We believe this is an exemplary document that provides a sound basis for the development of legislation. Unfortunately in practice it is typically not followed as effectively as it might be. In particular HMRC do not tend to spend enough time at Stages 1 and 2 of the framework. As a result drafting often commences before the issue that the legislation is intended to address is properly defined, before the options for action are identified and before concluding whether legislation is the most effective response. This also occurs in other areas of the law, such as the introduction of the corporate register of Persons with Significant Control, which increased substantially the burden of small and medium sized enterprises, with doubtful value to law enforcement.

11. A perennial impediment to effective consultation is the short timescale often allotted to this crucial stage of the legislative process, and the timing of it. Again, from a tax legislation perspective, once draft legislation appears in early December there is then normally only a short time for comment, by early February, but then the die is very much cast. Very few changes are typically accepted by government once the Finance Bill is published in late March. This cannot be a process designed to do all that is possible to produce effective legislation. In this sense the consultation process becomes a defence mechanism rather than a genuinely useful exercise.
12. Inevitably, this process then means that once a provision is deemed appropriate for inclusion in the next year’s Finance Act the particular provision is on a ‘treadmill’. At this stage it can be very difficult to convince government that more time is needed to get this particular provision into really good shape before it is enacted. Inadequate legislation then needs to be supplemented by HMRC guidance which does not have the force of law and creates uncertainty.

**Q3: Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?**

13. Yes; we suggest some below.

14. We note that the UK legislative drafting style is legalistic. There may be good reasons why it has developed as it has, but it has now reached its sell by point. Our laws should be readable for a reasonably educated 21st century citizen, not just lawyers and other professionals. The point is illustrated in the drafting of two recent legislative initiatives - the Persons of Significant Control register requirements and the auditor cessation regulations. Ironically, the EU approach to legislation has some advantages with its explanatory preambles and short provisions. The guidance to parliamentary draftsmen contains the following sage advice:

‘it is especially important to take the reader by the hand and lead him or her in a logical way through the story you have to tell...Whether an effort to make a draft easy to understand has been successful is tested by whether the intended readers in fact find the draft easy to understand’.

It is a shame that it is not followed consistently. Responsibility for this lies not only with draftsmen, but with those who conceive regulation in broad terms with little understanding or concern for the complexities that will inevitably result.

15. We also note that there appears to be a significant amount of evidence collecting taking place in consultations that have a short timeframe and, further, ask inappropriately open questions. The recent consultation on the transposition of the 4th anti-money laundering Directive could be said to read like a survey in places. It is not necessarily desirable to conduct an impact assessment as part of a legislative consultation. This is surely a separate process.

16. Moreover, in some recent examples we have observed ‘tough new legislation’ being announced to fix a problem for which there is already legislation in place (just not being used effectively, or not brought into force). The motives for this approach are unclear but the end product lamentably is all too often a ‘cheap’ solution.

17. Partly this may be due to there simply being too much legislation; a point also evidenced by the number of inconsistencies or contradictions. In the insolvency world for example, (heavily EU influenced) employment law requires insolvency practitioners to ‘meaningfully’ consult employees, which, if followed, might be at odds with their legal obligations to act in the interests of all creditors. A further example is the conflict between the Proceeds of
Crime Act and the Serious Crime Act around the ‘consent’ defence. To address this, more analysis might be done before new legislation is introduced as to whether existing legislation could be amended to cover the point and to ensure that all potential implications have been taken into account.

18. Clarity could also be enhanced by improvements to web versions of legislation. These should be kept fully up to date, changes and prospective changes marked (and implementation dates annotated) and links provided to all related legislation/regulations. At the moment this is done by external providers (at a cost), and these organisations have a key role in any developments here, but government should examine the extent and clarity of information it provides to determine how it can help in this process. In the democratic interests of UK citizens, sufficient information to reasonably enable compliance with the law should always be available free of charge.

19. Finally we would observe that there is no panacea for some of the issues leading to bad legislation, as sometimes this arises from bad policy initiatives. To some extent this result is inevitable and may even increase if the legislative process is made more agile. Robust processes for the review and replacement of defective legislation need to be maintained to redress the situation.

20. Our Ten Tenets for a better tax system are attached as an appendix to this response. We believe these provide a framework for effective tax legislation and indeed these intuitive principles can be easily adapted and applied to the wider legislative process.

**Brexit**

**Q4: What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?**

21. The UK’s withdrawal will have a significant impact and government needs to begin to prepare for this now. Extra resource will undoubtedly be required even to maintain ‘business as usual’. Proportionate and smart legislation, reflecting the UK context, is vital to national competitiveness in a post-EU Britain. It will need adequate resources to deliver this. Hard choices will need to be made about the distribution of resources for this task. The government will need to address competing claims for priority. These will not always be easy calls to make, but we suggest that if the government’s priority is economic renaissance then those areas that contribute most productively to UK output need to be prioritised. Professional services is one area where we remain a world leader and where it is vital that our ability to compete is not shackled by poorly drafted legislation.

**Q5: Will there be changes required to how the Government and Parliament deal with legislation following Brexit?**

22. Yes. It requires a paradigm shift and government will need to be resourced in good time to address the opportunities and challenges this presents. Government needs to be mindful that in time, as the opportunities for more
proportionate and effective legislation become clearer, and as maintenance requirements accumulate, demands for legislative action will be made by an increasingly diverse range of groups. These will soon hit up against capacity constraints. Different groups will have different and sometimes conflicting objectives. For some contexts there will be a strong imperative not to change legislation, or to update it to follow EU developments in order to maintain equivalence. Elsewhere the demand will be to keep up to date with developments in international ‘soft law’, perhaps sometimes ploughing a different furrow to the EU. In still other cases stakeholders may seize the opportunity to develop distinctive UK laws that are reflective of local conditions. Sometimes all three considerations might be present in a single area and will need to be mediated. Our point is that all of this will require sufficient capacity to recognise, take account of, and respond to these demands.

23. To do this we make two specific suggestions. Firstly that the government as a matter of principle reflects more deeply whenever draft legislation would ‘gold plate’ international requirements. Simplicity should be the order of the day in a capacity constrained world unless there are compelling reasons for a more stringent UK regulatory regime. Secondly, that consideration be given to the role of non-governmental organisations, with some requirements currently contained in primary legislation relegated to become regulatory requirements, for example. We have consistently maintained that many of the specific provisions relating to accounting in the Companies Act (hitherto derived from the Accounting Directive) would be better located in the UK accounting standards maintained by the Financial Reporting Council rather than in legislation.

Technology

Q6: How effectively do Parliament and the Government make use of technology at this stage of the legislative process?

24. In general the UK government have been proficient in the use of the internet for communicating with citizens and businesses. We are not commenting at length in this response on the possible uses of technology within parliament to make the process more effective, although there should be many opportunities here. As regards interaction with those wishing to comment on draft legislation we would caution against over-engineering the process as there is a risk that this distracts from other more pressing priorities. In fact the biggest improvements may not need development of new technologies, but rather more consistent use of the existing ones. The important point is that all of those with an interest in a particular legislative area can easily keep themselves up to date with developments, and that the pages they view to do so are comprehensive. Email alerts or RSS feeds they set from these sources should be expected to notify them of any and all new consultations in the areas selected. In practice we have experienced difficulties with the reliability and completeness of the consultation notification emails on gov.uk. We have also not been able to locate any single web site or publication that aims at listing all parliamentary Calls for Evidence as they are issued.
Q7: How could new or existing technologies be used to support the development and scrutiny of legislation?

25. Technology provides the opportunity to socialise legislative consultation far beyond what was historically possible. To some extent this is already being done, with gov.uk providing free, 24 hour access to drafts from anywhere in the world. More could clearly be done to use electronic means to both explain the purpose of draft legislation and seek comments on it, but note our comments in paragraph 24 above regarding over-engineering. As a first step we would reiterate that the aim should be that at least those with an interest in responding to a particular proposal are able to be made aware of it. This is not consistently the case at present. As we have said in previous government consultations, consistent access to high speed broadband across the UK would aid in participation.

Public involvement and engagement

Q8. To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?

26. Members of the general public might not be heavily involved in the review of draft legislation. However, representative bodies such as ICAEW do play a significant role in the development of legislation. We have lengthy experience in doing so and have the networks to reach those affected and mediate opposing views through our internal consultation processes. Our networks have an important role to play in gathering comment and processing it into coherent suggestions. We commend the government for those efforts it does make to place this consultation at the core of the legislative process. In the current inquiry the committee may wish to investigate further the value that is gained from the interaction between government and representative bodies and how it might be more systematised.

27. To achieve effective consultation we believe that government should aim to enter into it with a genuinely blank slate as to what might work, rather than a pre-determined outcome. In practice this means starting a much wider “pre-consultation” consultation at a much earlier point.

Q9. What factors inhibit effective engagement?

28. Inhibitors of effective engagement include short timeframes, as well as, in some cases, the simple fact that engagement might be undesirable to achieve the perceived goal of the legislation. In this case we would suggest that good legislation is unlikely to emerge. See our comments under question 3 above.

Q10. What mechanisms could be used to increase or improve engagement with the public and stakeholders?

29. Allowing sufficient time and ensuring that interested parties can find the consultation/can be consistently alerted are key priorities. These apply equally, or even more so, to Parliamentary consultations as to ones by government, regulators or independent inquiries. We note that in the case of this Call for Evidence we had not been alerted with adequate time to respond. We would have welcomed an alert given that we are a seasoned contributor to this type of consultation and have deep knowledge on tax and other business law areas. Legal Services Board research indicates that accountants...
Information provision

**Q11. How effectively is information about potential legislation disseminated at this stage in the process?**

30. The important point is that prospective legislation is discussed with those with an interest in commenting on it, and draft legislation is made available to them as soon as possible. At present it is not always easy to find out what consultations and inquiries are open in respect of potential legislation. We note particular difficulties when a piece of legislation is drafted by a department that does not usually legislate in that particular area. For example legislation to require mandatory Gender Pay Gap reporting was published earlier this year by the Government Equalities Office. These proposals affected corporate reporting but were from a department not typically involved in legislating in this area. Compendiously all of the documents were published on gov.uk, but for those searching for corporate reporting consultations this was not an area of the website that they would likely come across (or be alerted to from their email alert settings).

**Q12. How useful is the information that is disseminated and how could it be improved?**

31. Consultees need to have the opportunity to comment on the objectives of prospective legislation, and the early plans for how these will be achieved by the planned legislation, as well as access to the draft legislation as it emerges. As long as this is made easily accessible it is difficult to see that further innovations can contribute much to the process of reviewing and commenting on legislation. Ultimately this will remain a human process. What could be improved would be to allow more time for constituents to scrutinise drafts. We recommend a minimum of 12 weeks for major consultations. Our review process typically involves significant consultation with our own stakeholders; having sufficient time means we can complete this satisfactorily. The Government Consultation Principles were last updated earlier this year.

Parliamentary involvement

**Q13. To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?**

32. We are not responding to this question.

**Q14. Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?**

33. We are not responding to this question.

APPENDIX 1

**ICAEW TAX FACULTY’S TEN TENETS FOR A BETTER TAX SYSTEM**

The tax system should be:
1. Statutory: tax legislation should be enacted by statute and subject to proper
democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be
certain. It should not normally be necessary for anyone to resort to the courts in
order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in
their objectives.

4. Easy to collect and to calculate: a person’s tax liability should be easy to
calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard
should be had to maintaining the simplicity and certainty of the tax system by
targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum.
There should be a justifiable economic and/or social basis for any change to the
tax rules and this justification should be made public and the underlying policy
made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the
Government should allow adequate time for both the drafting of tax legislation
and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review
to determine their continuing relevance and whether their original justification
has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their
powers reasonably. There should be a right of appeal to an independent tribunal
against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage
investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in

October 2016
1. There is a recognised need for better use of evidence in policymaking and also for greater transparency about the evidence used. The benefits of this are:
   - To reduce ill-founded claims and assumptions
   - To ensure citizens are properly informed
   - To enhance scrutiny and accountability
   - To increase the impact of the research that government pays for
   - To make the best use of resources and opportunities.

2. There is not, however, sufficient appreciation of the importance of transparency about what evidence has been used and how. Over the last few parliaments there have been significant moves to promote both the better use of evidence and justification of policy decisions, including What Works Centres, the Office for Budget Responsibility, the Regulatory Policy Committee, the Civil Service Reform Plan, and the Open Government Action Plan. However, these fall short of a transparent systematic method for assessing the use of evidence across the full range of government policymaking.

3. In 2015, at the suggestion of the Cabinet Office What Works Advisor, David Halpern, our three organisations accepted the challenge of developing a rapid assessment tool to rate government departments on the use of evidence in making policy decisions. Initial testing revealed a prior challenge: that it is often not possible to see what evidence has been used or the basis for the assumptions being made in a policy proposal. To address this we developed a framework to assess the transparency of evidence used in policymaking. This was published by the Institute for Government (IfG) in October 2015.

4. Sense about Science, in partnership with IfG and the Alliance for Useful Evidence, then led testing and revision of the framework and a benchmarking exercise to identify good and bad practice by government departments on policies announced between May 2015 and May 2016. The results of this are due to be published by early November 2016. Meanwhile the House of Commons Science and Technology Committee has used the framework for “evidence check” exercises to interrogate government over its use of evidence in nine policy areas – and produced its first report, on smart metering, in which it expressed concern about government’s ability to identify its evidence base:

   “The Government’s difficulty in engaging with the evidence check framework suggests that in some departments there is a lack of experience of articulating the evidence base for its policies. More
worryingly it may also indicate that some areas lack the necessary evidence base.”

**The evidence transparency framework**

5. The evidence transparency framework aims to establish (without specialist knowledge of the subject) the chain of reasoning in a policy proposal. For the purposes of benchmarking, we have modified the original framework published in 2015, to include value for money under both proposal and implementation. We have also developed the language and guidance in response to engagement from departmental chief scientific advisers, directors of analysis and parliamentary committee specialists. It looks at four areas:

a) Diagnosis – can we see what the issue is that will be addressed and how it has been assessed;

b) Proposal – can we see what underpins the government’s chosen intervention, and how evidence has been used;

c) Implementation – can we see what underpins the choice of implementation and why, and is it possible to see the assumptions underpinning the assessment of policy options;

d) Testing and evaluation – what has been tested already, what further information is sought, how will it be used and how will we know if the policy has worked?

6. The evidence transparency framework is designed to be applied to individual policies and their associated documents. We defined a policy as a specific intervention to change the status quo. It may be something announced as part of a package of measures. In defining it in this way we aim for what is intuitive for the public and the way policies are presented in announcements. We do not expect the public or parliament to have to ‘dig’ for evidence – it is the responsibility of government to make it readily accessible through inclusion, discussion and clear links and references.

7. The evidence transparency framework is designed to assess documents associated with policies on the first occasion when the government substantively sets out the proposed intervention in public prior to implementation. It is central to transparency and to enabling scrutiny and engagement with the policymaking process that supporting evidence is available at this stage. For example, material that was prepared for the third reading of a bill would not be considered if it was not available when the bill was first published.

**Assessing the government’s transparency in use of evidence**

8. Following publication of the initial review of good and bad practice in policies announced May 2015-May 2016, we plan to undertake a further review of the period May 2016-May 2017 to produce ranked departmental scores.

9. In undertaking the good and bad practice review, we noted that it was particularly difficult to locate policy initiatives for each department, their associated documents and context or to discover the progress of previously announced plans. This is because departmental websites have been removed in

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Institute for Government, the Alliance for Useful Evidence and Sense about Science—Written evidence (LEG00008)

favour of amassing everything at .Gov.uk, which is geared towards people finding passport forms or tax returns and does not at all facilitate public (or parliament or subject specialist) engagement in policymaking. The Government Digital Service is aware of this problem, and frustration it causes in and outside of government, but reports a lack of central resource and drive to resolve it.

10. We would be happy to share full details of our first review of transparency with the committee. Observations include:
   a) In a lot of cases departments failed to disclose the evidence they had in fact prepared and analysed well. This is wasted work when it cannot help the public or parliament understand or scrutinise the reasoning behind a policy. It also removes the possibility of a sensible debate on the quality of the evidence base on which the government is basing its policies.

b) Manifesto commitments do not necessarily give rise to lack of transparency about evidence. Manifesto commitments that are implementation-focused (ie where the manifesto made a commitment to a very specific method of tackling a problem) are often less transparent about evidence than those where the commitment was more open-ended and outcome-oriented.

c) Standards of citation and referencing are highly variable within and between departments.

Parliamentary scrutiny

11. There is a particular role for Parliament in holding Ministers to account for the evidence base behind policy, via mechanisms including pre-legislative scrutiny, select committee inquiries and evidence checks. Parliament cannot perform its scrutiny role properly if the government is not transparent about what evidence is used and what role it has played. We urge the committee to give consideration to transparency aspects of evidence use and to look at what can be done to encourage wider appreciation of the impact of that on meaningful scrutiny and improvement.

12. Parliament should also hold Ministers accountable for being much more rigorous in post-implementation reviews of policy. This is an important role committees can play and it is disappointing that committees do so little of this. The Constitution Committee proposed both greater parliamentary scrutiny and post-implementation reviews of policy in its 2004 report. We believe our evidence transparency framework could be helpful with these. The framework equips parliamentarians with the right questions to ask when examining draft legislation and policy proposals. The framework is designed to be applied rapidly; we believe this tool could be an effective and efficient use of parliamentarians’ limited time.

Public engagement and provision of information

13. Government should also be clear about how it uses, or will use, consultation responses. Doing so could enhance public and stakeholder engagement and contribution.

14. Transparency about the use of evidence and the reasoning behind policy and legislative proposals is essential for enhancing parliamentary scrutiny and public engagement – it allows people to understand how government is making
decisions. To achieve this government should set out its thinking in the earliest stages of proposing policy or legislation, as this is when engagement can be most meaningful. Parliament has a vital role to play in demanding government transparency, on behalf of both its members and the public.

October 2016
How to Build a Post-Brexit Immigration Policy: JCWI’s 5 Principles

Immigration is a deeply political issue in the UK. While there will never be a full cross-party consensus on how immigration should be managed, we believe that all parties across the political spectrum can and should get behind these five broad principles for reforming law and policy. These principles would show that politicians are committed to creating a system that works for the economy and for society as a whole.

The UK’s immigration policy and laws are facing a complete overhaul in the wake of the June referendum vote to leave the European Union. This moment provides an opportunity to review and reform the disparate and complicated assortment of laws, regulations, guidance and policies that make up UK immigration law.

Even evidence-based policy is made pursuant to political aims and objectives, such as increasing community cohesion, increasing GDP, reducing the national debt, or addressing voter concerns. It is neither possible nor is it desirable that every party or interest group in the UK agree on what those policy goals should be. In a democratic society, it is however essential that all parties agree on certain basic principles, including the importance of the rule of law; that due regard is had to evidence; and that there is some agreement as to core long-term aims to improve community cohesion and economic growth.

We have set out the following principles for policymakers to use in order to create a system that is fair, accessible, and that works for both migrant communities and the UK as a whole.

1. New laws and policy must be led by evidence and pursue realistic and deliverable goals.
2. Immigration policy and law in the UK must promote and respect the requirements of the rule of law.
3. No community should be left behind: the economic benefits of migration should be shared amongst us all through reinvestment in communities, infrastructure, jobs, and education.
4. Immigration policy should encourage long-term integration and the formation of stable, cohesive communities of migrants and non-migrants alike.
5. Respect for human rights and equality must be integral to our immigration system.

We call on lawyers, politicians and policymakers from across the political spectrum to sign up to these five broad principles and to use them to both review current policy, as well as to inform any future changes to immigration law and policy.
A Principled Approach

1. *New laws and policies must be led by evidence and pursue realistic and deliverable goals.*

For policies to be effective they must have a verifiable basis established through objective evidence, as opposed to purely being led by ideology or as a response to presumed public perception. Such an approach not only ensures that public money is spent to achieve realistic and achievable goals, but will also inspire faith and support from the wider public and civil society.

To ensure that future immigration policy is evidence-led, three questions must be asked at an early stage:

1. **Need:** is there an actual problem that needs to be addressed by making a new law or policy?
2. **Efficacy:** will the policy or law that is proposed in reality address the need that has been identified?
3. **Realism:** is this a realistic policy and can it deliver what is being promised?

To ensure public confidence in effective policies, they must also be designed in ways that allow for effective evaluation, with built-in data recording and monitoring to ensure that they achieve their aims over time in a way that is measurable.

2. *UK immigration law and policy must promote and respect the requirements of the rule of law.*

The rule of law is the framework that underpins open, fair and democratic societies. It is essential that any future changes to our immigration system therefore serve to maintain and enhance, rather than undermine, the rule of law. We consider that all future immigration law and policy should reflect Lord Bingham’s eight tenets of the rule of law: 164

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair;
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

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164 *The Rule of Law*, Tom Bingham, 2010
3. No community should be left behind: the economic benefits of migration should be shared amongst us all through reinvestment in communities, infrastructure, jobs, and education.

Immigration policy must take as a starting point the understanding that there are both benefits and pressures caused by the movement of people. A fair and sustainable immigration system must attempt to balance both benefits and pressures among communities, and ensure that the contribution of migrants to the UK economy and society is felt by all.

We must also recognise that different regions have different migration needs. Policymakers cannot continue to impose a one-size-fits-all immigration system on diverse regions in the UK. There may instead be a place for a regional mechanism by which areas of the UK, major cities, and devolved administrations can feed back to central government about the migration needs in their local areas.

The UK needs:

1. To gather more data, and conduct impartial and independent analysis of the local and regional impacts of migration;
2. A mechanism that considers this data, and ensures that the economic benefits of migration are reinvested in order to ensure adequate infrastructure and services across the country. A properly managed migration fund could be a starting point;
3. A mechanism allowing regions with a high demand for migrants’ skills and labour to inform central government planning. This will ensure that centralised controls on migration do not stifle local and regional growth across the UK.

4. Immigration policy should encourage long-term integration and the formation of stable, cohesive communities of migrants and non-migrants alike.

As every mainstream political party recognises, one of the UK’s greatest strengths is that British society is made up of people from diverse backgrounds, ethnicities, religions and cultures. Recognising the reality of this diversity and its benefits, alongside promoting inclusion and integration into our communities, must therefore be central to immigration policy.

Integration and inclusion should be understood as a long-term endeavour, the benefits of which are both social and economic. These include stable, safer and more tolerant communities that foster equality of opportunity and increased participation in society, including of disadvantaged and vulnerable groups and persons. Failing to promote long-term cohesion can result in significant social and economic consequences, both for communities and for society as a whole. Integration policy should reflect the following principles:

1. Opportunity and encouragement should be favoured over coercion. The vast majority of new migrants in the UK are anxious to improve their English, if it is lacking, and to contribute to their communities. Opportunities to take lessons, join in with community events and so on are far more valuable than coercive measures.
2. Integration must not be viewed as a test for migrants alone. Stable communities are ones in which all members, whether migrants or UK-
born, are active in their engagement, acceptance, and tolerance for others.

3. Integration is hampered by precariousness and uncertainty. While not every visa route needs to be long-term, it is important that routes to eventual long-term settlement in the UK are clear and fair. Uncertainty or overly harsh rules lead to a sense of disconnection from UK society that can hamper integration.

4. Politicians and public figures should recognise that they play a significant role in encouraging good community relations and ensuring a balanced public debate. Evidence-free rhetoric vilifying migrants and ethnic minorities can be hugely damaging to community relations and in some circumstances may even encourage violence towards minority groups.

5. Respect for human rights and equality must be integral to our immigration system. People must never be seen as less than human, merely owing to the fact that they were born elsewhere. The UK has historically been a leader in the establishment of human rights principles and in their global enforcement. From establishing the principle of habeas corpus, to the first international prosecutions of war crimes at Nuremberg, and through to the founding of the European Convention on Human Rights, the UK has been at the forefront of the development of human and civil rights law. This respect for human rights, for equality and non-discrimination must continue to be at the heart of our policymaking.

A system based on respect for human rights and non-discrimination is central to a democratic, cohesive and functioning society. Protecting and safeguarding the human rights of migrants and promoting equality should not be seen as a frustration or afterthought of migration management, but instead must form an integral part of policy formulation and implementation. As well as adhering to international human rights standards, where human rights are promoted and protected by the Government, this encourages faith in the system and fair and just decision-making.

Conclusion
Within the framework of these principles there is a wide amount of space to pursue differing goals, such as ensuring that certain skills gaps are filled, improving the skills of the domestic workforce, or prioritising certain kinds of migration while discouraging others. As long as these aims are pursued within the framework put forward in this briefing, they should go some way to inspiring public trust, while working for different communities, as well as UK society as a whole.

We would greatly welcome your views on the principles outlined above.

November 2016
The Law Commission welcomes the Constitution Committee’s inquiry. We have been advised that the Committee is at present conducting the first part of its inquiry dealing with the drafting of legislation and that issues relating to the passage of primary legislation through Parliament, or the approval of secondary legislation by Parliament, will form the second part of the inquiry. When that stage is reached we would wish to make a submission to the Committee about the Parliamentary process as it affects the Commission’s work, in particular the special procedure for Law Commission Bills.

The founding statute of the Law Commission (and of the Scottish Law Commission) was the Law Commissions Act 1965. Section 3 (1) of that Act includes the following:

“... It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete or necessary enactments, the reduction of separate enactments and generally the simplification and modernisation of the law, and for that purpose - ...

(d) to prepare from time to time at the request of the Minister [the Lord Chancellor] comprehensive programmes of consolidation and statute law revision and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister. ...”

Consolidation
Over the half century since the 1965 Act was passed the value of consolidation has in our view if anything increased. This is for two reasons. The first is that unlike a Queen’s Printer’s copy, a statute in digital form can be readily updated when the legislation is amended. Secondly, statute law is accessible free of charge on the internet, so that (provided that the website is kept up to date) a single Act of Parliament containing all the statute law on one subject can be a useful resource available to the public as well as to lawyers.

There are a number of areas in which consolidation would be worthwhile, including immigration law about which previous witnesses have given evidence to the Committee. It is striking to note that in the period between the 1965 Act and the end of 2006 Parliament passed over 200 consolidation Acts, but in the last ten years there have only been two such Acts: the Charities Act 2011 and the Cooperative Societies and Community Benefits Act 2014. It appears that there is now little support for devoting the scarce and expensive resource of Parliamentary Counsel to the drafting of traditional consolidations, although, as noted by the Leader of the House of Commons in his evidence to your Committee’s inquiry, the Office of the Parliamentary Counsel guidance continues to highlight the need for legislation to be coherent and accessible to the user and mentions “where possible consolidating legislation” as one way of achieving this objective.

The proposed Sentencing Procedure Code
In its early years the Law Commission embarked on some massive codification projects, for example codification of the law of contract, which proved to be impracticable. More recently the great majority of the Law Commission’s work has been concerned with law reform, but the Commissioners have not lost sight of our statutory duty to promote the simplification and modernisation of the law. An important current project, which forms part of the Commission’s Twelfth Programme approved in 2014 by the then Lord Chancellor, the Rt Hon Christopher Grayling MP, is the preparation of a Sentencing Procedure Code. We emphasise that this Code will not be a set of guidelines, which are the responsibility of the Sentencing Council; it will deal with procedural matters. It is not designed either to increase or to decrease the prison population, but to rationalise and streamline a large mass of statutory provisions which in their current form run to 1,300 pages.

The enactment of the Code will be achieved in two stages. The first stage will be the introduction, either as a separate Bill or as part of a Government programme Bill, of a small number of pre-consolidation or paving clauses. The second stage will be a Consolidation Bill.

The pre consolidation or paving provisions required fall within two categories. The first is a standard pre-consolidation amendment power allowing minor changes to be made to the law to produce a satisfactory consolidation. Such powers commonly precede a major statutory consolidation, see for example the National Health Service Reform and Health Care Professions Act 2002, s. 36. The draft Statutory Instruments to make the changes are conventionally published prior to enactment of the power in order to provide guidance on how the power granted is intended to be used.

The other paving provision, to run in parallel to this, is a clause to implement the recommendations on transition we made in our report “A New Sentencing Code for England and Wales. Transition – Final Report and Recommendations”: sweeping away historic complexities of sentencing procedure which are currently retained and to which judges are compelled to have regard in many cases. This would have the effect that, in most cases, the law set out in the Code would apply in all cases, irrespective of the date of the offence. The one exception, which reflects a rule well established in both domestic law and under Article 7 of the ECHR, will be that no defendant can receive a sentence greater than the statutory maximum which applied at the time the relevant offence was committed.

While the Commission is actively working to simplify and streamline the law in the course of this project, the Sentencing Procedure Code will be a very substantial piece of legislation. In addition to the benefits which will be achieved through bringing all of the law on sentencing into a single place, and the ‘clean sweep’ approach to transitional provisions and historic layers of law, the Code provides a flagship opportunity for championing ‘good law’ initiatives and experimenting with innovative ways of using technology to improve the experience of the users in navigating legislation.

*Technology and the new Code*

The Commission is currently in active discussion with the National Archive regarding ways in which the [legislation.gov.uk](http://legislation.gov.uk) platform or something similar to it could be harnessed to explore new ways to allow scrutiny of, and
interaction with, draft legislation. The current intention is for a draft version of the new Sentencing Procedure Code to be hosted online for a lengthy period of pre-legislative public scrutiny, in a format which clearly shows users how the law would look if enacted, and encourages user-friendly interaction, for example, through the use of tables, flow-charts, and filtering tools.

For instance, the drafting of the Code includes frequent signposting provisions, designed to assist users by alerting them to the existence of related provisions whether elsewhere in the Code or in other legislation. When used digitally, such signposts could link users at the click of a button to that other material, and users might be able to drag some or all of the related information onto the same screen as the initial provision they are viewing, for instance by hovering the cursor over the link. Filtering tools could enable users to see more or less background detail depending on a user’s purpose and needs. Users could choose to hide provisions which are limited in their geographical extent if they do not apply to the case. Alternatively, users might choose to view or hide details such as commencement information; provisions that are not yet in force; detailed tables of origins etc. if not needed for their purpose, or if conducting quick initial research.

This functionality dovetails neatly with the novel approach to legislative ‘meta-information’ which is informing the drafting of the Sentencing Procedure Code. On the traditional approach, important information relating to the relevance of a legislative provision (such as its commencement date, and whether it has retrospective effect) is often hidden in commencement orders and other secondary legislation, whereas information not of current importance to most users sits alongside the primary law in force, potentially distracting an unwary user (and on occasion even the wary judge or lawyer). The drafting of the Code is being undertaken wherever possible to remedy these defects of the traditional approach, for instance by including commencement dates on the face of the primary legislative provisions, and relegating un-commenced amendments to Schedules until they are brought into force, when they will be promoted to the body of the Code. Where the limitations of current legislative drafting conventions prevent us from fully realising such ambitions, we hope to use the digital medium through which most users will engage with the law to help us achieve the same ends, by allowing users to hide distracting information and highlight key features such as the dates on which, and places in which, the law is actually in force.

These are examples of the way in which technological tools can be harnessed to improve ease of navigation of legislation, and which are informing our approach to drafting the new Sentencing Procedure Code. Depending on the response on consultation, and during user testing, we hope that these and many more technologies can be employed which will make the law of sentencing clearer and more accessible.

December 2016
The Law Society of England and Wales—Oral evidence (QQ 57-62)

Transcript to be found under Michael Clancy, Law Society of Scotland
The Law Society of Scotland—Written evidence (LEG0025)

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee (‘the Sub-Committee’). The Sub-Committee is comprised of senior and specialist lawyers (both in-house and private practice).

General Comments

Question 1: How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

The current practices in Government and Parliament for delivering draft legislation with the qualities of clarity, coherence, effectiveness and accessibility are of variable effectiveness. Firstly, pre legislative consultation requires to be undertaken in a clearer and more accessible way. It is relatively easy for professional organisations, campaigning bodies, experts in the relevant fields, and those accustomed to civil service and political structures to respond to consultation papers. It is less easy for those whose interaction with government or legislative authorities is sporadic. There are issues concerning the language used in consultation in consultation papers, the assumptions made of prior knowledge and understanding of the constitutional and legislative backdrop militate against a broad range of participation from a broad range of people. Some may be intimidated by the machinery of government or the image presented by Parliament. Some potential consultees may be put off by a sense of political detachment documented in reports such as the Hansard Society’s regular Audits
of Political Engagement; For example in the most recent Audit, only 7% of those polled said they had participated in a public consultation (Hansard Society, Audit of Political Engagement 13: the 2016 Report).

The current practices in Government and Parliament for delivering draft legislation frequently require reference to legislation which has already been made. However, once legislation has been made it can frequently be difficult to find an up to date version of legislation (or one which makes sense due to the cumulative nature of the statute book, where a later statute amends an earlier one in various ways to differing degrees). Accordingly reading a statute requires both training and expertise which requires specialised education. Furthermore legislation.gov.uk as the repository of statute law which is freely available to the public is not kept up to date quickly enough and can give a misleading impression of the law in force at any given time. Commercial statute law databases show it is not impossible to provide an up to date version of statute law online in a way which is readily accessible and minimises the "cut and paste" approach of the pre internet days.

**Question 2: Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of 'good law'?**  
The mechanisms, processes and practices which hinder the development of ‘good law’ include the relative obscurity of consultation documents and their supportive evidence, the time made available for responses and the need for expertise and resources in order to properly participate in the consultation process. The evidence upon which the consultation proceeds needs to be robust and broadly drawn. Good research which provides solid evidence should result in sound policies which make good law.

**Question 3: Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?**  
Improvements which could be made at this stage of the process would include the use of plain language in consultation papers and draft bills. We endorse suggestions made by the House of Commons Political and Constitutional Report “Ensuring Standards in the quality of legislation (2013 HC85). Where possible a consultation document should be accompanied by a draft bill. If Government
presents a bill to Parliament which has not previously been published in draft there should be a Ministerial Statement setting out why the bill was not published in draft. More draft legislation should be self-contained, and there should be more consolidation measures bringing together series of statutes in a readable fashion. Finally, codification (where all the law on a given area is codified in a statute expressed in a way which is accessible) should be proposed. Codification is a function of the Law Commissions, but Governments will need to plan with them how this process could be taken forward to statutory legislation. Initiatives such as the “Good law” project from the Cabinet Office and Office of the Parliamentary Counsel and the Guidance on the drafting of primary legislation from the Scottish Government’s Parliamentary Counsel Office are welcome and need constant reiteration. The use of technology to engage with the public at large and specialist users should not be underestimated. Outreach through the internet, blogs and social media about the existence of consultation, how to participate, where to participate and within what timescale would improve this aspect of the legislative experience. In particular government departments could conduct consultation meetings on important pieces of legislation in localities across the country and engage on a one to one basis with the communities affected by the proposed policy or legislative changes.

**Question 4: What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?**

At the moment it is difficult to predict the impact which the UK’s withdrawal from the EU will have on the volume of and type of legislation or how it will affect the legislative process. Much depends on the terms of the Great Repeal Bill, the withdrawal agreement and the post withdrawal EU-UK relationship. However it is predictable that there are some aspects of the UK’s withdrawal from the EU which will result in significant legislation at both UK and devolved administration levels. The repatriation of EU law to the UK will allow for the retention of those aspects of EU law which should be retained and the amendment and repeal of those aspects which should not. In some instances law which is repatriated from the EU will fall specifically within the devolved competencies of the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales. In these circumstances proper consultation will need to be carried with the devolved
administrations to ensure the smooth transition of the legislative powers in the areas concerned (in the case of Scotland such as Agriculture, Fisheries, Environmental Law, and aspects of Civil and Criminal Law and procedure).

In this connection, it is understood that the Great Repeal Bill may contain “Henry VIII” clauses which would permit Ministers to amend EU law once it has been repatriated. Although the Law Society is not in favour of such clauses, there may be little alternative in this case but it is important to ensure that, if any repatriated EU law falls within the devolved competence of the Scottish Parliament, the Ministers who can exercise such a power should be Scottish Ministers and not UK Ministers. This is particularly important because UK subordinate legislation applying to devolved areas is not subject to the Sewel convention.

**Question 5: Will there be changes required to how the Government and Parliament deal with legislation following Brexit?**

The need to maintain stability in the law, repeal legislation and prepare new legislation to fill in gaps arising from leaving the EU will comprise a significant part of the domestic legislation which is passed at or following withdrawal. Bearing in mind the public interest in maintaining consistent application of the law concerning aspects of the freedom, security and justice legal framework, recognition and enforcement of citizens’ rights, CJEU pending cases, immigration, residence, citizenship and the impact of the UK’s exit on the devolved administrations, it is clear that a wholesale repeal of the law which has emanated from the EU over the years would be problematic, difficult to implement, and unduly disruptive.

We propose that domestic legislation is passed to ensure a “soft landing” in terms of legal change. In principle laws with direct effect (Treaties and Regulations) will cease to apply once the withdrawal agreement is in place, the UK is no longer a member of the EU and the European Communities Act 1972 has been repealed. However it would be inappropriate to include in any new law the wholesale repeal of direct effect provisions without making some alternative arrangements. These arrangements would ensure clarity and stability in the law and prevent legal uncertainty. Similarly EU law with indirect effect (Directives) has already been transposed into domestic legislation. This has been through primary or secondary legislation either at UK level or through the Scottish Parliament and other devolved
structures. That law will continue to be part of the English and Scots Law until and unless it is specifically repealed. Many statutory instruments deriving from EU directives have been enacted under Section 2 of the 1972 Act and so would be repealed once the Act is repealed unless explicitly retained.

In order to reassure and create stability for citizens, business and consumers we believe it is vitally important that effective transitional arrangements are in place to ensure that all necessary provisions continue to apply unless and until they are specifically repealed and that alternative domestic provisions are put in place. It is likely that much of what the UK decides to retain will depend on the outcome of the withdrawal agreement and the new relationship between the UK and the EU. Because it is likely that UK Law derived from EU laws will continue in force, Parliament will still need to be aware of changes made in the EU and jurisprudence from the CJEU. Therefore some continuing Parliamentary scrutiny function will be needed particularly if changes made in the EU to law still applying in the UK would be advantageous to adopt into UK Law.

**Question 6: How effectively do Parliament and the Government make use of technology at this stage of the legislative process?**

The Society has not undertaken any statistical research as to how effectively Parliament and Government make use of technology at this stage of the legislative process. Our impression is that the Parliament website is generally quite good and relatively easily navigable.

The GOV.UK Website is a very large collection of documents and the grouping of consultations, consultation outcome and collections in a chronological order is not especially helpful. There are more than 3400 documents on the site and the organisation of this information could be improved. www.gov.uk/government/publications?publication_filter_option=consultations.

**Question 7: How could new or existing technologies be used to support the development and scrutiny of legislation?**

Technology could be used to support the development and scrutiny of legislation by allowing for further and better consultation for example by video with
consultation groups and through social media. Witnesses should also be able to provide evidence by video link on draft legislation to Parliamentary Committees such as a Draft Bill Committee or Select Committees.

**Question 8: To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?**
The Society is not in a position to comment on the extent to which the public are involved in this stage of the legislative process. As a regularly consulted stakeholder we are engaged in a number of consultations with Parliament and Government (around 100 each year) and provide evidence regularly to Public Bill Committees in the House of Commons and Bill Committees in the House of Lords. The Society also briefs MP’s and Peers across the political spectrum on measures before either House. This is generally speaking a satisfactory process however earlier notification about the Parliamentary timetable would be helpful. Disclosure of the content of the Queen’s Speech in advance could also be helpful as would the exposure of draft clauses in a more general way.

**Question 9: What factors inhibit effective engagement?**
The factors which inhibit effective engagement include the large number of consultations, the timescale for responses, the number of inquiries and policy issues which require significant resources on the part of stakeholders to identify, analyse and respond to. The lack of resources generally amongst stakeholders means that legislation and policy matters are prioritised in order of impact on the stakeholder which may restrict the number of responses made.

**Question 10: What mechanisms could be used to increase or improve engagement with the public and stakeholders?**
Engagement with the public and stakeholders could be increased by some of the suggestions which we have made in response to Question 7.

**Question 11: How effectively is information about potential legislation disseminated at this stage in the process?**
A significant amount of, but not enough, information about potential legislation is disseminated prior to introduction of legislation; for example Government Departments frequently consult on issues which are to be legislated upon in the
The Law Society of Scotland—Written evidence (LEG0025)

future. The Queen’s Speech sets out the Government’s programme for legislation. However the difficulty is that consultation can take place without relevant stakeholders or the public at large being aware of it. Therefore the usefulness of the consultation may be limited. ‘Doing less better’ - in the sense of having smarter, more focussed consultations would be one way in which proposals for change in the law or policy could be more effectively made. Reducing the range of matters consulted upon would give stakeholders and the public a significantly enhanced opportunity to respond to those issues. Longer consultation periods would be a distinct improvement especially avoiding holiday periods (recognising that holidays are not uniform across the UK).

**Question 12: How useful is the information that is disseminated and how could it be improved?**

See the response to Question 11.

**Question 13: To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?**

The Society approves of the process of pre legislative scrutiny by Parliament including the examination of draft bills and has participated in the evidence sessions relating to a number of them e.g. the Draft Deregulation Bill and the Draft Investigatory Powers Bill. This process could be applied to many other measures which would increase engagement with Parliament in this area.

Parliamentarians are of course involved in not only the scrutiny of draft legislation but also sometimes in the origination of draft legislation and Private Members Bills could be subject to more transparent arrangements for introduction and a similar system of pre legislative scrutiny and consultation as that which applies to Government Bills. In the Scottish Parliament Members Bills are subject to consultation before introduction and can only be introduced if they acquire sufficient support from other members. Frequently pre-introduction consultation highlights issues with the proposals made by the MSP which can result in a better Bill being introduced or in a change of direction by the MSP.
Question 14: Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

Adoption of a system of consultation on Members Bills such as that applicable in the Scottish Parliament would enable the public, Parliament and parliamentarians to be more involved in the pre legislative process.

Ministers could be called more frequently to Committees to answer questions about consultations which their departments are conducting. Such inquiries could investigate the evidence base for the policy consulted upon and question the Minister about the engagement strategy being undertaken.

October 2016
The Law Society of Scotland—Oral evidence (QQ 57-62)

Michael Clancy, Law Society of Scotland; Robert Khan, law Society of England and Wales; and Andrew Walker QC, Vice Chairman-Elect of the Bar Council and the Vice Chairman of the Bar Council Law Reform Committee.

Evidence Session No. 4 Heard in Public Questions 57 - 62

Wednesday 23 November 2016

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Hunt of Wirral; Lord Judge; Lord Macdonnan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Examination of witnesses

Q57 The Chairman: I begin with the same apology to you. The time available does not do justice to your experience and the fact that there are three of you. We have had two written submissions from you on some of our questions, so please do not feel that you have to go through it all again. Please speak for the length that you think is appropriate to the relatively limited time available. We are very grateful to you for talking to us because your experience, both on behalf of the Law Societies and the Bar Council, will be of great value to our inquiry. Possibly, you heard the question that I asked Mr Greenberg at the outset, quoting the Office of the Parliamentary Counsel describing “good law” as law that is “necessary; clear; coherent; and accessible”. Perhaps you could tell us not just your view but what your members tell you about this, and how you think we might address it. Would you like to start, Mr Khan?

Robert Khan: Thank you very much for inviting us to give evidence. I think we would absolutely agree with the definition of “good law” that parliamentary counsel provided. I will briefly trot through each of those different parts. Mr Greenberg painted a bleak picture about a lot of things, including the necessity of legislation. I agree with him in some senses that a lot of pieces of legislation are perhaps not necessary. It is interesting with private legislation that you have to demonstrate the necessity of that legislation, which you do not have to do in the public sphere.

You have discussed at previous sessions how some Bills are caused, for example, by great public controversy, which causes moral panic, which causes people to say that something must be done and which then causes suboptimal legislation. There are also knee-jerk responses, and of course there are certain pieces of legislation on the statute book that could be said to be government by press release. The Compensation Act 2006, for example, arguably did not add to the existing corpus of law.
On “clear” and “coherent”, again Mr Greenberg painted a very bleak picture, but I agree with some of it. I think legislation has improved over historical time. Certainly we do not see the “herewiths” and “theretofores” that we used to see. The language is far more accessible. However, a lot of our members say that, for example, when statutory instruments amend statutory instruments it becomes very hard to follow. There are particular examples in the tax field or in the Immigration Rules. There was a recent case where Lord Justice Jackson described the rules as having now “achieved a degree of complexity which even the Byzantine Emperors would have envied”, so there are certainly some issues.

Mirroring what Mr Greenberg said on effectiveness, there is certainly a role for more post-legislative scrutiny. On accessibility, I agree with Mr Greenberg that the legislation.gov website is not nearly there. I think 85% of primary legislation is now there, and it is increasing by about 1% a month. A lot more needs to be done to get it where it needs to be.

**Michael Clancy:** It is quite difficult to say that there are absolute rules about this. Some legislation fits those criteria and some do not. Mr Greenberg’s bravura performance, with his examples, is a very good way of pointing out defects. It is rather more difficult to be able to point out virtues.

I would take the step back that the Committee began to explore toward the end of the evidence session. Policy creation is what dictates whether good law is made, in a sense. It may be all about political necessity. That is a matter of political judgment. Political coherence is a matter of political communication, or perhaps political accessibility, which might be an aspect of political vision. It is taking that step back: on what basis do the draftsmen draft what they are asked to draft?

Many of you who have been originators of policy, and the producers and advocates of the legislation that then follows, are perhaps able to tell a better story than we who are external observers. We who are external observers see a product. Of course, in a sense it is easy when you are looking at a product such as a miscellaneous provisions Bill. Lord Chairman, you and I, once upon a time, had an experience over the Law Reform (Miscellaneous Provisions) (Scotland) Bill in 1990.

**The Chairman:** I remember it.

**Michael Clancy:** You might remember it too, Lord Hunt. It is the sort of thing where we find now that, although they are not called miscellaneous provisions Bills, many Bills are in fact miscellaneous provisions Bills. It is not unexpected that the bulk of a measure may compartmentalise into several sections. For example, the Digital Economy Bill, currently being considered in the House of Commons, has provisions not only about the communications code, which provides for internet providers to be able to run wires through farmland and things like that, but about the protection of children from pornography on the internet. You can see that it is quite a difficult question to answer.

**The Chairman:** Is political urgency another component of the problem?
**Michael Clancy:** Of course, there is an issue about speed of production. I do not think it was the Kaiser who said that law reform is like sausage making; you like the result but you do not like the means of production. I do not think it is like that, but the speed of production certainly has an impact on the quality of legislation. We deal with relatively few emergency Bills in the Scottish Parliament. From the Law Society perspective, I think I have had to deal with three emergency Bills. In the UK Parliament, perhaps more time should be allowed, first, for the policy formulation process and then the policy execution process. That would be helpful. In particular, it would allow us to catch the gaps where legislation fails to capture the entire sense of the policy. That has an impact on its effectiveness.

**Andrew Walker:** I endorse all of that, and indeed what Daniel Greenberg said. I will not bore you by repeating it all. To give further examples of where things are not working, there are a number of powers that are not actually used by the Executive. My perception is that an increasing number of Bills are enacted into law but never brought into force. That is a classic example of suddenly realising after the event that it just does not work.

Policy clarity seems to me something that we really require. Daniel Greenberg was absolutely right about that. If the policy is clear, the drafting will be easier. It is the same as any other legal exercise. If your instructions are clear, you know where you are heading and you can perform the task much more easily. What may be missing in the process is what Daniel Greenberg said about expert involvement. When you realise that the Act is not going to work, it may be a facet of the drafting or it may be the failure of parliamentary counsel to have input from those who will have to implement it saying, “This is just not going to work. You could do it a different way, but what you cannot do is do it this way”. When that happens, as it does in relation to some delegated legislation, my experience is that, if you are listened to, you can end up with a far better piece of legislation at the end of the process than you started with.

Delegated legislation is an area where accessibility is an increasing problem. What I would emphasise in relation to that is not just the problem with the government website and its availability but the ability to work out which pieces of delegated legislation are relevant. In areas such as immigration and planning, where there is policy as well, the website is changed, but you often need to know what the position was at a particular point in time, and it is impossible to do that, certainly for any member of the public.

**The Chairman:** As you have mentioned delegated legislation, perhaps I could bring in Lord Judge, who wishes to ask about it.

**Q58 Lord Judge:** What are the appropriate—I underline appropriate—criteria for deciding whether delegated powers should be included in primary legislation?

**Andrew Walker:** That is a difficult question to answer.

**Lord Judge:** I am sorry about that.
Andrew Walker: It is a difficult question to answer in this sense. Every area is likely to need, I suggest, a slightly different response in primary and delegated legislation. There is a general concern about Henry VIII clauses, mitigated perhaps, as Daniel Greenberg said, by judicial reluctance to apply a wider Henry VIII clause rather than a narrower one.

There should be some guidelines in relation to legislation at the point of presentation. For example, one can readily identify human rights, as Daniel Greenberg mentioned, and rule-of-law issues. One could identify certain basic criteria for things that should not be the subject of delegated legislation, certainly not without strict safeguards.

Beyond that, the answer may be for Parliament itself to pay more attention to the delegated legislation powers when they are in a draft Bill. It is not at all clear to me that a great deal of attention is given to the scope of those powers or to restrictions on those powers. My understanding is that, when delegated legislation is considered by the House, the consideration is relatively limited to, one might say, a rough assessment of whether or not the powers in the Bill are sufficient. Having seen the product of that at the end, with one piece of draft delegated legislation that has still not seen the light of day, I do not think I am convinced that the answer that came back from the House was the right answer about the scope of the powers in relation to the Bill. There is just one Committee that considers that, and the merits of delegated legislation are not given any consideration at all in substance.

Lord Beith: In your written evidence, at paragraph 12, you issue a warning that this will be writ large with the transfer of EU legislation. You say, “It is one thing to use a subordinate instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making”. Would you like to say anything more about that?

Andrew Walker: Absolutely. Perhaps I can summarise it in this way. When we are transposing EU legislation into UK legislation, it has already been through a process of consideration, and indeed considerable negotiation, at EU level. In many cases, there is then a further process of much more careful consideration here as to how legislation should be implemented. The fourth money laundering directive is a clear example. At the moment, the Treasury is consulting. Supposedly it is an evidence-gathering exercise. The reality is that they are saying, “There are several problems with this. What do you think the answers are? How can we meet those problems?” At the moment, quite often there is a double layer, but certainly a layer of scrutiny at EU level. If we were to change—in effect, simply by ministerial fiat—legislation that at the moment is delegated legislation in the UK, there is no process of scrutiny at all for things that were seen as important enough to go through two levels of scrutiny when they were enacted in the first place.

Robert Khan: I concur with what Andrew said. I would certainly support the idea of Parliament laying down firm criteria about what should be primary and what should be secondary legislation, although we need to be mindful that there are thousands of pages of secondary legislation
promulgated every year, and much of it is about putting roadworks on the M1. You would not necessarily want that higher level of scrutiny for those sorts of issues.

To give one live example, a couple of years ago the Ministry of Justice promulgated what were called damages-based agreements, which would allow solicitors to fund cases in different ways. The profession felt there were so many technical issues with the drafting that colloquially they became known as “Don’t bother agreements”. If there was primary legislation and more scrutiny of higher issues of policy, it might ameliorate those sorts of issues.

Michael Clancy: Where is the dividing line? Of course, issues that would be more suited to primary legislation should not be put into delegated legislation. Those that have some element of political or legal controversy about them would perhaps be one way of assessing that. On the other hand, there are those that are technical, such as your M1 example, Robert, or changing fine levels or things like that, and perhaps even the deregulation regime. Those are perfectly well-understood examples. If we can extrapolate from those general principles, there should be no reason why we could not do that.

I take the point about how much scrutiny the provisions get. In some instances, they get a lot of scrutiny. They may come at the end of a chapter at the start of the Bill. Recently, this year, we had the Scotland Bill, which became the Scotland Act 2016, and the significant powers given to the Secretary of State to alter legislation were at the back of the Bill. The Delegated Legislation Committee here had considered those powers and had issued a memorandum criticising them quite significantly. It was not until Report in the House of Lords that the Government relented, after some pressure, and made amendments to have those provisions conform to some extent with the Deregulation Committee.

The Chairman: We share your sense of outrage about aspects of that Bill.

Michael Clancy: You know what I am on about.

The Chairman: Yes, I do.

Lord Hunt of Wirral: Turning to the way improvements could be made in the way legislation is drafted, how might they be achieved, bearing in mind that there has always been resistance from parliamentary counsel to any interference in the way in which they draft Bills? That is mainly concentrated on amending previous legislation. Every time you have a draft piece of legislation you have to have all the other facts around you in order to try to understand it. How are we to return to plain English, so that people can take an Act of Parliament and know what the law is because it is easy to read? Mr Khan, you have huge resources—thousands of solicitors. At the Bar, we have thousands of barristers who could have an input in trying to make legislation more intelligible. How are we going to do that?

Robert Khan: That is not a suggestion the profession would want to refuse, Lord Hunt. There are two ways we could possibly address it. The
first is more draft Bills. In our experience, having more draft Bills allows us to scrutinise properly. For example, Lord Pannick will be aware of the Investigatory Powers Bill that was produced in draft. That allowed us to have much more dialogue with the Bill team. Because it is published as a draft there is less ministerial pride in making changes. We got significant changes to that legislation that were very much in the public interest.

A more technical response might be Keeling schedules. We are all aware, of course, that you would not want a Keeling schedule for minor amendments to a very big Bill, but for Bills that cause a lot of amendments to previous bits of legislation, why not publish the Keeling schedule with the legislation? They must exist; I am sure parliamentary counsel must have informal Keeling schedules on their walls as they try to work out legislation, otherwise how would they ever do it? It might be good to have more public scrutiny of them.

Michael Clancy: I am intrigued by the idea of the public having more access to legislation and being able to read it easily. Robert’s quote about Byzantine lawmaking reminds me of the Emperor Justinian, who was devoted to codification. That could give us a route to rethinking how to consider law that might be more accessible, more easily managed and more easily read. There could certainly be consolidation; anyone who knows that I can drone on for hours about codification knows where I stand on that.

The process of consultation that precedes any legislation should aim to meet the standards of legislation that this Committee and others, such as the Constitution Unit and the Bingham Centre for the rule of law, have expressed as desirable: simplicity, using language that people can understand and getting rid of foreign language terms. I refer to some of the work that the Scottish Government parliamentary counsel’s unit has produced in its latest guidance on the production of Bills. It goes into some detail about the kinds of expressions that ought to be used; not “shall” but “must” and no Latin. Ex facie, that is a good idea.

The Chairman: Interesting. We will pause there.

Andrew Walker: Lord Hunt, with respect, hit the nail on the head. If you want to achieve that change, you would not start from where we are now. There is little one can do about all the legislation that is on the statute book unless Parliament will take the time and civil servants will be provided to do the drafting and a much more comprehensive consolidation exercise.

In real terms, practically speaking, I suspect that sort of exercise will be limited to areas where it is pressing. The Committee heard about immigration law last week. At the moment, another area the Law Commission is looking at is sentencing, which is a disgrace and a pressing need. If we achieve the position, where there is a pressing need, of getting a new statute that replaces everything that was there before, we start from a better place when we go forward. Amendments to that can be seen to be much more transparent. You can understand them much more easily and you can make sure that they actually work.
I have some additional suggestions. There is not enough parliamentary control over the quality of legislation, and Parliament itself ought to have some system both for primary and delegated legislation, put in simple terms of a red card and a yellow card. With a yellow card it gets sent back for reconsideration, and red is, “We will not take this. It simply does not comply with what we require in order to be able to consult on it and work out whether it is going to work”.

The other thing I would add, again going back to Daniel Greenberg’s suggestion, is expert involvement. One used to have a Green Paper, where we would get involvement on consultation. With a White Paper, there is a proper explanation of policy, a draft Bill that seeks to implement that policy and the scope for structured expert input from those who are going to have to work with it, both those implementing it in practice and the lawyers—possibly not the judges for constitutional reasons—who will have to apply it in a court of law if there is a dispute. There is then the opportunity for someone to say, “Well, the policy may be right or wrong, but, even if that is the policy, that is not the way to do the implementation of the policy”. As was said earlier, we see that very much with delegated legislation; you can do that. There is no process for primary legislation.

Lord MacGregor of Pulham Market: Mr Clancy, in your written evidence, the Law Society of Scotland says, “More draft legislation should be self-contained, and there should be more consolidation measures bringing together a series of statutes in a readable fashion. Finally, codification should be proposed”. Without droning on for hours, as you put it, should there be greater emphasis on consolidating law? What are the advantages and disadvantages of amending versus consolidating law? What would be the resource implication?

Michael Clancy: I agree that there are resource issues about consolidation. The Law Commission has consolidated 200 Bills over the last 50 years. The Joint Committee on Consolidation Bills has dealt with three Bills over the last four years. There are issues about resources. There is no doubt, however, that, although consolidation is meant to bring together a number of enactments in one enactment, there has to be some amendment around the edges, because over the years original legislation becomes careworn and a bit tired at the edges. It does not keep up with modern circumstances. We need to make sure that our law is pertinent and useable today.

The Solicitors (Scotland) Act 1980 is a consolidation measure. In it, we can see traces of legislation that stretch back to the late 19th century. Since 1980, there have been something like six Acts of Parliament, both here and in Scotland, which have affected it. We are dealing with a piece of legislation that requires us to be able to read something written by a draftsman 40 years ago and something written by a draftsman last year. They are completely different styles and there is a completely different milieu for interpreting statutes today. That is one of the reasons why we are looking for fresh legislation in Scotland.

That example can be replicated hundreds of times. Mr Greenberg made a very amusing point about the Small Charitable Donations and Childcare
Payments Bill. That would be a prime object for consolidation as a small measure, because the Small Charitable Donations Act was only passed about six years ago, so it is within living memory. We could do it quite easily. Why don’t we? That is something that is important for us to ask. Why not consolidate when we deal with policy development? Yes, it would take resources. The Law Commission estimates that it takes about two years to produce a consolidation measure, and it has significant resources to devote to that. It might be two years well spent if we had a moratorium on legislating on such and such an area of law with the hope of some consolidated measure in the future.

**Lord MacGregor of Pulham Market:** What are the resource implications for Parliament, given that most Members of Parliament are extremely stretched already?

**Michael Clancy:** That, of course, is a very big question. It is a very difficult situation for Members of the House of Lords in particular, who may not have staff to assist them. They may not have office space in which to sit properly, and things like that. There is a big resource issue. There is a resource issue in the other place. Trying to enlist assistance from external bodies is probably one quick way to do that, but, as you know, you get a lot of assistance from external bodies already. They issue briefings on Bills. They prepare amendments. Organisation such as ours, here at this table, charities and third-sector organisations do it as well. There is resource, in a sense, but it would have to be marshalled and ordered in a particular way.

**The Chairman:** Can I ask your two colleagues to be very brief in any supplementary comments they would like to make?

**Robert Khan:** I agree. There is an example that Andrew will know about in relation to compulsory purchase legislation. It is Victorian legislation that was amended in the 1960s. It was influenced in the 1970s and there were more influences in the 1990s. It is a total morass. It is very difficult for trained practitioners to understand, let alone their clients and members of the public. There needs to be more priority. Again, of course, we need to be realistic. No Minister ever made their reputation by saying, “I think I want to be the next Justinian and bring in more consolidation”, even though perhaps they should have that aspiration.

**The Chairman:** That was a very good long answer.

**Robert Khan:** I am sorry.

**The Chairman:** Please, do not apologise. It was interesting to hear about Justinian, as it always would be.

**Andrew Walker:** I would add only this. I am not sure that the bulk of the resources are at parliamentary level. The largest part of a consolidation exercise is drawing everything together and putting it into a single document. The role for Parliament there, as much as anything, is to make sure that that exercise has been done correctly. Michael’s point is a good one about language used a long time ago being applied in modern
circumstances. If a change of language is perceived to be necessary, the scrutiny needs to go to that. For that, you need people who understand the original language and how it has been transposed. It is expert outside involvement that the Committee is likely to depend on; the procedures are relatively straightforward.

Q61 **Lord Beith:** Can I be clear on whether parliamentary draftsmen in fact consult your organisations, and should they, or is that task left to the department and departmental lawyers?

**Andrew Walker:** I can answer that by saying no. Our law reform committee had one session a few years ago with parliamentary counsel to seek an interchange on the way things were drafted. My feeling was that there was so much awkwardness on the part of parliamentary counsel that its usefulness was limited. They did not really want to engage for fear that we were seen to be influencing them in some way. I think there ought to be consultation. In the example of delegated legislation, there ought to be an obligation to do it because, by and large, it is drafted by people who are not parliamentary draftsmen. That example really proves the benefits of it. If we all have the resources to be able to engage—we are not going to engage on a 350-page Bill; we might on a 20-page Bill or a 50-page Bill—we can bring some very useful insight into whether what has been drafted will work in practice or whether it is too convoluted.

**Michael Clancy:** I have had experience of parliamentary counsel in Scotland being present at meetings with civil servants, and the discussion was useful. My ideas were batted down by parliamentary counsel as unworkable, but it is a good way to engage properly. I was being a bit unkind. The important thing is to get parliamentary counsel’s perspective on how one sees a piece of legislation working out in practice.

**Robert Khan:** I cannot say that in recent memory the Law Society in England and Wales has ever been consulted directly or has interacted with a parliamentary draftsman.

Q62 **Lord Norton of Louth:** This question is a follow-up about consultation. The Law Society of Scotland’s evidence stressed the value of pre-legislative scrutiny. I suspect that would be common to all the witnesses. The question is: how far can it be taken? At the moment, it is very much the exception to the rule and it is dependent on government deciding which Bills will be subject to it. Would there be value in pre-legislative scrutiny being the norm rather than the exception, and is that feasible?

**Michael Clancy:** I think it is. There are examples that show how it works. Certainly Ministers will want discretion. The Irish Parliament effectively requires pre-legislative scrutiny unless there is some special reason. My colleague Nicola Whiteford, who produced some work on this for me, was able to show that there were particular rules in the Oireachtas which required that. There are pre-legislative scrutiny provisions in Victoria in Australia, and in New Zealand, which could be useful models for us to examine more closely as we go on.

**Robert Khan:** I support that and agree. The Law Society would concur that it would be a very good thing if pre-legislative scrutiny were the
norm rather than the exception. An associated point is that we are quite concerned in any case about the length of consultation periods that lead up to a Bill being produced. The Cabinet Office guidance used to be around 12 weeks. That has now been amended to what is “proportionate”. I will give you one live example. The Government announced last week that it was going to bring in plans to raise the small claims limit for personal injury to £5,000. Whatever you think of that measure, it will have potentially huge effects on the rights of ordinary citizens. The consultation paper and impact assessment together are 200 pages long, and the consultation deadline is 6 January.

**Lord Pannick:** If we had a presumption of pre-legislative scrutiny, what could be the possible exceptions, other than urgency or simplicity? Could there be any other reason, if you have a presumption, not to have pre-legislative scrutiny?

**The Chairman:** Who would like to answer that?

**Andrew Walker:** It is difficult to think of one. I agree. I would ask you to think for a moment about what you mean by pre-legislative scrutiny. There is the policy formulation stage and then there is the implementation stage; there are two aspects to pre-legislative scrutiny. I am not sure that the current system allows for clear distinction of the two.

**Lord Pannick:** I am thinking of a draft Bill on which people consult, on policy and on the terms.

**Andrew Walker:** I cannot immediately think of one.

**The Chairman:** Time is limited, I am afraid, but would you like to unburden yourselves of any points we have not asked you about? There are a few moments we can spare for that.

**Michael Clancy:** I am very happy, Lord Chairman. I think we have covered everything. You asked at the start what our members tell us. Of course, our members tell us through our sub-committees and committees where they see difficulties. It is not just our members; people in Parliament, judges and a whole host of agencies are able to comment on the quality of legislation, and they do so. We have to be sensitive to the fact that it is not simply those people who have a particular interest. This is a matter which is for all the people. We have to reassess and reposition ourselves to make sure that, when we are making legislation, it is not for the benefit of the lawyers or industry but for the benefit of the people of this country who elect individuals to sit in Parliament and make law.

**The Chairman:** I would very much have liked to have time to ask you—but it would have excluded the other two—whether there were any lessons to be learned from procedures, shortcomings or high-quality performance activities in the processing of legislation in the Scottish Parliament. I am not asking you to answer now. Perhaps you would take it away, think about it and write to the Committee.
**Michael Clancy:** I can certainly do that. Of course, only a couple of years ago, in 2013, the Scottish Parliament Standards, Procedures and Public Appointments Committee issued a report on this topic that you may want to mine. It covers the gamut, from pre-legislative scrutiny right the way through to the production of a Bill and Royal Assent. Yes, there will be examples that I can produce.

**The Chairman:** That would be extremely helpful. Mr Khan, is there anything else you would like to say?

**Robert Khan:** I have nothing to add, Lord Chairman.

**Andrew Walker:** Nothing from me either.

**The Chairman:** That is brilliant. You have brought us in on time. Thank you very much indeed. It has been extremely informative and I am sorry it had to be a bit compressed. That is the problem of the success of interest in the inquiry we are conducting. Your contributions will be extremely valuable when we draw up the report. Thank you very much.
Sir Stephen Laws, former First Parliamentary Counsel—Oral evidence (QQ 63-75)

Wednesday 23 November 2016

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Hunt of Wirral; Lord Judge; Lord Maclellan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 4 Heard in Public Questions 63 - 75

Examination of witness

Sir Stephen Laws

Q63  The Chairman: Welcome, Sir Stephen. After 37 years of lawmaking there can be no stronger and more powerful fount of wisdom than you bring to this inquiry. You have, however, had four years of reflection since you retired, which may have changed your views in some ways. We were very interested to receive your submission entitled “What is Parliamentary Scrutiny of Legislation for?” It is of considerable value to us. We have a few questions. You were here earlier so you may have heard me asking the “good law” question. The Office of the Parliamentary Counsel described “good law” as law that is “necessary; clear; coherent; effective; and accessible”. You may have had something to do with drafting that.

Sir Stephen Laws: I am afraid it was after my time.

The Chairman: Do you think legislation does now meet that criterion, or not?

Sir Stephen Laws: I said it was after my time, but it has always been the ambition that those standards should be met. In my time I thought we got close to it, certainly on Royal Assent. Sometimes the test is not always satisfied on introduction, but that is part of the process. The difficult bit about those tests is how you reconcile inconsistencies between the standards. Effectiveness is a very important standard, and sometimes it is difficult to be both effective and clear and simple. There is also the difficulty of reconciling it with the other job of the drafter, which is to draft a Bill that will pass through Parliament.

The main difficulty is knowing when you have satisfied the standards. It is very easy to sit in an armchair and say that we know what “necessary, effective and accessible” is, but we have to find some way of testing that in the real world. In my time, the office started a project with the National Archives, using some of the techniques they use for testing the quality of the legislation.gov.uk website, asking people what they thought of
Sir Stephen Laws—Oral evidence (QQ 63-75)

legislation, whether they found it easy and what they understood by it. That approach is much better than a conceptual attempt to analyse what effective and coherent is.

**The Chairman:** That is understood. Perhaps it will develop as we ask more specific questions.

Q64 **Lord Maclellan of Rogart:** Do you consider that external advice should be brought in, as we heard from previous witnesses? If so, who should consult and advise on the external advice?

**Sir Stephen Laws:** Consultation is a very important part of producing legislation at policy level. I heard it said that parliamentary drafters do not speak to the Law Society and the Bar Council. I am not sure that is quite right. When I was drafting the Finance Bill in the 1990s, I had frequent meetings with the revenue law committee of the Law Society to talk about it, but it was also our experience that it was important for consultees to address the policy when giving their consultation.

I remember drafting privatisation Bills in the 1980s when all the parties to the sell-off were represented by firms of solicitors, and we had some very difficult meetings at which solicitors for the companies or existing corporations came along. We had long discussions that purported to be about the drafting but were in fact about the policy. It would have been much better if we had not been there so that both the department and the consultees could not divert the discussion in our direction to talk about something that was made out to be drafting when the real issue was one of policy.

Q65 **Lord Pannick:** If parliamentary counsel receive instructions that are obscure or incoherent, or they think that the provision they are being asked to draft conflicts with the rule of law, is it their job to raise that concern? If so, how effective are the mechanisms for doing so?

**Sir Stephen Laws:** I think they are very effective. If we cannot understand what people want, obviously we have to ask them. Part of the skill of the job is to try to elicit what the real intention is. I do not think there is any drafter who picks up a set of instructions, who does not think, “These instructions are hopeless and I do not think I am going to be able to do this”, but eventually they work their way through it. I remember only one set of instructions that I could make no sense of at all and had to send back.

As far as the rule of law is concerned, things have changed a bit since the Human Rights Act because there is much greater concentration on the requirements of the human rights convention. The traditional approach was that, if the drafter had a problem with something and the rule of law, he would raise it with the department, and if the department was unable to resolve it, he would ask the Law Officers to raise it at the Legislation Committee meeting at which the Bill was discussed. That was normally effective. It is the way of Whitehall; people are always saying they are not going to die in a ditch about something; and they tend not to. So things change and that works. If the Law Officers raised it at the Legislation Committee usually some change would result, but it was not normally necessary to go that far.
The Chairman: Is there a hierarchy of responsibility for the quality of drafting legislation among Ministers, parliamentary counsel, departmental lawyers, drafting and policy officials in the department, or some other layer of activity?

Sir Stephen Laws: Everybody is involved in the process.

The Chairman: The danger of that is that everybody is responsible, and therefore nobody is.

Sir Stephen Laws: Everybody has different perspectives. The particular perspective of the drafter is the effect on the system as a whole, because every time you introduce a piece of legislation you affect the whole system. The constant fear of the drafter is that you will throw out the baby with the bathwater, or cause an unintended consequence that fundamentally prejudices the system. That is the main responsibility of the drafters, as well as getting the words to have the effect the department wants for them.

Lord Morgan: The purpose is to make and draft good law. There has been a particular debate lately about the extent to which that is affected, or obstructed, by political pressures. There was much debate about it during the period of coalition government when there were different, perhaps conflicting, pressures within the Government between Lib Dem and Conservative Ministers, for example on Lords reform. How far is that a factor that complicates, or perhaps diminishes, the quality of good law?

Sir Stephen Laws: We would not legislate at all if it was not for political factors. Legislation is there most of the time in order to implement government policy. So part of the exercise is designed to produce good law while reconciling it with the political needs of the day—to draft a Bill that will “pass as razors war made to sell”, as one of my predecessors said.

The main point I noticed in relation to the coalition Government was an issue that is quite often technical when there is a single-party Government. That is how much you ratchet a change. When you make a change, how far do you make it impossible to turn it back? That became quite an intense political issue, because if one part of the coalition wanted something very much, and wanted it to stick, they wanted it to be ratcheted so that it could not be turned back: so people were forced to follow through with the change. The other side of the coalition, which might have thought, “We are happy to go along with the idea. We are not sure it will work, but we can change it back if it turns out that it does not”, would want a change that was not ratcheted and enabled things to go on in the same way as they had been going on, if need be. That was quite a difficult element in drafting legislation in that period.

I do not think there was much pressure to fudge things. I have always said there is no such thing as an ambiguous statute; there is only a statute that you have to litigate to the Supreme Court in order to find out what it means. Fudging things just results in a delegation of the decision to the courts, and I do not think there was an extra desire to do that.

Lord Morgan: I suppose an alternative to fudging is producing legislation
that anticipates, or perhaps even invites, amendment. For example, in this House it is presented as an imperfect sample of what is proposed.

**Sir Stephen Laws:** I did not come across that.

**Lord Morgan:** I was thinking of the Trade Union Bill, for example, which anticipated amendment in the House of Lords.

**Sir Stephen Laws:** Governments sometimes expect amendments. I have never been asked to draft something in the belief that it would invite a change later on. I sometimes predicted that something would be changed later on because it was not the sort of thing that would go down well in a particular House, and would be told, “We will try it anyway”; but I have never been asked to draft it in that way. There is a great risk in doing so, because the things you introduce in the hope that someone will overturn them may well not get overturned.

**Q67 Lord Beith:** A significant part of many Bills is amendments introducing new material brought in either by the Government or in response to other elements in the House. What is the engagement of parliamentary counsel with that amendment process and, therefore, with the final wording of what might be 20% of the Bill?

**Sir Stephen Laws:** It is complete. We draft all government amendments. Few Bills are amended, if they are amended, without the amendments that are eventually made being drafted by the Government. As well as drafting, we provide a handling service; we are in discussion with the department all the time about when the Bill will be amended and how, and so on.

**Lord Beith:** It is also changing or bringing into format amendments from other quarters in the House. It is not just the departmental noise; it is you, is it?

**Sir Stephen Laws:** Yes.

**Q68 Lord Norton of Louth:** I asked Daniel Greenberg earlier about the relationship between parliamentary counsel and the Leader of the House, as chair of the Parliamentary Business and Legislation Committee, and the problems arising, if they are not a heavyweight, in dealing with some of the big beasts in the Cabinet. How do parliamentary counsel see the Leader of the House? Is he or she seen as the voice of parliamentary counsel in relation to the Cabinet?

**Sir Stephen Laws:** The relationship is not wholly about the Leader of the House being chairman of the Legislation Committee, because since 2010 the First Parliamentary Counsel has been head of the Government in Parliament group in the Cabinet Office. The Leaders and Chief Whips of both Houses see First Parliamentary Counsel as their permanent secretary, so there is a much closer relationship. I do not recognise “not a big beast”. To suggest that the Leader of the House and the Chief Whip are not big beasts is unfair. Their influence on government policy depends on how difficult parliamentary handling is. If you are a technician in government raising technical problems and talking about technical risks, you expect to be taken seriously—and in my experience, you always are—
but you also expect to be asked to solve the problems and minimise the risks, and that happens too.

**Lord Norton of Louth:** When Sir Richard Mottram gave evidence, he said there could be some very big figures in Cabinet who try to steamroller their Bills through.

**Sir Stephen Laws:** Policy is always the driver for all legislation, and it is other Ministers who are responsible for the policy. That can happen, but I never thought that it required me to abandon all our standards.

**Lord Norton of Louth:** You would regard the relationship particularly between the Leader of the House and parliamentary counsel as appropriate; indeed, it has probably strengthened as a result of the changes that have taken place.

**Sir Stephen Laws:** Yes.

**Q69 Lord Pannick:** Sir Richard Mottram also told us there had been a change in the working relationship, and that parliamentary counsel used to be a much more austere and distant body, whereas the modern tendency is for parliamentary counsel to work together with officials to produce the legislation. Is that your experience? In addition, might there be virtue in distance, by which I mean that a closer working relationship may have diminished the capacity of parliamentary counsel to act as an independent constraint, to encourage higher-quality legislation?

**Sir Stephen Laws:** I do not think it has. The change has certainly taken place. Colin Tapper wrote a book in which he described parliamentary counsel as having an enviable reputation for technical accuracy and an unenviable one for hubris. I do not think that is the case anymore. We all recognise that it is a team game. I say “we”, but I suppose it is now “they”. They also know that what they bring to the process is an independent perspective. There is always a question about when parliamentary counsel should get involved in drafting a Bill. If you get involved too early, you can be signed up and captured by the department to their view of the policy, and you should avoid that. On the other hand, if you get involved too late, you are asking them to change things at a point when they are very reluctant to do it. It depends very much on the Bill, but I do not think people lose their independent perspective; they know that is what they add to the process.

**Q70 Lord Hunt of Wirral:** In your experience, to what extent was there pressure from Ministers to get outside external counsel to draft legislation? I recall that when Tony Newton chaired the Legislation Committee we were told there was huge resistance by parliamentary counsel to any attempt—because there was a fear of privatising the department—to ask anyone outside to draft a Bill. In the end, I think the Treasury, who were pressing it, were told, “Well, you get someone to draft the Finance Bill”, and it was an utter disaster, as it was intended to be. Why was there such resistance to outside influence?

**Sir Stephen Laws:** I am not sure there was resistance. Some people thought it would be a jolly good idea to be privatised. I was the drafter of the 1996 Finance Bill, so I was the inside drafter who had to incorporate
drafting from the outsiders. What were the things learned from that experience? First of all, it is a specialist job. We provide not only the drafting—other lawyers do drafting—but a handling service all the way through. We know more about legislation than anybody else in Whitehall, where individuals may work on only two or three Bills, and we are practised at the business of reconciling political and legal concerns. It is also the fact that when you recruit someone to the Office of the Parliamentary Counsel you have to teach them how to think as a lawyer in a completely inside out way. Lawyers in the outside world are used to finding the line, not drawing it. They have to treat the law as a fixed point, and they move everything around it. You then have to teach people how to think of the law as the movable bit. It is a specialist trade. What you get from a central service is a cadre of people with a consistent approach; and consistency is a large part of how to achieve coherence and clarity. In principle I do not think using others is a good idea. The experiment also showed, partly because of the amount of work that goes into the handling service, that it was a lot more expensive, so the Treasury thought. Finally, there were problems about conflict of interest, because the firms that took on the job of drafting bits of the Finance Bill were reluctant to commit themselves not to advise on the contents of the provisions they had drafted, which was what the Government required. They were not keen on drafting the bits of the Finance Bill that would give rise to extensive new business. All those problems arise, which does not mean that you cannot take comments from people outside and get some help from time to time.

Q71 **Lord MacGregor of Pulham Market:** On what basis do parliamentary counsel decide whether or not it is appropriate to insert delegated powers into legislation? Are there any guiding principles?

**Sir Stephen Laws:** The overriding guiding principle is what Parliament wants. It is a matter of policy how much you put in delegated legislation and how much you put in the Act. If you think Parliament is going to be content for the detail to be dealt with in subordinate legislation, you are happy to do it. If you think Parliament is going to insist on its being in the Bill, you try to make sure it is in the Bill.

What do parliamentary counsel do about it? They advise the department on the line they should expect both from this Committee and the Delegated Powers Committee. Jack Simson Caird and Dawn Oliver have done an interesting analysis of the jurisprudence of this Committee that gives some guidance in that respect. Parliamentary counsel advise on the current views of the Law Officers. Quite often, the Law Officers take the line that they do not want Henry VIII clauses in Bills, so you tell the department that the Law Officers are not going to like it, and that works in similar ways to the ones I have already described in relation to the rule of law.

The other thing is that you tell departments, because it is the case, is that the most difficult provisions to draft are powers that departments do not yet know how they will exercise. The invariable experience in those circumstances is that they ask for a very wide power and, however wide you make it, the one thing they want to do, when it comes to it, is the thing you are not sure falls within it. I had a particular hobbyhorse about
transitional provisions. Lots of legislation is about moving the law from A to B. People envisage B and ask you to draft it, and then they want to take a power to get from A to B. When the Bill is passed, and they then tell you the transitional provisions they want so that they can get from A to B, they may often begin to realise that C would have been much easier to get to and would not have made much difference so far as the destination was concerned. Those are the factors parliamentary counsel take into account, as well of course as our experience, because we do lots of Bills, of how the two Houses will react to a particular power.

**Lord Pannick:** What you have said suggests that no substantive principles apply; it is what will be acceptable. This Committee issued a response to the Strathclyde review. We said that delegated legislation had “increasingly been used to address issues of policy and principle, rather than to manage administrative and technical changes”. I wonder whether parliamentary counsel and Whitehall recognise as a principled distinction that delegated legislation should not address issues of policy and principle.

**Sir Stephen Laws:** You know that I was an adviser to Lord Strathclyde on his report. I am having difficulty answering, because I am trying to avoid the drafter’s normal thing which is, “Define policy and principle for me”. All legislation is ultimately about policy. The question is: how important is the policy? I am not sure I can take it much further.

**Q72 Lord Beith:** You ended an article, with which we have been kindly provided, with the words: “It is essential that the political importance of a desired improvement in quality is established before attempts are made to change the process to produce that improvement”. Was not part of the difficulty you had in answering Lord Pannick that you shied away from any sense that there should be broad principles of quality independent of the political desirability, or otherwise, of the measure being put before Parliament?

**Sir Stephen Laws:** The point I was making was that you cannot guarantee a good result by producing an abstractly good process. You have to decide in a political way what policy and outcome you want, in order to know whether, if you amend the process, you will get what you want.

**Lord Beith:** But should you not be ensuring that the process is one that protects certain principles against the rush of a desired political outcome?

**Sir Stephen Laws:** You need to decide first the outcome you want and then design the process to produce that outcome. I do not think you can guarantee a good outcome by designing a process that you think is a good process.

**Q73 The Chairman:** In that article, which is extremely interesting, you reminded us: “The two Houses cannot be expected to be exhaustively responsible for every aspect of legislation. Their role is that of critic, not author”. It is quite clear that the role of critic is a hell of a lot easier than the role of author. You have been away for four years, and I imagine that from time to time you pick up a Bill. Do you think, “Oh, my God. Who wrote this rubbish?” or whatever.
**Sir Stephen Laws:** I do not go that far.

**The Chairman:** Do you have any sense of a degenerative trend in the drafting of legislation, or do you think it is as good, or as bad, as it ever was?

**Sir Stephen Laws:** I try to resist the natural tendency of ageing to think that everything was better before. No, I do not. I am able to assume that the drafting done in the Office of the Parliamentary Counsel meets the political and legal needs of the day.

**The Chairman:** It comes back to the responsibility of the Government to know what they want to do.

**Sir Stephen Laws:** Yes.

Q74 **Lord Norton of Louth:** One of the important factors in getting the drafting right is time. How much pressure is there on parliamentary counsel from the point of view of time constraints? Are we seeing a greater trend of government rushing legislation?

**Sir Stephen Laws:** Not a “greater trend”. I agree there is pressure of time; there always has been. I joined the office in April 1976. We had to introduce a Bill to extract pay beds from the health service and do some other things to the National Health Service within six weeks. We got the instructions just after I joined the office and we had to get the Bill in before the Whitsun recess. There has always been pressure of time, and it is one of the things you have to manage. You ask for more, and normally you do not get as much as you asked for.

**Lord Norton of Louth:** If you do not have the time you need, presumably that has a consequence for the quality of what you are drafting.

**Sir Stephen Laws:** It can affect it. The important thing is the policy analysis. Time is important. You cannot do things in a hurry. You cannot rush the process of legislation. Quite often, it is emergency legislation that goes wrong, not mainly because it has been drafted in a hurry but because it has not been given enough time to acquire the acceptance it needs to work as law. Sorry, I have lost my train of thought a bit.

**Lord Norton of Louth:** To follow that up, if there is not enough time, the solution is either to create more time or, presumably, expand the Office of the Parliamentary Counsel.

**Sir Stephen Laws:** Yes.

**Lord Norton of Louth:** Did you not increase the number of staff a few years ago?

**Sir Stephen Laws:** When I took over there were 60; when I left there were 50. It might be a bit less than 50 now, but they may be recruiting. In some ways increasing the numbers does not help a lot, because the virtue of the system is that it provides one person, with perhaps a couple of people assisting, oversight of the whole Bill. There are some Bills you
can split into bits and give to different drafters, of which the Finance Bill is the classic example, but if you are to draft something that is coherent, the thing you want to bring to it is one mind that can hold it all together. You cannot just throw more people at it, because that makes it less efficient.

**Lord Norton of Louth:** You need more time. The number of Bills is not necessarily increasing, but the length has tended to increase, which presumably puts pressure on the individual drafting a big Bill. It is an issue of making sure they have adequate time to draft the Bill.

**Sir Stephen Laws:** Yes.

**The Chairman:** Time is our enemy, but we will let Lord Judge have the last question.

**Q75 Lord Judge:** Going back to delegated legislation and the principles that are going to be applied, I am slightly alarmed and want to give you a chance to take this further. I had the impression from what you said that whether a piece of delegated legislation was provided for depended on whether or not it was thought that Parliament, and then the Law Officers, would wear it. Can you expand that, please?

**Sir Stephen Laws:** It is similar to what you put in a schedule. You make the decision on the basis that there will be some things that Parliament will want to subject to the full range of scrutiny that it applies to a parliamentary Bill. There are some things that Parliament will be content to see approved by statutory instrument. That is the basis on which you decide what goes in the clause and what goes in the schedules; that is the basis on which you decide whether or not it would be acceptable to make a particular topic the subject of subordinate legislation. There can be no other, because what you are deciding is how much scrutiny the particular proposition will be subjected to by Parliament, and Parliament ought to have control of that.

**The Chairman:** It has been a fascinating session, Sir Stephen. We are extremely grateful to you. We shall study with great care every answer you have given us, and I am sure we shall find the seeds of enormous amounts of wisdom within them. Thank you very much indeed.
Professor Cristina Leston-Bandeira, University of Leeds, and Dr Louise Thompson, University of Surrey—Written evidence (LEG0011)

1. We are submitting this evidence as academics whose areas of research lie on Parliament, legislation and public engagement. We have published extensively in these areas and, specifically, we have developed a research project over the past year which investigated Parliament’s 2013 public reading stage pilot. This project was funded by a British Academy / Leverhulme Trust grant [reference: SG141934]. Our evidence to this inquiry stems from this research project and its final summary report.165

2. Parliament’s public reading stage pilot took place during the scrutiny of the Children and Families Bill (2013). Public reading stage enabled members of the public to submit over 1400 comments on the proposed legislation. Our project explored the impact of public reading stage on Parliament’s scrutiny of the bill, the integration of public scrutiny into the legislative process and its impact on public engagement. Our submission focuses on the coherence and accessibility of legislation, the means by which technology can be used to enhance public scrutiny of legislation and the factors which inhibit effective public scrutiny at present. We recommend that:

- **Public scrutiny of legislation can be a valuable tool for legislative scrutiny.** Where this type of scrutiny is considered appropriate, it should take place in the pre-legislative phase and with a more formal integration into Parliament’s formal legislative process in both chambers.

- **The public should be provided with additional information and resources about the content of proposed legislation.** This should be specifically developed for the general public in a format which is more “issue led” rather than “bill structure led”, and more accessible than the information ordinarily produced for each piece of legislation which suits a more specialised audience (such as Explanatory Notes). This should also include explanation about the process through which it will be scrutinised. There should also be feedback mechanisms ensuring the public is kept informed about the scrutiny of the bill.

3. **Using technology to enhance scrutiny of legislation**

3.1 Parliament’s experience of enabling the public to comment directly on the Children and Families Bill demonstrated the real value of using online technology to open up legislative scrutiny to citizens. Those participating left

165 Full details of the public reading stage project can be found at www.publicreadingstudy.com. Our final report is also available from our website https://publicreadingstage.files.wordpress.com/2016/02/prs-research-report.pdf
very coherent and detailed comments on the bill, the vast majority of which referred to specific clauses or schedules\(^{166}\). Its value lay most obviously in the very personal contributions which were submitted. These included very vivid testimonies of people who had experienced painful separations, distressing adoption processes or huge struggles to support children with very complex health needs, to name but a few. They provided concrete evidence of the potential impact of the bill and had huge potential value to MPs considering the consequences of the bill. Many of the concerns raised by the public mirrored those expressed by MPs during their later debates on the bill and some of the changes which the public highlighted (particularly the inclusion of children with disabilities and long term medical conditions in the bill) were later incorporated into the text of the bill.

3.2 Although public involvement in the public reading stage was extensive (and went beyond the figures reported from parliaments engaging in similar mechanisms), its impact on the content of the bill was significantly hindered by its timing. Inviting the public to comment on a bill after its second reading debate brings significant constraints. At this stage the fundamental principles of the bill are more or less fixed and even those opposing the bill will already have decided which areas to focus on. It leaves little time for MPs to consider issues raised by the public and to table suitable amendments in response.

3.3 It was also constrained by its lack of formal integration into the traditional legislative process. Although a summary of the public’s comments was submitted to the House of Commons public bill committee, more could be done to disseminate the contribution made by the public within Parliament. This may mean for example, dedicating a short period of time specific to the discussion and debate of the public’s view (either at committee stage or in a general debate) in either chamber.

3.4. Public scrutiny of legislation can be a valuable tool for legislative scrutiny. Where this type of scrutiny is considered appropriate, it should take place in the pre-legislative phase and with a more formal integration into Parliament’s formal legislative process in both the House of Commons and the House of Lords.

4. Coherence and accessibility of legislation

4.1. Parliament’s experience of public reading stage also demonstrated the need to improve the accessibility of legislation to the public. This can be seen in terms of both the content of legislation and the process of scrutiny itself. Citizens are time pressured, have their specific interests and are not always able to read long and complex legislation in detail. One participant in the public reading web forum asked “How many families would read a document 185 pages long with over 70 confusing clauses?” (GC121). Others sought basic information about what the bill would change and how many people would be affected by the various clauses, but were unable to find the information on parliament’s website.

4.2. Understanding legislation is a challenge, due to its complexity in language, structure and process. We found that the public struggled to understand what

\(^{166}\) 74\% of comments left referred to a specific clause or schedule of the bill.
the bill’s clauses meant, except when they were guided by intermediary “interpreters” such as interest groups. We also found that the bill’s structure came across as very specialised and not necessarily easy to engage with, despite the fact the House of Commons presented it to the public through clear identifiable separate sections. We also found that the public was drawn to comment on the bill because they were passionate about the issues covered. So translating a bill’s purpose into issues would seem the best way to communicate its complexity to the public.

4.3 We also found that it can be difficult for the public to distinguish between different types of consultations (departmental consultations, pre legislative scrutiny by select committees, calls for evidence from bill committees) and this means that they often feel disheartened by what feels like repeated requests for them to give the same information on bills. It adds to a sense of distrust in the political system as it appears that their contributions are being ignored. There was also a lack of feedback to the public about their comments and the bill’s scrutiny. This closing-the-loop feedback is very important to communicate to the public that their effort in submitting comments was worthwhile and that they were listened to.

4.4 The public should be provided with additional information and resources about the content of proposed legislation. This should be specifically developed to the general public in a format which is more “issue led” rather than “bill structure led”, and more accessible than the information ordinarily produced for each piece of legislation which suits a more specialised audience (such as Explanatory Notes). This should also include explanation about the process through which it will be scrutinised. There should also be feedback mechanisms ensuring the public is kept informed about the scrutiny of the bill.

October 2016
1. Liberal Democrats have long argued for greater parliamentary scrutiny of legislation, and at an earlier stage in policy development. We oversaw, through the Cook-Maclennan agreement prior to the 1997 election, and the subsequent work of the Modernisation Committee of the House of Commons the introduction of a greater degree of pre-legislative scrutiny, and we later continued to champion this practice in the Coalition Government.

2. In addressing the Committee’s call for evidence below, we address the Committee’s questions together in what we hope is a holistic way, setting the outline of a new gold standard legislative process which could amplify the voice of both people and Parliament in law-making. We make new proposals for scrutiny of secondary legislation, which could take on a still further increased role if the primary legislation on Brexit delegates power to Ministers to replace existing EU law with new domestic law. Finally, we advocate a more constructive relationship between the two Houses of Parliament, through a Joint Business Committee, such that the Commons and Lords can act together in a joint endeavour to improve their legislative product.

3. We strongly agree with the Constitution Committee that “the starting point for reviewing how parliament scrutinises the Executive should not be how the Executive can secure its business. The focus should be on how to ensure that the actions of the Executive are scrutinised effectively and that parliamentary approval of delegated legislation – by members of both Houses of Parliament – is not a mere box-ticking exercise.”

4. Indeed, this corrective should surely apply to both primary and secondary legislation. To that end, we believe a new gold standard legislative process should be adopted, and Ministers should be required to make a statement justifying any deviation from the pre-legislative parts of it. One such justification could be where a Bill implements key manifesto commitments, in the first year of the Parliament. Otherwise, our objective is to involve the public to a much greater degree between elections, and at an earlier stage in the legislative process, promoting engagement on the basis of policy choices rather than of simple opposition to one provision or another. We note, and welcome, the Prime Minister’s reported commitment to Green Papers and White Papers, which we argue should be a routine pre-requisite for Bills coming before Parliament.

5. To improve transparency, we believe that at each stage of the legislative process we set out, Ministers should publish details of any meetings they have held or attended with external organisations, either about the Bill or about its subject matter. This is crucial for the public and media to be able to understand

167 House of Lords Select Committee on the Constitution, 9th Report, 2015-16 session
who has been able to influence a Bill. A similar practice should take place alongside publication of draft Statutory Instruments.

6. Government policy to be implemented by means of primary legislation should routinely go through a process akin to the following:

**Green Paper stage**

I. A Green Paper presented to Parliament by Ministers, with adequate time for the relevant departmental select committee to conduct an inquiry, at that stage, on the policies proposed. Select Committees should seek professional assistance to distil the key issues and dilemmas for public consumption, and produce a standard form survey which Members of Parliament can send electronically to relevant groups in their constituency. The results could be compiled by the Select Committee concerned, which would also take evidence in the usual way, and make recommendations about how the government’s policy priorities should be pursued. This practice would augment departmental consultations, putting more of the power to set terms in the hands of Parliament.

**White Paper and Draft Bill stage**

II. A White Paper should then be presented to Parliament. It should be accompanied by a draft Bill, with explanatory notes sitting side by side each clause, noting how the policy conclusions had been reached, and the implications of the legislation. This method of explanatory notes was demonstrated in *Breaking the Deadlock* cross-party draft Bill on reform of party finance in 2013.169

III. A minimum period of 10 sitting days of the House of Commons should be allowed for Select Committees to identify the policy choices made, and to report on the extent to which their own recommendations at Green Paper stage, and the preferences of the public, had been met.

IV. The draft Bill stage would also allow time for an online “Public Reading” to take place with members of the public able to comment on each clause online.

V. Work on these stages of public involvement should aim for a discursive discussion between Parliament and the public. We suggest that the Constitution Committee, as part of this inquiry, might take evidence from some of the key drivers of public engagement – such as Involve, 38 Degrees and Change.org – in an effort to establish how involving the public at an early stage might encourage those responding to see each policy decision in broad context – for example, of expenditure vs taxation; rights and freedoms vs effective state action – and to balance competing priorities. It is in the interests of both Parliament and those who wish to influence it that citizens are not only invited, late in the day, to oppose a particular government policy by means of an online petition.

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**A reformed primary legislative process**

VI. Once the draft Bill process has taken place, the Government should bring forward a Bill for scrutiny in one or other House, via a Second Reading debate. To make this process more readily intelligible by the public, Second Reading should be renamed to indicate that it is the first parliamentary debate. We suggest "First Debate".

VII. The parliamentary website should chart each stage of the legislative process as now, including reference to the relevant Green Paper and Draft Bill stages, along with links to relevant Select Committee reports and Departmental consultation documents which were produced during those stages.

VIII. Public Bill Committees of the House of Commons should where possible be composed of members who have been involved in scrutiny of the Bill at Green Paper and Draft Bill stage. Public Bill Committees should continue to be empowered to take evidence, and should particularly focus on doing so around areas of a Bill that have changed since the Green Paper and Draft Bill stage.

IX. No programme motion should be tabled at the time of the First Debate (Second Reading). Instead, the Public Bill Committee to which the Bill is referred should set its own programme, with the Chair reporting to the House on their proposed “out-date” for the Bill to return for Report Stage. In the event a Public Bill Committee had not finished its work by that date, it would be for its Chair to return to the House to seek further time.

X. Once line by line scrutiny of a Bill has taken place in a Public Bill Committee, its clerks – not departmental civil servants – should work with members on a Programme Motion for Report Stage of the Bill, and the Chair of the Public Bill Committee should move that motion on the floor of the House of Commons. This would enable Bill Committees to determine those issues which receive closest attention by the whole House, taking into account public priorities.

XI. A Joint Business Committee of both Houses (see below) should oversee overall scrutiny for each Bill, ensuring that the second house to consider a Bill takes account of the extent of scrutiny in the first, and concentrates on areas which had not been comprehensively resolved. Clauses not considered in the first House should be starred in the version of the Bill as printed for the second House, to make clear that these had been passed without debate.

XII. The Joint Business Committee should be empowered to reconvene the Public Bill Committee in the Commons, or Committee Stage in the Lords, with a fresh opportunity to take evidence, if a Government introduces a wholly new policy proposal at Report Stage.

XIII. The parliamentary website should enable the public, interested parties, and indeed their representatives in Parliament itself, easily to see which clauses of a Bill are being debated in each House at each stage, to
understand how amendments are grouped, and to switch between the
debate which took place on a particular amendment and the text of that
amendment.

XIV. The practice of third reading amendments, to enable Ministerial
commitments made at an earlier stage to be tested, should be extended
to the House of Commons.

XV. Where there is disagreement over an amendment, Conciliation Committees
should be set up as a replacement to Reasons Committees, to enable
genuine dialogue between leading protagonists on a Bill, from each House.
These exist in countries as diverse as France, Germany, Switzerland,
Romania, Japan, Thailand and the United States, for resolving inter-
cameral disputes.

XVI. Where amendments in lieu are proposed by one House to another, there
should be at least 24 hours for these to be considered by the receiving
House and its members before they are formally debated. All amendments
sent from one House to another, whether from government or not, should
include an accompanying explanatory note, explaining both the effect and
the rationale of the proposed change.

Secondary legislation
7. As the Lords Constitution Committee points out in its recent report, Delegated
Legislation and Parliament: a response to the Strathclyde Review, it is not only
the volume of delegated legislation which has increased in recent decades170,
but the scope. Statutory Instruments now often areas of principle and policy
rather than points of an administrative or technical nature.171 Liberal
Democrats anticipate that the legislation repealing the European Communities
Act 1972 could place yet more delegated power into Ministers’ hands to “switch
off” parts of EU law that they do not like, and – more controversially still – to
replace it with transitional arrangements determined by the UK executive alone.

8. While we believe Governments should avoid using delegated legislation in this
way, we recognise that relying on Ministers to be more restrained is insufficient.
The two Houses should therefore merge the existing Joint Committee on
Statutory Instruments – which deals only with whether the Instruments are
ultra vires – and the Secondary Legislation Scrutiny Committee of the Lords,
which looks at their substance.

9. Both Houses – through a new Joint Committee – should be involved in assessing
the merits and the vires of SIs together, and should report to the floor of each
House before votes are taken. Such a committee could recommend
amendments, and invite Ministers to re-table the instrument in the light of

170 According to the House of Lords Delegated Powers and Regulatory Reform Committee,
in Delegated Legislation and Parliament: A response to the Strathclyde Review “there
were rarely more than 2,500 statutory instruments laid in any calendar year before 1990,
since 1992 there have generally been between 3,000 and 3,600 per year”.
171 House of Lords Delegated Powers and Regulatory Reform Committee, in Delegated
7.
those recommendations. If a Minister declined to do so, each House should be able to vote by resolution to accept the recommendations and to insist on the amendment.

10. This Committee should be additionally empowered to recommend, on the advice of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRCC), that either House suspend consideration of a Bill where it delegates powers to Ministers over policy and principle, and the Government has failed to publish draft regulations prior to Report Stage in the first house. The DPRCC should continue to take lead responsibility in scrutinising the extent of order making powers in legislation before Parliament, recognising the additional capacity of the Lords to this work. The standard Draft Bill stage of the legislative process which we have advocated would make this task considerably more straightforward.

11. Taken together, these changes would have the joint effect of enabling Parliament to take greater control of secondary legislation proposed by Ministers, and of encouraging governments to build the detail of their proposals into Bills at the primary legislative stage rather than go through a committee scrutiny procedure later.

A joint business committee

12. Parliament as a whole should “take back control”, of the cross-House legislative process, by establishing a Joint Business Committee of both Houses (hereafter, JBC). This should liaise closely with, and have access to papers from, the Parliamentary Business and Legislation Committee in Government. It would be the senior committee, taking a decisive role in managing the flow of legislation, and in determining which House a Bill should start in. In doing so, it would seek to avoid the ‘London Bus Syndrome’ where governments keen to secure a Commons mandate for controversial measures start a disproportionate number of Bills there, leaving the Lords without legislative work for a long period, followed later by an intense scrabble for Peers to fit in sufficient scrutiny in when Bills emerge.

13. The JBC could additionally allocate time to Bills in each House, put a brake on the introduction of Bills which leave too much detail to delegated legislation, and agree “carry over” when it is desirable to provide more time for scrutiny at the end of session. Each House as a whole should have the right by resolution to refer a Bill back to the Committee for more time to be allocated.

Conclusions

14. The present legislative process too often confers too great a power on the Executive of the day, while affording privileged access to corporate lobbyists – whose ‘upstream’ influence on government departments can be decisive – and denying the general public a say. That parliamentary practice is to call the first, crucial debate on a Bill the “second reading” amply demonstrates the opacity of the present process.

15. Meanwhile secondary legislation has an important and growing role, not merely in filling in the administrative detail of government policy which has already received ‘in principle’ consent in Parliament but in determining the
principles themselves. While parliamentary committees will always criticise governments for according themselves order-making powers, we believe the practices and procedures of Parliament must be reformed such that the governments are actively deterred from doing so rather than merely exhorted not to.

16. The combination of:

- a standard Green Paper and Draft Bill process, incorporating early public involvement;
- a Joint Business Committee, overseeing the quality of legislation which is to be introduced and determining in which House it should start;
- and a powerful Joint Committee on Secondary Legislation working with the Lords’ Delegated Powers and Regulatory Reform Committee

would amplify the voice of the public in the legislative process, and strengthen the hand of both Houses of Parliament in their joint endeavour to hold the Executive to account.

October 2016
The Government welcomes the Constitution Committee's inquiry. This Government wants to ensure that new legislation is effectively scrutinised and stress tested before and during its passage through Parliament. I hope the Committee will find this submission helpful in relation to its inquiry. During the course of the inquiry I would be very happy to work with the Committee and to provide further evidence.

Creating good law

The preparation of legislation involves a number of parties within Government, with policy being developed by members of the policy profession, legal input from departmental lawyers and drafting by Parliamentary Counsel. All those involved work together to produce legislation which reflects the good law principles. The Cabinet Office is leading efforts to bolster parliamentary skills within Government and to ensure that civil servants have the requisite skills to support Ministers in Parliament and engage Parliament when Government legislation is being scrutinised.

The Office of the Parliamentary Counsel leads efforts within Government to produce clear and comprehensible legislation. “Good law” principles are embedded in their drafting guidance, and draft legislation is reviewed as it is prepared with a view to assessing its clarity and adherence to the principles in the guidance. The guidance also highlights the need for legislation to be coherent and accessible for the user, this includes drafting in plain English, avoiding unnecessary cross-references and where possible consolidating legislation.

The Office of the Parliamentary Counsel has been working with stakeholders from across the legal profession, industry, Parliament and academia to discuss and take forward ideas to ensure that legislation is clearer and more accessible. This dialogue has helped to highlight several examples of best practice to build upon, including Defra’s publicly available online catalogue of the legislation in their portfolio and the access to the criminal law provided by the Police National Legal Database.

The statute book in the United Kingdom stretches back to the 11th century and new policy often has to be woven into existing legislation. The Government continues to support the work of the Law Commissions in their work to identify and repeal redundant legislation through Statute Law Repeal Bills, but also through their regular Bills to modernise the law in specific areas. Examples of this include the current Intellectual Property (Unjustified Threats) Bill, the Statute Law (Repeals) Act 2013 and the Partnerships (Prosecution) (Scotland) Act 2013.

With regard to new legislation, it is Government policy to seek to legislate only where legislation is necessary to achieve a policy outcome. Within Government there is a stringent bidding process for new primary legislation which is designed to ensure that each legislative programme focuses on the top political and
administrative priorities. From the outset, bids for primary legislation are required to set out why primary legislation is necessary to achieve the intended policy outcome and what the consequences would be if new primary legislation was not taken forward. Departments are also strongly encouraged to publish legislation in draft for pre-legislative scrutiny.

Withdrawal from the European Union

The Government will bring forward legislation in the next session that, when enacted, will repeal the European Communities Act 1972 on the day the United Kingdom leaves the EU. The Bill will also transpose current EU law into domestic law, while allowing for amendments to take account of the future negotiated UK-EU relationship. All Government Departments are currently reviewing the EU laws that apply in their policy areas and how our withdrawal from the EU will affect the operation of those laws. Where laws need to be fixed, that is what the Government will do.

The Government is committed to engaging and consulting with Parliament as much as possible. The current framework provides for effective legislative scrutiny mechanisms that should continue as far as possible. Once we have a clearer idea of the size of any legislation, we will work with Parliament to ensure there are robust scrutiny arrangements. It is the Government’s intention to work hand-in-hand with Parliament.

Public involvement and engagement

The Prime Minister has been clear that the Government will seek to publish more Green Papers and White Papers to ensure that policies are drawn up in cooperation with stakeholders. In this Parliament several packages of draft legislation have been published and some of these subject to pre-legislative scrutiny. Draft legislation published by the Government in this Parliament includes:

2015-16 session:
- draft Wales Bill
- draft Investigatory Powers Bill
- draft Finance Bill measures
- draft legislation on energy
- draft legislation on data sharing

2016-17 session:
- draft legislation on further education

Whilst not negating the need for formal consultation and pre-legislative scrutiny, it should be recognised that Government departments are continuously discussing proposals for legislation with public sector partners, the charity sector and industry. These conversations are vital as they allow for frank and confidential debates on new policies and proposals for legislation. I would be particularly interested to hear suggestions as to how new technology can be used to source input from stakeholders.
Since 2010, procedures have been embedded within Government to ensure that new legislation, and especially regulation, and its impact, are thoroughly considered. All new regulatory burdens are scrutinised by the Regulatory Policy Committee (RPC), which provides the Government with external, independent scrutiny of new regulatory and deregulatory proposals. The Committee has included representatives from industry, trade unions, academics and consumer representatives. The RPC’s independent assessment of Impact Assessments, and the Government’s overall performance on regulatory policy, is published on a regular basis.

**Information provision**

The Government has also striven to improve the quality of information provided during the passage of Bills. At the beginning of the current Parliament the Government introduced a new format for Explanatory Notes. The new format uses a modern style which is simpler, easier to navigate and allows better links to online resources. For the first time the notes also provide an overview of the Bill’s extent and whether legislative consent motions are required from the devolved legislatures.

Alongside Bills, Government Departments also provide memoranda to the Delegated Powers and Regulatory Reform Committee setting out the justification for the delegated powers in each Bill. Likewise, memoranda are submitted to the Joint Committee on Human Rights. Both documents are published on the Parliament website, so they are available to parliamentarians and the public. Where possible draft regulations or policy documents are published alongside Bills to help explain how delegated powers will be used.

I hope the Committee will find this submission helpful and I look forward to following the progress of the inquiry.

Yours ever,

Rt Hon David Lidington CBE MP

*October 2016*
Rt Hon David Lidington MP, Leader of the House of Commons—Oral evidence (QQ 89-101)

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

Wednesday 14 December 2016

Watch the meeting

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

Evidence Session No. 6 Heard in Public Questions 89 - 101

Examination of witnesses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When it comes to a particular Bill within the session, the Committee will hear Ministers appearing without official support a little way ahead of the Bill’s proposed introduction date. By that time, we would hope that we would have ironed out problems. There is a formal so-called gateway stage where the Minister directly responsible for the Bill, usually a Minister of State, will come before PBL to make the case and explain how far he or she has advanced on the Bill. I, the other business managers, the law officers, the territorial departments, and the Treasury, which are all
Rt Hon David Lidington MP, Leader of the House of Commons—Oral evidence (QQ 89-101)

represented at PBL, will ask any questions and mount any challenges that we think are appropriate both about the content of the Bill and about the degree to which the department has thought through the potential parliamentary risks in both Houses of taking that legislation forward.

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

Lady Taylor’s basic point was whether there is responsibility to Parliament. Yes, there is a responsibility to Parliament. There is also a responsibility to the people who send us here to try to have legislation in as good shape as possible.

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

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

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

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

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

**David Lidington:** Yes, it is. I can hear the voice of experience there. That is why it was so important and so welcome that the Prime Minister, very early on in her premiership, made it plain that she would normally expect a Minister, before having legislation, to have gone through a Green Paper stage for discussion and then a White Paper stage to set out policy. You can go through quite a lot of this work of testing in public and well in advance of committing yourself to legal language.

**Baroness Taylor of Bolton:** Thank you.

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

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

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

Lord Norton of Louth: So you can argue that the consultation is necessary but not sufficient when it comes to actually generating the legislation derived. Could you say a bit more about what the Cabinet Office is doing in this respect? I mentioned your memo, and I take it from the comments you were just making that the effort, for the reasons you have touched upon, really ought to be government-wide?

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

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

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

There is a lot of work going on in different strands. There will be no big bang overnight, but it is definitely a direction of travel, and there is huge enthusiasm within the Civil Service because there is a recognition that they would like to be better at this and that they need to be better at this to best serve the Government. There is a lot of work going on.

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

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

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

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

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

**Elizabeth Gardiner:** Yes, but often it would be more helpful to take a group of sections together and explain what they do rather than go through them line by line.
David Cook: I would just add that we have to wrestle a bit with the Explanatory Notes because we are dealing with different audiences. The courts could ultimately look at the Explanatory Notes through Pepper v Hart, so there is a natural nervousness about sweeping generalisations that could, if it came to a case, be read in a way that was unintended. That is something we have to get over as far as we can, because there is a lot more that we can do with the notes to make them more explanatory for the main audience, which is the parliamentary audience and the public who want to understand the Bill.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

David Lidington: That was at that particular stage. In the previous effort at House of Lords’ reform, the House of Commons delivered very clear majorities against all three of the options that had been brought forward, so pre-legislative scrutiny is no guarantee of a consensual process at the end of the day.
Lord Pannick: In that process for that particular Bill, the pre-legislative scrutiny did identify the issues and did enable Parliament generally to express its views. Would you accept that there should be a presumption of pre-legislative scrutiny for any Bill and, if there is not to be pre-legislative scrutiny, there should be a good reason? The reasons may be urgency or that it may be unnecessary because of the consultation that has already taken place or it may be—a point made to me by Lord Beith in the first session. You have to have some Bills that are on track and Parliament cannot sit idly by. Would you accept a presumption of pre-legislative scrutiny?

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

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

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

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

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

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

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

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

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

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

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

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

**Q96 Lord Brennan:** Looking at the good law principles, “necessary” and “accessible” are at the beginning and the end, with “clear”, “coherent” and “effective” as the day-to-day consequences. I would like you all to give your opinions about the state of affairs where a body of law has reached the stage where it does not fulfil those requirements. As the Lord Chairman pointed out, we heard from Sir Ernest Ryder and several immigration judges a few weeks ago about how deeply concerned they are—my word, not theirs—about the implosion of legislation and rules in the immigration field. Knowing that you favour consolidation where possible, Minister, and that you have worked on it, Ms Gardiner, what are
the plans for consolidation or clarification, call it what you will, and, if there are not any, why are there not?

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

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

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

**Elizabeth Gardiner:** I agree with everything that the Leader has said about consolidation. It is incredibly resource-intensive, so they are always looking to prioritise that resource. Something that is likely to be subject to continual amendment or to vary a lot from Government to Government is not necessarily going to be natural as a first choice for consolidation. The Law Commission is currently working on a project on sentencing law, which has also been subject to a massive amount of amendment over the years, and the judgment has been made that now is the point to try to consolidate that, so there is a lot of resource going into that. That is also
a very lengthy project, with a view to bringing one statute forward that will contain all consolidated sentencing law, which will be a huge improvement.

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

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

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

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

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

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

David Lidington: Again, I can only speak with any authority for the most recent period when I have held this particular office. The principle that I and my PBL colleagues impress upon Ministers is that they should not seek, in a new piece of legislation, to have additional regulation-making powers unless those are essential and can be fully justified to Parliament. Certainly business managers and, increasingly, departmental Ministers are acutely aware of the views of the relevant committees on delegated legislation and how in the House of Lords, in particular, the views of the DPRRC can have a very powerful impact upon debates and Divisions at this end of the Palace. There will, I believe, always be the need for some secondary legislation to cover areas of policy that will require very frequent updating. An obvious example is the regular uprating of benefit rates, where you really do not want to have a statute every year to index them with inflation.

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

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

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

Lord Judge: Is it exhortation?

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

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

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

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

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

**Lord Judge:** Thank you.

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

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

**Lord Beith:** The risk is, is it not, if you use secondary legislation widely, that you will have a situation which has already been described to us by witnesses, writ large, which is that, because of the absence of an amendment process, errors, mis-descriptions and things like that will arise in the resultant law which would have been avoided if it had been in primary legislation and subject to a proper amendment process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Elizabeth Gardiner:** Similarly on childcare, I would be surprised if that is the case—but I will go back and check.
Lord Judge: The Childcare Act last year—I cannot remember whether it was in Section 4 or Section 5—had 11.

Elizabeth Gardiner: Limbs of a power, yes.

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

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

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

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

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

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

Lord Judge: That leads on to the question of who should be given the powers. Help me to understand why a Minister should be given powers to repeal a statute: in other words, secondary legislation repealing primary legislation.

Elizabeth Gardiner: Obviously, secondary legislation itself is also subject to parliamentary control, so it is not the Minister doing it without any parliamentary control. I also think that it is better really to focus on what the power is doing. There is a range of situations where it might be entirely sensible to take a Henry VIII power where it is not sensible to come back and expect Parliament to spend time on the sorts of amendments that you might want to make. Often, we have a consequential amendment power at the back of a Bill where some tidying up might be required. So these are not substantive new policies but powers that are just needed to tidy up. Say you are changing the name of a body, and there are references to that body across the statute book, it might be more expedient to take a power and to tidy those up afterwards in an instrument, particularly if you do not know what the name of that body is at the time that you are doing it. There can be a whole variety of reasons why you might do it.
The other thing is that sometimes you can achieve the same result either by amending the primary legislation or by having free-standing secondary legislation, but it might be better for the end-user to do the former. Going back to the consolidation point, say you are creating another thing in your secondary legislation that is quite akin to something that is already in the primary, it might be better for the end user if you amended the primary and put it in beside the existing provision so that, when the reader comes, they pick up the Act and the whole story is there. That is a case of form over substance, and it might be better for everybody in the end if you amend the statute rather than create yet another instrument that somebody has to consult and fit together. There is a variety of reasons why you might end up wanting to amend the primary legislation.

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

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

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

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

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

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

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

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

David Lidington: Work in progress.

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

David Lidington: Simply because there is going to be a negotiation that would start with the triggering of Article 50. The Government have made very clear that they are not going to publish details of their negotiating plans any more than any of the other 27 Governments or the institutions intend to do. We will need to have a confidential space within which Ministers can discuss collectively what the approach to negotiations should be, how they are going and to take advice from our officials without having red lines, fall-back positions or the like discussed in public. I genuinely do not think that Baroness Dean should have too many fears because, if I look at what is happening at the moment, we will have had, by Monday next week, three debates in government time on different aspects of EU exit. There have been, I think, about 14 appearances by the Secretary of State for Exiting the European Union or his Ministers in front
Rt Hon David Lidington MP, Leader of the House of Commons—Oral evidence (QQ 89-101)

of various committees of both Houses. There are in progress at the moment, at my last count, 31 different select committee inquiries into the EU exit process in this House and in the House of Commons. The Government, of course, have to give evidence to each, often oral as well as written, and to provide a formal response to every Select Committee report. So there is going to be lots of parliamentary engagement and scrutiny.

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

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

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

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

David Lidington: Thank you, Lord Chairman.
**Emran Mian, Social Market Foundation—Oral evidence (QQ 29-35)**

**Emran Mian and Chris Walker**

Wednesday 16 November 2016

[Watch the meeting](#)

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 Maclellan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 3  Heard in Public  Questions 29 - 35

Examination of witnesses

Q29  **The Chairman:** Welcome to Mr Emran Mian of the Social Market Foundation and Mr Chris Walker, who has just left the Policy Exchange and is now working in his own housing business. We are grateful to you both for coming. I have explained to you both that we are under pressure on time and I apologise for that. We shall try to make our questions concise. I will start with one about the use of evidence, which is something that resonates throughout our inquiry on the law-making process. What are the constraints that prevent government departments from proposing evidence-based policy? Is it lack of in-house capacity or some other factor?

**Emran Mian:** The primary reason why the Government are not always as effective as they should be is a mismatch between the timeframes needed to do rigorous, robust research and the timeframes that we usually allow for policy-making. On the occasions when those timetables can be aligned, we make effective use of policy-making in government. To give an example from my own experience, I was the civil servant responsible for the independent review of higher education funding. Because we knew three years in advance that that review was to take place, because there was a commitment made in the course of the legislation to increase tuition fees, we had three years to plan for putting the evidence base in place. We were able to commission academics to do work that would contribute to the review. That was an occasion when we were able to align the timescale needed to do robust research with the policy-making timescale. That is often not the case because policy-making is often done in a much more abbreviated timescale.

The second reason that sometimes inhibits us is not a skills issue; it is a capacity issue. Often the skillsets that we have in government in the analytical services—economic and social-research—are very well deployed in response to events or things that Ministers or senior officials are interested in, but what those people lack is the time to do curiosity-based research. For example, I used to work in the business department as the
director of strategy. I found that our labour market economists were very effective in responding to our requests and to Ministers’ requests, but did not have the time or the bandwidth to look themselves at what was going on in the labour market and propose issues that we should be thinking about on the policy side. That is a capacity issue rather than a skills issue. There simply was not enough capacity, enough people, to do curiosity-based research.

**Chris Walker:** I have worked across three or four different government departments in my lifetime inside the Government Economic Service. Generally, I found that the use of evidence in policy-making was, on the whole, pretty decent across the departments I worked in. I was the lead analyst on the right to buy reinvigoration policy a few years ago. We used extensive econometric modelling to forecast right-to-buy sales under the different options. We also did some pretty extensive value-for-money analysis to look at the value to the public purse. Generally, that was quite a good example of where the evidence was really brought to bear. I can safely say that the results coming from that analysis had a bearing on the final policy options that were selected.

There is always tension, which Emran alluded to, between political timescales and the timescales that ideally you would have to do evidence in policy-making. Inevitably, there is tension ultimately between democracy on the one hand and technocracy on the other. For example, the Treasury’s Green Book talks about the ROAMEF cycle, which is an ideal way of applying an evidence base to policy-making. To do that and adhere to it properly takes a lot of time, so, particularly if you are under a lot of pressure, strict adherence to the ROAMEF cycle can very quickly go out of the window.

**The Chairman:** On the timescale point, do you have a solution in mind? There is obviously a difficulty with an incoming Government with a manifesto to deliver, who want all the Bills fairly early on and therefore they are perhaps not properly considered early enough. Do you have a way of sorting that problem?

**Emran Mian:** There are some quite simple things that civil servants can do to help Ministers to be more responsive to evidence. For example, civil servants regularly do horizon-scanning on behalf of Ministers. We do it when there is a change of government, but we also do it at other points in the cycle. Often that horizon-scanning is done purely by policy civil servants. What we usually fail to do is to engage with academics who might be thinking about the same fields. We fail to engage with researchers who might be trying to project forward trends that we might be able to foresee. We are very bad at involving outside expertise in that kind of horizon-scanning.

There are examples. The Government Office for Science does a set of foresight reports that are precisely that kind of horizon-scanning. They are often done on a very long-term basis. There was one on the future of manufacturing, looking 50 years from now, a superb piece of work involving lots of serious researchers. That is the kind of thing that we should not leave to just the Government Office for Science to do.
Something that more policy civil servants should regard as part of their day job is helping Ministers to do that kind of forward-thinking.

Another thing that policy civil servants often fail to do is related to my first point. We underestimate how keen experts and academics are to engage in a policy conversation. A switch turned for me at some point when I realised, as a senior civil servant, that if I called or wrote to academics and invited them to come in and talk to us about their work, they would come. There was no barrier. The barrier was an imagined one from our side, and to some extent imagined on the other side as well. Senior academics in particular probably underestimate the extent to which they can just ring us up and we would be interested in having a conversation. Equally, I think senior civil servants often lack the nous to do that. We should just pretend that there is no barrier whatsoever and ring people up and speak to them much more often.

Q30 Lord MacGregor of Pulham Market: Following on from some of the comments you have made, is there a tension between political commitments to legislation—for example, from the manifesto or in response to public or political pressure—and adherence to evidence-based policy-making?

Chris Walker: Inevitably there is tension, yes. To give an example, a certain party might have a particular election manifesto; that party subsequently gets elected to government and discovers that actually the commitment in the manifesto does not have the evidence-based credentials that it wanted. As the Civil Service scrutinises it and draws up the evidence, it can often point in exactly the opposite direction. That is an example of where there can be tension and where, inevitably, there can be a degree of retrofitting so that, rather than evidence-based policy, there is policy-based evidence.

At the end of the day, it is that tension between having an elected Government and a technocratic arrangement. At the end of the day, you cannot just have adherence to an economic model that says yes or no; you have to take the other considerations into account. One of the key roles of evidence in policy-making is to get the best possible outcome for Ministers and the Government, subject to the political constraints and the realpolitik.

Emran Mian: I depart slightly from Chris’s view. I completely understand that there will be cases when Ministers choose not to follow where the balance of evidence might be. What is inexcusable is when the Civil Service fails to inform Ministers about where the balance of evidence is, and that happens all too often. All too often, a political decision is allowed to take place without Ministers even knowing what the evidence base is, and that does not feel right to me. It is the Civil Service’s obligation to ensure that, when Ministers are making that decision, they are doing it at least with sight of all available evidence. I am not sure that we always have the mechanisms in place to make sure that that is happening.

Lord MacGregor of Pulham Market: Would you go so far as to say that evidence, or a lack thereof, should block the fulfilment of political commitments? That may be idealistic, but is it realistic in practice?
Chris Walker: I do not think that should be the case, no. Ultimately, it is for Ministers to decide whether a policy is enacted or not. The role of the Civil Service is to help the Minister make that decision in the most informed way possible and to highlight the best possible policy options to deliver their mandate, which again should be underpinned by an evidence basis. In short, the answer to your question is that ultimately Ministers must decide, but it should be done in an open and transparent way. For example, we have the ministerial direction. If a Minister goes against the evidence, the department can issue a direction to say that that is what happened. As long as it is done openly and transparently, and the Minister is accountable for his decision, the decision should absolutely rest with him.

Emran Mian: That feels key to me. We must have the transparency mechanisms by which, if a political decision is being made that is contrary to the balance of evidence, it is transparent. We have a number of mechanisms to help that be the case. We have ministerial directions, which are used if a ministerial decision does not prove value for money; the Permanent Secretary writes to the Secretary of State asking for a direction and the Secretary of State replies. That makes transparent where the balance of evidence lies. Equally, we have equality impact assessments and regulatory impact assessments that often serve the same function of making it clear where the balance of evidence might be.

Lord Judge: Could you give me a couple of short examples of occasions when the Civil Service failed to provide Ministers with evidence? That was the criticism that I understood you to make. I would like you to give us a little more detail, please.

Emran Mian: One example is when I was director of strategy at the business department in 2011-12 and we were thinking about what the foundations of a government industrial strategy should be—again, a live policy issue at the moment. In that role, one of the things I felt that we were unable to do as effectively as we should have was to provide Ministers with an evidence base for the success or otherwise of previous attempts to do industrial policy. In that case we had a Secretary of State, Vince Cable, who himself was an economist and understood quite well some of the evidence that was there. We often found ourselves in the position, as civil servants, that the Secretary of State knew more about the evidence base than we did. In one sense that is great, but in another sense it illustrated to me the way in which we were perhaps failing to fulfil our function. The other thing was that I do not think we had the mechanisms in place to know who the academics were who were doing really serious rigorous work on what the impact of industrial strategy would be.

Lord Judge: Do you mind if I interrupt? I want to go back. I understood you to be giving us in effect a summary of a failure of will by the Civil Service to do what it is supposed to do. That is what I was looking for examples of, or have I misunderstood the evidence you have given?

Emran Mian: I cannot offhand think of examples when there has been a failure of will. Reflecting on occasions when there has been tension
between a ministerial direction and the evidence base, I must say that for the most part the Civil Service has had the will to bring the evidence to bear on decision-making. I was commenting more on whether the Civil Service always has the capability and the capacity to enact that will.

**Q31 Lord Pannick:** I want to follow up on transparency. You have both mentioned the importance of transparency when there is tension between Ministers and civil servants. Would you go further and accept that there is no justification for government not to publish the entire evidence base for legislative proposals, absent of course some particular fact of national security or commercial confidentiality? In principle, would you accept that?

**Chris Walker:** I would accept that, yes. Ultimately, if Parliament is to fulfil its function as a legislature scrutinising legislation, there has to be a level playing-field for access to evidence and information, both among the legislature and the Executive. I do not think we quite have that situation yet. To give an example, for new policies and legislative changes, we have policy impact assessments. It is fair to say that those impact assessments are of variable quality over the span of time, and they do not always include all the evidence that the Government have had when making their decisions.

**Emran Mian:** I agree in principle with what you said. It is often the case in specific policy commitments or specific policy consultations that the evidence base is not always presented in as transparent and clear a way as it should be, but when the Government publish a consultation paper you can see the structure of the argument by which they arrive at the policy direction, and the premises for the structure of that argument are usually evidenced either by reference to official statistics or by reference to other work that has taken place. When the Government proceed in the proper way through a policy consultation, the structure of the argument and the evidence base is clear—not always, but often.

Where it is much less clear is when the Government are making policy decisions via the two fiscal events—the Budget and the Autumn Statement—but, equally, when they are making policy decisions through the comprehensive spending review. The truncation of the policy argument in each of those events is such that it is much harder to divine what the evidence base is when policy decisions—often substantial ones—are made in the context of those fiscal events.

**Chris Walker:** The OBR is probably quite a good example of an independent institution that can help diffuse the evidence in a transparent way and has less political interference than in the past with regard to Budgets and Autumn Statements.

**Q32 Baroness Dean of Thornton-le-Fylde:** We have the evidence base and the draft legislation. Taking it to the next stage, how far do Governments go to test in pilots? We can all give evidence of legislation that has gone through that seemed absolutely the right thing to do at the time, but then the unintended consequences brought it into severe question. Last week, David Halpern of the Behavioural Insights Team at the Cabinet Office said, when talking about Brexit and switching from the EU to the UK,
“There is a risk we just shift legislation from the EU context to the UK context without testing if there are alternative ways to deliver”. If you were looking at major change in other sectors in the UK, you would pilot it to see if it was going to work before you said, “That's what we are going to do”. I know there has been a move towards piloting, but what do you think the reasons are for not carrying out more pilots? In other words, should there be almost mandatory pilot testing of any major piece of legislation?

**Emran Mian:** There are some pieces of legislation for which piloting does not feel appropriate. To use an example from my experience, I worked on the changes to higher education funding, as I said. We were moving to a regime in which there was a much higher ceiling on tuition fees, and that is the kind of case where it feels to me very difficult to do it on a pilot basis. In one sense, the argument for doing it on a pilot basis is very strong, because you can observe the effects on participation, et cetera, but it is hard to see how you could do it on a pilot basis. Would you allow four or five universities to raise their fees and then see what happens? The problem with doing that is, of course, that it has effects all the way through the rest of the sector.

For policies such as that—the big regulatory shift that Brexit will bring is another example—piloting feels inappropriate to the structure of the policy problem. That said, some of the times when we do not use a pilot we are not doing it for what I consider a good reason. We are sometimes doing it for a bad reason, which is a desire to just get on with it and enact the political decision. That is the reason why a pilot seems inappropriate; it is often read either by the political decision-maker—the Minister—or by the Opposition as foot-dragging. That is the reason why a pilot is not pursued, and that feels to me like a much less sound reason for failing to use piloting.

**Baroness Dean of Thornton-le-Fylde:** Are there criteria in a government department as to when they will or will not pilot?

**Emran Mian:** I have not, in any of my roles, come across a fixed set of criteria for when we do or do not pilot. It is a much more impressionistic judgment.

**Chris Walker:** Obviously Governments of both creeds have used pilots in their policy-making. Two policy areas I have been involved in used pilots: the pathways to work programme, which was part of welfare reforms leading up to 2007, and the extension of right to buy to housing association tenants, which I understand has just finished piloting. It was piloted by five housing associations, and it recently concluded.

Pilots are an important part of gathering the evidence base and there are instances where they have been used, but, as Emran says, sometimes the Government of the day just want to get on and implement the policy. There is always the time tension. Even if you can do a pilot, and all the right conditions are met to do a pilot, it will not always be the case that it necessarily adds to the evidence base. One of the reasons to do a pilot is to test a behavioural response. Of course, another way to get at behaviour responses is to look at experimental economics of the type that...
the Behavioural Insights Team looks at. There are ways of getting at things other than pilots.

Q33 **Lord Norton of Louth**: I want to bring Parliament into the process, because so far we have focused on evidence collection and analysis within government itself. When the Government bring forward a policy, Parliament has a role to play, not least in testing the evidence base and knowing what it is. There are two elements of that. One is the process. At what point does Parliament come into the process, and how much of a role can Parliament play before a Bill is formally drafted and introduced? Is there a case for greater pre-legislative scrutiny? Of course, to test the evidence we need to know what the evidence is. Is there more that Parliament could do to ensure that it is actually eking out of the Government the evidence on which they are relying?

**Chris Walker**: Possibly. In my experience, the work and political deliberation that goes into preparing a Bill tends to go right up to the wire, as you can possibly imagine. There is a question of whether that is practically possible. Unless I have misunderstood the point, you would not know what legislation you were going to be scrutinising, because you would not know what was in the Bill until it was introduced. It is a bit of a chicken and egg situation. Obviously, you could lengthen the legislative timescale, but time is tight.

**Emran Mian**: You referred to the greater use of pre-legislative scrutiny. That is the most obvious and probably the most effective tool to provide Parliament with the clearest possible evidence base, and to provide parliamentarians with the longest possible period of time in which to gather their own impression of the evidence and to use that to scrutinise government legislation.

When government is pursuing policy objectives through legislation, that is probably our best case for evidence being used in the policy-making process. It is partly due to the expectation of scrutiny. It is due to the fact that Committees such as this will themselves consult experts in the field. There are various reasons why something that government is trying to do through legislation will, even from the Government’s side, require an evidence base that something that is not being done through legislation will not necessarily require. The area I feel most concerned about is when government is trying to enact policy objectives without needing legislation. That is probably where some of the most serious gaps are in whether it is consulting the evidence base early enough.

**Lord Norton of Louth**: For the route there, one relies on Select Committees of the two Houses to find out what is going on and to check the evidence.

**Emran Mian**: Yes, that is right. We rely greatly on departmental Select Committees. There might be things to do around that. Lots of departmental Select Committees have expert advisers. Increasing the scope for that would feel like a good approach. It is often very hard to see how a single expert adviser, or two of them, might be able to cover the entire span of what a department is doing, especially something like the Department for Exiting the EU. It is difficult for me to see how one expert...
adviser, or even a small group of expert advisers, might be able to help that Committee be as effective as it could be in scrutinising the Government’s plans. Expanding the capacity of Select Committees to use expertise would be very positive. The other dimension would be relying on the desire and the capability of the Civil Service to bring evidence-making to bear.

**Lord Norton of Louth:** Absolutely. Is there more one can do there? Presumably when the Government bring forward evidence, it is quite often interested evidence, in the sense of, “This is the evidence to support what we are bringing forward, but we are not necessarily telling you about material we have that may not support the case”. Is it in a sense an attitude that we have to address as much as anything—to eke that out and make sure we are assessing the full gamut of evidence and not simply what is presented?

**Emran Mian:** I think that is right. I can think of at least a couple of policy White Papers where there was a serious attempt by the Government to engage with some of the evidence against the proposition that they were putting forward, and then to explain why that evidence should not determine the decision being made. On the whole, though, government policy papers ignore, sideline or even at times ridicule evidence against the policy intention that they are pursuing. It is a question of tone. There are also some quite soft things in the mix. Often, people from the evidence streams in the Civil Service are given much less prominence in policy-making processes than are the policy civil servants. We rely to an inordinate extent on policy civil servants being interested and curious about evidence. Some of them are and some of them are not. We fail to bring in economists or social researchers. They very rarely get to see Ministers, and they are very rarely in the room when something is being considered. That soft stuff really does matter in the end. Government lawyers will be in the room much more frequently when a decision is being made; economists and social researchers often will not be. In the end, that kind of thing has an impact on how decisions are made and how documents are written.

**Lord Norton of Louth:** I presume from what you are saying that, from a parliamentary point of view, the point about capacity for Committees would be Committees having the capacity themselves to pick up the phone and talk to academics who are researching in the area so that they have something against which to test the Government’s evidence.

**Emran Mian:** Thinking about it from the academics’ point of view, I wonder whether there is more we should be doing to support early career researchers, in giving them the time and space to engage with policy-making processes, and indeed parliamentary processes. That is a difficult thing for early career researchers to do. Those who are extremely enthusiastic about wanting to do it, and feel that it is part of their duty, will do it, but it is very much a discretionary activity for them; personal desire is leading it. There is no funding tied up with it; there is no career preference tied up with it. Your head of department is very unlikely to
promote you on the basis of that kind of activity. Addressing some of those incentives would be quite an important thing to do.

Q34 Lord Hunt of Wirral: How should government departments engage with the wider public in acquiring evidence for policy and legislation, and then making that evidence known? Is there a role for new technology in that regard, or perhaps better use of existing technology?

Chris Walker: It is an interesting question. The typical answer is the use of consultations and the use of calls for evidence in order to gather evidence from the public, professionals and professional bodies. In the last 10 or 20 years, much greater use has been made of the internet and online technology to get at some of that. Alas, that is not quite so old now. Another interesting area is the use of ways of collating information by the public, almost of a Wikipedia type. That is quite an interesting concept.

For me, one of the most exciting developments in government at the moment is open data, and making data available to the public and professionals so that they can scrutinise it, and feed in through various channels to the policy-making process. I hope ultimately we will get to a situation where it is not just you, as Parliament, scrutinising government policy, but the public at large are much more able to scrutinise policy. Open data has a really important role in that.

Emran Mian: The other role that technology can play, which the Government do not exploit at the moment, is that it could allow for personalisation of the way in which people respond to consultations. At the moment, there is the equivalent of a sheet at the back of the consultation paper that has a set of questions, and those questions are addressed to any audience. They are written in a way that does not differentiate a generalist member of the public and a specialist. To me, that feels like an approach we no longer need to take.

It should be easy for somebody to respond to a consultation through technology. Let us say you are an education expert and you are commenting on an education White Paper. The Government should seek your view in much more detail on specific propositions than if you were a member of the public responding to that consultation paper. What technology should do very simply is allow the consultation response to be taken in a range of different ways, depending on the level of expertise or the nature of the expertise of the person responding, so that people could see different sets of questions depending on what their expertise is. That kind of tailoring is very easy to do through a government website, but government departments do not currently do it.

Lord Hunt of Wirral: One of the reasons may be that they rely on trade bodies to give a view on behalf of their members. You are suggesting that government departments should go direct to their members. You would have a wonderful opportunity to get free legal advice by targeting questions to all the lawyers. Is that something that you are aware has ever been considered? In the past, consultation papers used to have just some general questions. They have become much more specific, but they are not targeted. Has that ever been contemplated? Are we pushing at a
slightly open door in advocating better systematic targeting on particular questions?

*Emran Mian:* My view would be that we are pushing at an open door. I do not think there is a significant cost associated with government doing it in that way. There are potentially lots of upsides for government in doing that kind of targeting. The technology makes it easy to do. There is still a question about the incentives for respondents to respond to something that might require a lot more discretionary effort and time from them. There is definitely an open question about that, but it is easy for government—from the supply side—to fix the way in which it seeks input to consultations.

*Lord MacGregor of Pulham Market:* You would have to be careful; opponents of a particular piece of legislation or proposal would be more likely to respond than supporters.

*Emran Mian:* Yes. That is an issue the Government face all the time. They have evolved a range of techniques to ensure that they get a broad range of opinion. One of the ways, for example, is that alongside a consultation paper they hold a set of consultation events. The consultation events are often with representatives of the sector, and the people who tend to go to them either provide a more balanced view or might be supportive of the proposals. You end up creating a balance between the responses you get in that way. I am not endorsing that tactic; I am just saying that the Government have a way of dealing with that situation. It does not seem to me that that should be a block to consulting in a different way.

*The Chairman:* We must come to the last question. Lady Taylor will ask it.

*Q35 Baroness Taylor of Bolton:* There has been increasing criticism in recent years about the quality of legislation that comes to Parliament, about the fact that the Government introduce a Bill and then introduce hundreds of amendments—or maybe 1,000—to their own legislation, and that a lot is done by secondary legislation, which is increasingly complex and difficult. There have been suggestions that there should be standards for legislation being introduced.

Could there be one standard? Bills are presented to a Cabinet Committee, where they are signed off by the Treasury, or on environmental grounds, human rights and things of that kind. There has been a suggestion that there should be a legislative scrutiny committee, perhaps of both Houses. In your view, what is the practicality of one standard for all pieces of legislation, and what is the role that the evidence base could play in that, bearing in mind that at the end of the day we are not just looking at policy as an academic exercise; it is also about political delivery?

*Chris Walker:* Having a single standard would be tremendously helpful. The question is how we can achieve that in a pragmatic way. I talked earlier about impact assessments, for example. Having a good single bar as a standard to which all impact assessments have to adhere would be
tremendously helpful. The difficulty is in how you achieve it. Do you make it some kind of tick-box exercise by which you say, “Okay, I have met that criterion, I have done that and I have done that”? That could be quite easily done and co-ordinated through the Cabinet Office, so that there was at least a good but stringent set of guidelines that all impact assessments had to follow.

**Emran Mian:** I agree with that. I have nothing to add.

**The Chairman:** How very tactful of you. That brings us in on time. Thank you both very much. We only had half an hour or so, but we have put it to enormously good use. We are very grateful to you for giving us your knowledge and experience on these matters, and for your productivity. We have a lot to look over as we peruse the evidence, when the text arrives on our desk. Thank you very much for coming.
‘Creating Good Law’

*The Office of the Parliamentary Counsel describe “good law” as “law that is: necessary; clear; coherent; effective; [and] accessible.”*

1. How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

The practices in place to present draft legislation, once drafted, are good, and are very comprehensive. The Parliament website, for example, is extremely easy to navigate and has a wide variety of information and links to further sources that make it easy to have all of the published information to hand. Equally, the government website has a similar amount of information, although it is perhaps not set out as clearly for a general readership.

However, before the stage whereby draft legislation is published, it is largely down to individual departments or individuals Ministers or Secretaries of State as to how clear and accessible any process of drafting may be. In some cases, departments do not engage at all with stakeholders, and draft legislation is withheld until publication, which necessitates a greater need for questions to the government and amendments to draft legislation. If government was always clearer in its intentions, the need to provide more information around context for certain policies or clauses would be diminished, which would speed up the process, provide greater transparency and allow for a greater opportunity for comment, particularly from those outside Parliament.

There is also an issue with explanatory notes. The notes online, around the actual processes as opposed to the documents themselves, are excellent for a general reader. However, the published notes that accompany a Bill are too often written in precisely the same legalistic language that the Bill itself uses. In many cases, therefore, they only serve the purpose of clarifying technical points for those already well versed in the subject matter, and used to the legislative process, and not actually improving the understanding for any general reader on what any element of a Bill is actually seeking to achieve.

2. Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

Not engaging with stakeholders on draft legislation before it is published can hinder the development of good law. Whilst everybody accepts that
the government will have a policy agenda that they are wanting to push through, if they do not consult the relevant sector stakeholders at all when drafting they will miss out on some practical implications of their proposals, which will in turn make the need for amendments more pressing – which slows down the legislative process and can reduce the time given to scrutiny in other areas.

3. Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

As above, in terms of understanding, more user-friendly explanatory notes would be a very good starting point, especially from the point of view of a general readership. The public should be able to understand what the legislation is seeking to do, and government should move towards making this easier by better utilising this tool.

**Brexit**

*Following the UK’s withdrawal from the EU, Parliament will have to legislate across a range of areas previously legislated for at an EU level.*

4. What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?

We would imagine it will increase the volume of legislation, due to the legal implications of any repeal Bill, and the stated ambition of the government to transition some elements of EU law into British law. Due to EU law being drafted in a different way to British law, it may make it more complicated for the general reader to understand what changes will come about as a result of any transition. If it is a simple case of copying legislation into British law, with the same wording (or broadly equivalent), it may not have too significant an impact in the drafting of legislation. However, where there are policy differences as a consequence of withdrawal (which there inevitably will be it will be very important to highlight this, so that the UK government processes this legislation in the same way it would any new UK legislation – with effective consultation and scrutiny.

5. Will there be changes required to how the Government and Parliament deal with legislation following Brexit?

The volume of legislation may mean there are practical changes required, even if these are simply having requisite space (either online or on paper) to house new proposals and explanatory notes.
There will also be a need for far greater explanation of the impact of any changes from EU law to UK law, and that this is accessible for a general readership. It must be made clear what is happening at all stages of the process, with extended explanatory notes.

**Technology**

*New technologies—and particularly developments in information technology—have changed the way that people access information and share their opinions, experiences and insights.*

6. How effectively do Parliament and the Government make use of technology at this stage of the legislative process?

They both use technology well when drafts are published, and the websites are excellent at holding easily accessible information. For a general readership, however, there may be scope for enhancing their understanding of how legislation works, and what individual Bills are proposing, and using video or audio may make this more accessible.

However, in the drafting process there is little evidence given, or engagement done, on Bills being worked up, so engagement is usually at the behest of the department, and involves only selected stakeholders. Much more should be online about what the government is currently drafting, with a tool available to input recommendations, or sign up for notifications.

7. How could new or existing technologies be used to support the development and scrutiny of legislation?

As above, utilising audio or video tools may make some elements of the process more accessible, which will aid scrutiny.

It may also be beneficial to better publicise tools that allow stakeholders to register interest in areas, and then be contacted about any announcements or changes. These are useful, but are largely hidden, and should be much more prominent on both the Parliament and Government websites.

**Public involvement and engagement**

*Engagement with those affected by new legislation, or those with expertise that can assist the development and scrutiny of legislation, is an important factor in ensuring that legislation is effective in meeting its policy objectives.*

8. To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?
Not enough. There is no set standard for engagement at this stage of the process, and it varies widely from department to department and from issue to issue. Once opened up for discussion, consultation can be very good, but with no set tools in place it cannot be said to be successful currently.

9. What factors inhibit effective engagement?

Government pursuing a policy objective in secret, or without any wish to consult, will clearly inhibit any engagement, effective or otherwise. Also, self-selecting who to consult will hamper effective engagement.

10. What mechanisms could be used to increase or improve engagement with the public and stakeholders?

Having a notice of all Bills currently being drafted, or worked up, by departments or individuals, and a tool whereby you could register your interest as a stakeholder or interested party would be a very good start. This way, it would make sure the government could not self-select who it consults (as there would be a list of all those who believe they have an interest), and all notifications on any movements of the draft legislation would be circulated to all those on that register. The people principally drafting the legislation should always be in the driving seat, so to speak, but any lack of consultation, or any moves to ignore any comments made or advice given, would have to be justified, which would make for more effective scrutiny.

Information provision

*Informing the public, stakeholders and parliamentarians about potential legislation is an important part of effective law-making.*

11. How effectively is information about potential legislation disseminated at this stage in the process?

As above, not very well. You have to follow Parliament fairly closely, or be informed by government, to know exactly what is going on.

12. How useful is the information that is disseminated and how could it be improved?

When stated the information available is fairly useful. However, it is not publicised widely enough. People should know exactly where to go to see what is being developed, and how they can get involved, or register their interest.

Parliamentary involvement
Parliament is central to the legislative process, but its involvement varies across the different stages of the legislative process.

13. To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?

It largely depends on the type of Bill or the department in question. Parliamentarians are usually only involved if they are informed by a constituent or a campaigning organisation.

14. Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

Yes, greater use of pre-legislative scrutiny, particularly for far reaching Bills, would be enormously beneficial. Ideally, any Secretary of State, or MP, should have to justify very clearly why pre-legislative scrutiny is not necessary for their proposed legislation before a Committee in Parliament. At the moment, it is far too easy for Bills to ignore this tool when it suits them. Clearly, many Bills will not require it, but this process will enable better understanding that this tool is available, and will give Parliamentarians the chance to better scrutinise the government’s drafting process, which will have the knock-on effect of better engaging the public in the process as well.

October 2016
1. Across the world there are now a range of initiatives which engage citizens in the legislative process – from policy development and consultation, to drafting legislation and providing scrutiny over legislative proposals. Digital tools are playing a fundamental role in enabling parliamentarians to gather a wider range of views and perspectives on particular issues, improve the transparency and legitimacy of the legislative process, and contribute to better legislation.

2. Parliament should seize the opportunity provided by the Restoration and Renewal programme of the Palace of Westminster to experiment with a number of approaches to better engaging citizens in the legislative process. The temporary spaces used during the decant should be used as a lab for innovations in democracy. We have suggested elsewhere that a budget of £2 million be set aside for such experiments during the decant period.\(^\text{172}\) Parliament should also seek to remain abreast of pioneering approaches to the use of digital tools and public participation in the legislative process - ideally by commissioning a comprehensive review.

3. Despite a number of initiatives, including the pilots for a Public Reading Stage of Bills, Parliament and the Government continue to make insufficient use of technology in preparing legislation for introduction to Parliament. In addition, far more could be done to engage the public in the decisions and deliberations of Parliament. Many consultations are tokenistic, committees often struggle to engage a broad and representative group of stakeholders and the quality of contributions is often highly variable.

4. There is significant scope for better using digital technologies to engage members of the public to take part in this stage of the legislative process, and to improve the quality and scrutiny of legislative proposals. Indeed, there are now a raft of tools which could be used to engage stakeholders in policy development and consultation, legislative drafting and pre-legislative scrutiny.

5. These and other digital tools provide Parliament with the greatest opportunity to engage the public in more meaningful ways and thereby reinvigorate our democratic institutions. By ‘engagement’, we mean going beyond informing and consulting, to involving people

\(^{172}\) http://www.nesta.org.uk/sites/default/files/submissiontothejointcommitteefinal_0.pdf
in deliberation and decision making. This includes, for example, inviting people to submit ideas and proposals, rank priorities, provide scrutiny over proposals, and contribute to the decision making process.

6. There are already myriad tools and platforms which enable citizens to deliberate (e.g. Pol.is), submit proposals and rank priorities (e.g. Your Priorities), undertake participatory budgeting (e.g. Madame Mayor I have an Idea), receive notifications of upcoming debates (e.g. Helsinki citizen’s notifications) and vote securely (e.g. Agora Voting). Many of these tools were first trialled in Madrid, Barcelona, Helsinki and Reykjavik as part of Nesta’s three-year D-CENT research project and are now being used across Europe.173

7. There are now a number of experiments to use digital tools for public participation in the legislative process. Two notable examples from universities and civil society are CrowdLaw, convened by GovLab174 to identify and share case studies of open and collaborative approaches to drafting legislation,175 and Legislation Lab, a platform for public participation in the legislative process, which was used in 2011 to crowdsource contributions for the new Constitution of Morocco.176

8. A number of governments have also created new initiatives to enable citizens to propose new laws or make amendments to existing legislation. Open Ministry177 in Finland, for example, crowdsources new legislation and puts popular proposals before parliament for a vote. A new law legalising same-sex marriage was passed in this way. In Estonia, a new online platform – rahvaalgatus.ee178 – was launched in February 2016 to facilitate the process of making proposals, discussing, debating and voting on them. Citizens require 1,000 signatures of support for their proposals to progress to the next stage - discussion by Parliamentary Committees.

9. In Brazil, the e-Democracia179 portal provides citizens with numerous ways of engaging in the legislative process. In 2014, and as an extension to the project, the Brazilian Chamber of Deputies created a permanent hackerspace – called LabHacker – to act as an innovation lab within the Chamber. LabHacker is now responsible for improving the e-Democracia portal, as well as developing new

173 http://dcentproject.eu/
174 http://thegovlab.org/
175 http://www.thegovlab.org/project-crowdlaw.html
176 http://legislationlab.org/en/
177 http://openministry.info/
178 https://rahvaalgatus.ee/
179 http://edemocracia.camara.gov.br/
digital tools to broaden public participation and improve the transparency of the legislative process. Through the portal, citizens can: share content relevant to discussions of draft bills; take part in discussions about draft bills; take part in the virtual communities that have been created on the platform to discuss thematic areas – such as sport, education, space policy and the environment – and for which bills have been drafted; and work collaboratively on legislative proposals which can then be submitted to parliamentary committees and/or the Chamber of Deputies.

10. However, our research highlights five main challenges of using these kinds of tools:

   a. *It’s imperative to engage users as early as possible* to give them the chance to set the agenda and frame the problem. There is a danger with collaborative approaches to drafting legislation that most of the substantive decisions have already been made by this stage, therefore limiting the role that citizens can play in shaping and influencing the direction of the legislation. The most effective approaches engage people from the outset, prior to the drafting of any text at all.

   b. *Citizens need additional support to be able to draft legislation.* In the case of the e-Democracia portal, for example, legislative consultants provided content for participants, moderated discussions, synthesised contributions made by citizens and helped to make sense of legal texts. As such, they served as ‘technical translators’, guiding citizens in their deliberations and helping them to contribute to the bill-drafting process using the Wikilegis tool.

   c. *Parliamentarians should focus on engaging the most appropriate stakeholders rather than ‘the general public’.* This requires mapping the landscape to identify relevant stakeholders, targeted outreach and developing relationships with communities of interest.

   d. *Such processes are expensive and require significant resources* for outreach, facilitation, and communication throughout the process. It is a mistake to see digital engagement as a cheap option.

   e. *There must be genuine buy-in from Parliamentarians.* Without a true commitment to listen to and engage with the input from citizens the process risks becoming tokenistic. As well as potentially deterring citizens from future participation and increasing distrust in politics and politicians, it becomes a
highly inefficient process and has little benefit for the quality of legislation.

11. The Restoration and Renewal programme presents Parliament with an historic opportunity to dramatically improve the way it engages with the public. This is desperately needed to stem the tide of popular disenchchantment and disillusionment with our political system and its institutions. The temporary buildings used during the decant should be used as a lab for democratic innovation to experiment with tools for improving the way parliamentarians and parliamentary staff engage the public. The decant could provide an excellent opportunity to test and trial a number of approaches to better engaging the public in the legislative process – such as crowdsourcing legislation, enabling citizens to submit legislative proposals, take part in deliberative exercises and attend virtual committee hearings.

12. Nesta is an innovation charity based in the UK with a mission to help people and organisations bring great ideas to life. Nesta is one of the world’s leading centres of expertise in social innovation and innovation in public services, with a substantial body of research and policy work, through practical programmes in the Innovation Lab and through its investments in social ventures via Nesta Impact Investments. Nesta is currently working on a programme of work exploring innovations in democracy with a report on pioneering examples of digital democracy to be published at the beginning of 2017.\textsuperscript{180} Nesta has also conducted research on how the architecture of public space influences innovation\textsuperscript{181}, on the future of government and public services, and on technology and organisational change.\textsuperscript{182}

\textit{14th October 2016}

\textsuperscript{180} \url{http://www.nesta.org.uk/project/democratic-innovations}
\textsuperscript{181} \url{http://www.nesta.org.uk/blog/innovative-spaces}
\textsuperscript{182} \url{http://www.nesta.org.uk/project/digital-public-services}
Professor David Ormerod, Law Commissioner for Criminal Law and Evidence—Oral evidence (QQ 102-112)

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Transcript to be found under Sir David Bean, Chairman, the Law Commission
Judge Julian Phillips, Resident Judge of the First-tier Tribunal, Immigration and Asylum Chamber—Oral evidence (QQ 42-48)

Transcript to be found under Sir Ernest Ryder, Senior President of Tribunals
1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University and I have written a textbook on Constitutional and Administrative law (3rd edition, Routledge/Taylor & Francis Group, 2014). In terms of engagement with pre-legislative scrutiny, I have made a written submission to the House of Commons Political and Constitutional Reform Select Committee in relation to the Draft Scotland Clauses Bill (2015) as well as to the Joint Committee on the Draft House of Lords Reform Bill (2011-12). In addition, in September 2016 at Oxford University I delivered a conference paper at the Society of Legal Scholars on the process of constitutional legislation which considered the Committee’s own recommended checklist for legislation set out in its 2011 Report: The process of constitutional change, HL Paper 177. Finally, in 2012 I gave both written and oral evidence to the House of Commons Political and Constitutional Reform Select Committee in relation to the issue of ensuring standards in the quality of legislation. This submission is made in my personal capacity and indicates my brief observations in respect of the pre-legislative stage of the law-making process. It in no way reflects the views of my employer (Coventry University).

2. Question 1: It is axiomatic that laws should be clear, coherent and accessible as these are constitutional principles which underpin the rule of law. It is also clear that the establishment and development of such principles begin at the initial drafting stage (whether or not they form part of a formal pre-legislative process). The practical reality of legislation is that it is drafted by the Government of the day and so it is fair to argue that Parliament is not really (or meaningfully) involved in this initial stage of the legislative process. Indeed, the Coalition Government has previously made it clear that the process and content of draft legislation was the preserve and business of the Government. After all, in terms of the separation of powers, the Executive power is constitutionally responsible for initiating legislation for the Legislature thereafter to consider and scrutinise.

3. Question 2: One suggestion which could prove useful (and which draws for its inspiration upon the Committee’s own recommendations in 2011), is the introduction of a “necessity and context” legislative tag which could be attached to draft legislation. This would require the Government to formally justify the need for its proposed legislation and also how it would sit in relation to other existing legislation (including any law which it would displace). Such a requirement would focus the mind of Government policy-makers on the necessity of the law proposed as it is well documented that one of the major problems with modern legislation is that of its volume and detail. In terms of modern legislation, therefore, less is certainly better than more.

4. Question 3: Legislation, by its very nature, has to cover future eventualities (or close off possibilities or circumstances) and so by necessity requires a minimum level of detail to be legally workable. There is, therefore, an inherent tension in drafting legislation which is crystal clear (but somewhat simplistic and lacking in necessary detail with the result that the courts become involved in the
lacuna) and legislation which is so detailed (for the purposes of the law/courts) that it becomes impenetrable to the non-lawyer. Ultimately, the question is who is the clarity aimed at: the lawyer/courts or the lay general public?

5. Question 4: As the expectation appears to be that existing European Union law will be “frozen” in an Act of Parliament pending its removal (or perhaps retention and repackaged into other laws) at a later date, it is clear that in terms of volume, for the next decade, European Union law will dominate the legislative agenda in general and so, by extension, the pre-legislative process as well.

6. Question 5: As an adjunct to the above, it is clear that the next decade or so will be consumed by the issue of the highly complex (and politically divisive) issue of disentangling our domestic law from the law of the European Union. In this context, therefore, there will be enormous pressure placed on the existing parliamentary select committees which focus on the European Union. As a result, perhaps thought therefore should be given to the creation of a new overall Joint Committee on European Union law to perform a general overseeing role for this lengthy process which will necessarily require an integrated approach (given that European Union law straddles many aspects of domestic law).

7. Question 6: From my own observations in the last two decades, Parliament - in particular - seems to have adapted to, and embraced, technological advances with the provision of increasing amounts of information, documents and reports and this development is to be welcomed. My general impression is that the Government has, to some extent, caught up to Parliament in recent years in the provision of information.

8. Question 7: Although Parliament performs an invaluable (and crucially free) “alert” email service, by definition, this is used by an existing captive audience and so perhaps more could be done to outreach to Universities, colleges, schools, local government and libraries, etc. One recent and highly successful example of this was the outreach to the general public and organisations undertaken in 2014 by the House of Commons Political and Constitutional Reform Select Committee in relation to the possibility of a codified constitution (A new Magna Carta? HC 463). This resulted in the largest ever public response and engagement with a select committee.

9. Question 8: Public engagement is essential for the constitutional purposes of “participatory government” in order that people to some extent (however indirect or minimal) feel engaged with the decision-making process which affects their lives. The harsh reality, however, is that the public will be involved if they are aware of an issue and if they seek out the appropriate information. In other words, those not aware of the issue will by definition, not search for it or be engaged with the process.

10. Questions 9 & 10: One mistake which should not be made is to assume that all of the population are engaged with digital resources/ the internet, and also that those who are engaged have ready access to it. As indicated above, one possibility is to supply hard copy of materials (however expensive) to public libraries, local authorities/town halls, etc so as to outreach to those not engaged with the digital world. One, albeit highly expensive, alternative approach is the one adopted at referendums with physical copies of information being delivered to every doorstep, thus drawing the attention of every household to the issue. For example, this could be in the form an annual single leaflet which detailed proposed draft laws for the ensuing year.
11. Question 11: This is an issue which is driven by the Government of the day and it needs to do more to disseminate information (and also not solely in digital form either).

12. Question 12: The information provided is useful; however, it could have links to other digital resources and hard copy materials. For example, in relation to Constitutional law matters, a link could be posted to the independent and highly regarded Constitution Unit (the Unit is part of the University of London).

13. Questions 13 & 14: Historically, the process of legislation is driven by Government and controlled by it, but Parliament could be more proactively involved though its select committee deliberations. In short, irrespective of whether the Government of the day would favour or encourage pre-legislative scrutiny by a committee, existing select committees (or combination of) should provide pre-legislative scrutiny of all draft legislation (albeit this would have resource implications which should be provided for by Parliament).

*October 2016*
Sir Ernest Ryder, Senior President of Tribunals—Oral evidence (QQ 42-48)

Evidence Session No. 3  
Heard in Public  
Questions 42 - 48

Wednesday 16 November 2016

Watch the meeting

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 Macldennan of Rogart; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Examination of witnesses

Q42  
**The Chairman:** We are grateful for the opportunity of having a serried rank of three judges. Thank you very much for coming. You all share experience in the subject matter of today’s session—immigration, tribunals, asylum and refugees—so we very much value this opportunity to ask you questions. I will start the session with what I suppose is a slightly provocative approach. The Office of the Parliamentary Counsel has described immigration law as “good law”: law that is necessary, clear, coherent, effective and accessible. I am tempted to say, “Do you agree?” but I do not want a one-word answer.

**Sir Ernest Ryder:** The one-word answer is no. Of course, it is necessary. Effective immigration control and international obligations are taken as read, but can I give your Lordships a summary of why it is not clear, consistent or accessible? I am tempted to say, “Do you agree?” but I do not want a one-word answer.

**Sir Ernest Ryder:** The one-word answer is no. Of course, it is necessary. Effective immigration control and international obligations are taken as read, but can I give your Lordships a summary of why it is not clear, consistent or accessible?

**The Chairman:** Please do.

**Sir Ernest Ryder:** We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant whose first language is not English and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible. I have to add that most material that comes before Parliament is by negative resolution, so
scrutiny of it is necessarily much less than it would be if it was in another form.

The Chairman: Judge Clements, would you like to add anything?

Judge Michael Clements: I have nothing further to add. The main difficulty the judiciary has is the complexity of the law and the fact that statutes are brought in that not only amend the law but create new law. There are also the transitional provisions, which we will probably come to at a later stage. The complexity of the law is such that, when I first started some 15 years ago, one would expect to deal with a number of appeals every day. Nowadays, one is pushed to do more than two. The work is more complex and the rules are more complex, and that has a knock-on effect on workload and dealing with listing.

Judge Julian Phillips: The only thing I would add is that the 97 changes to the Immigration Rules in 10 years that Sir Ernest mentioned sound as though each time they are minor changes to a word here or there. They are not; they are fully fledged statutory instruments that change, sometimes substantially, what the Immigration Rules say and add to them. As Sir Ernest mentioned, the rules have increased by four times in 10 years. When the current Immigration Rules, HC 395, were introduced as a consolidating set of rules in 1994, they were about 100 pages long. By 2004, they had grown to just under 150, so there was a 50% increase in the first 10 years, but in the next 10 years or so there was a 400% increase on top of that, so that is complexity.

The Chairman: That sets the scene very well.

Lord Pannick: Can you tell us something about the practical difficulties faced by the judiciary in this area, as regards the number of judges and the training and experience of judges?

Sir Ernest Ryder: Let me start by setting the context. As everyone here will know, there is no incentive not to appeal in this area of the law. One must expect, therefore, most asylum seekers and immigration appellants to use the appeal system provided for them, but the appeal system is used multiply, because we set out in our rather incoherent legislation defined routes of appeal that we then restrict. People then use judicial review as the alternative, because they have no statutory right of appeal. People then use judicial review as the alternative, because they have no statutory right of appeal. If one puts that into the context of people not understanding English as their first language and not having a legal adviser for the majority of the material that comes before the first tier, the first-tier judge has the obligation to understand the interplay between the primary legislation, the routes that have been provided for appeal and the alternatives to be found by the wise or advised appellant. There will not be somebody to explain something if it has not been caught on paper or in oral submissions before them. That is quite an obligation to put on a judge.

My judges, like all lawyers, enjoy the complexity of the law; it is what, with their public service ethic, drives them. It is their interest in life, but there is a limit to that, because the user cannot find it, and even if they find it, they do not necessarily understand it. The classic example is the deemed human rights appeal, which, if I may, I will ask Judge Phillips or
Judge Clements to explain. We went down to four statutory routes of appeal in the last Act, but there is now a deemed human rights provision, and that sets up a particular problem that a litigant faces.

_Judge Julian Phillips:_ Looking first at that problem, there was the famous reduction in the rights of appeal from 17 to four. From April 2015, that took out all Immigration Rules rights of appeal. However, at the same time, alongside that was introduced what was called a deemed human rights appeal. The deemed human rights appeal was made apparent by way of an appendix to the Immigration Rules then produced called appendix AR, which stands for administrative review. That explained to people who no longer had an Immigration Rules right of appeal that they could apply for administrative review in certain cases, but not in cases involving family and private life. Of course, a substantial number of cases do involve family and private life. Those applications made under the Immigration Rules were deemed by the appendix to be human rights applications, thus giving a human rights right of appeal.

The human rights right of appeal, however, was made as a result of an Immigration Rules application. As far as the individual is concerned, they have made an application under the Immigration Rules. As far as the judge is concerned, their right of appeal is a human rights appeal because the Government have said it is a deemed human rights appeal, but to decide whether their human rights have been breached—I see this is already making everybody feel a bit confused—the judge has to go back and look at whether or not they satisfy the Immigration Rules, because if they satisfied the Immigration Rules there would be no public interest in refusing their application. A deemed human rights appeal is no longer an Immigration Rules appeal, but the judge has to consider the Immigration Rules to decide whether human rights have been breached.

_The Chairman:_ Judge Clements, confuse us further.

_Judge Michael Clements:_ I hope not. Another area that we have not touched upon is the thing called Home Office guidance. Home Office guidance does not form part of statute or statutory instruments. However, the Home Office produces masses of guidance that we need to be aware of, or certainly the person making an application needs to be aware of. Not all of it is widely distributed. Sometimes you have to root around to find out what the policy guidance from the Home Office is.

We work in an adversarial tribunal. Unless the Home Office representative comes along armed with guidance, or whatever, we are in difficulties. I accept that has moved on to a certain extent, because we no longer have so many of those appeals before us, but certain parts of the guidance have started to form policy, such as the Immigration Rules for families. Some of the Home Office policy is very well publicised; some is not, and, if the Home Office has not followed its policy on a human rights application, that can be an issue.

_Q44 Baroness Taylor of Bolton:_ To follow up what Sir Ernest said earlier, I think you said that many applicants do not have legal advisers. You have just convinced us of the complexities of all of this. Can you tell us the number of applicants who are trying to get through these myriad
complications by themselves?

**Judge Michael Clements:** If it is a protection claim or if you are detained, it is probable that you will qualify for legal aid. Not everybody does, and there are still delays in legal aid. Obviously, the legal aid provisions in Scotland and Northern Ireland, where we also have courts and tribunals, are different. For all immigration matters there is now no legal aid. I was speaking to a senior legal person from a law representative society that works in the community. They basically said that they are now very pushed to give full advice on immigration matters. The society is not publicly funded; it gets funding from the community. Therefore, we have people coming before us who are not legally represented. That causes us difficulties, especially as these people often do not have English as their first language. It is a double hit, if I may put it like that.

**Sir Ernest Ryder:** You might well ask what is different in this jurisdiction from many others that have similar problems. One needs to reflect on the fact that many of the Home Office presenting officers will not themselves have the time and, some of them, the skill to act as specialist counsel would act in this field. They are not presenting a comprehensive overview of the law and the guidance to the tribunal.

The decision letters from the determining officers in the Home Office do not sufficiently rely on the law and guidance they are making decisions about and applying. Therefore, when our judges come to look at what is being appealed, neither the appellant nor the judge will necessarily know what issues will be pursued in the case. There is no tradition in this tribunal of case management in each case. If there were to be, we would have to double the number of hearings, and that is not a funded circumstance. We have to select what we case manage. Somebody who comes without English and without a legal adviser in a deemed human rights case thinking it is about the rules must have that explained to them before they even start. It is the best example we can give of just how difficult this can be on a daily basis.

**Judge Julian Phillips:** In the area of protection claims, where the majority of people will be legally aided, the law is relatively simple. The complex areas are the immigration cases. In protection claims, the Immigration Rules are based on the refugee convention and the EU qualification directive. It is fairly simple from a legal point of view, although difficult from a factual point of view. The complex rules are in immigration cases.

**Q45 Lord Beith:** Can you take us through what you do when faced with the situation you have just described? You have to establish in your mind—even you are not omniscient—not only what the law is but what it was at the time relevant to the case in front of you. What process do you go through, bearing in mind the lack of the advocacy that would otherwise provide you with some of the material?

**Judge Michael Clements:** We encourage all our judges to be in early. When I say early, it is probably not as early as you might think, but certainly by 8.30 am, and cases start at 10 am. That hour and a half is absolutely essential for preparation. It is a matter of going through the
files, trying to identify the issues and, as and when necessary, speaking to other leadership judges as to matters that may arise. The answer to all of this is preparation, preparation, preparation. If the judge prepares the appeal prior to the hearing, there is a far better chance of their coming out of that hearing knowing the decision. Quite often, you come out of the hearing without necessarily knowing exactly what decision you are going to make. There may be other matters that you want to think about.

Sir Ernest Ryder: One impact of the way we have to prepare chronologically by going back to find the guidance and the relevant legislation and what had and had not been commenced at the relevant time and now in every case, because you do not know from one case to another what you are going to face, is that the practice has developed over time—before my time—that all immigration judges take time out to write judgments instead of giving ex tempore judgments. That is not in the public interest. I can say that without having to talk to either of my colleagues to my left and right. In cases of this kind, before a tribunal that is not a court of record, you should have ample but short reasoning. That is not possible because of the lack of clarity in the law and the guidance. That is what we are trying to aim for, but it is quite difficult to do.

Judge Julian Phillips: When researching cases and looking at a matter beforehand, we have a legal research department that provides us online with a tracked version of the Immigration Rules, so we are able to look at a tracked version rather than going back through each edition separately. That is one way of doing it. Certainly, as far as unrepresented appellants are concerned, we do our best to assist. It is an adversarial situation, but we are increasingly becoming an inquisitorial jurisdiction.

Q46 Lord Pannick: Is it simplistic to say that, if the Home Office letter addressed all the relevant provisions and guidance, fewer of these appeals would succeed? You would have far less work, it would mean the waiting lists would be far shorter and people would have less inclination to appeal in bad cases. It is all because the Home Office does not do its job at the outset.

Sir Ernest Ryder: The quality of the determining officer decision is what drives the rest of the litigation path, so I would absolutely agree with that.

Lord Beith: The implication of that is that one of your main headaches arises from an administrative failing in the Home Office and would not be cured by better legislation.

Sir Ernest Ryder: I am happy to say that the determining officers are saddled with the same problem that advisers and judges have. They must find their way through the primary and secondary guidance material. Unless they can find a way of adequately summarising that in a letter, by identifying, as I would want a judge to do it, the factual premise upon which a decision is made and the applicable provisions that lead to the decision, it is exactly the same source problem. Overcomplexity and lack of coherence cause everybody the same problem.
Lord Beith: What would make a difference to the quality of immigration law?

Sir Ernest Ryder: Codification—that is the simplest route. It has been tried. Between 2007 and 2009, there was a Bill, which sadly failed, almost certainly on the basis that it was just too difficult to achieve the end result, but it was a published Bill, with consultation. As I understand it, the Home Office at least acknowledges that that is an objective worthy of pursuit, but if, for example, one were to go to the Law Commission and ask it to do it as a neutral exercise under the special provisions that would then apply, it would need a period of 18 months or more, which is, if not a policy vacuum, at least minimal policy change to the statutory material. At least there is an appetite for it again, as people realise just how big the behemoth has become.

We could also look at codification and simplification of the Immigration Rules. As my colleagues have mentioned, there are elements that are not that contentious. The asylum element of what we deal with on a daily basis is relatively settled, and we know where we are going with it. That could be relatively easily taken to one side and clarified. I am sure most practitioners would say, “Could somebody be looking in parallel at the points-based system, please?”, which would not be quite so easy to take to one side and clarify but urgently needs it. There could most certainly be that process.

The one way of preventing us getting to where we are at the moment would be much better pre-legislative discussion and consultation. We have very little discussion with the expert organisations, including the judiciary, before consultations come in writing. When we get consultations in writing—there are any number of examples—they are adversarial and leading in style; they do not give you an option but ask for a yes or no answer. Bearing in mind that the consultation is likely to be on a small element of problem solving that has arisen over the past year, it takes no strategic overview and does not allow an opportunity to provide coherence to the whole. It is simply another provision that is being inserted or removed, with another transitional and saving provision that has to be carefully scrutinised as to when it comes into effect in relation to which appeal. The simple answer is codification and simplification.

Q47 Lord Brennan: How do we achieve it? Is it possible for the judiciary to ask that the Law Commission set aside, with government help, time and staff to do it, coupled with work by the Home Office? For people like us, the fear is that, if nothing is done, the whole situation will implode into delay, expense and trouble in terms of public life in this country.

Sir Ernest Ryder: I respectfully agree with that. We already have the circumstance that delays in both asylum and detained migration cases are unacceptable to the public and the judiciary alike, to the extent that we have spent since the summer working on a whole series of proposals, administratively and judicially, to move as many resources into this field from elsewhere as we can. In a world where resources are short—for example, public law family proceedings are escalating in the same way as immigration and asylum claims—there is a clear debate as to who gets the spare resources first. There is sufficient will at the moment to send
this matter to the Law Commission. That is not necessarily a guarantor of success; the commission would have to have the resources and the time, but I would have thought that would be a primary recommendation one might seriously consider and the judiciary would welcome.

On the Immigration Rules, although it is more difficult for the judiciary to enter what is essentially a policy arena, because the rules should be codified policy, there is nothing to stop the judiciary in an appropriate multidisciplinary environment discussing with the Home Office, the Ministry of Justice and interested parties how one can simplify the process and reduce it to something more accessible. We have to do that anyway. There is a very useful hook on which to hang it. We are at the moment reforming all courts and tribunal processes. That means effectively making them digital by default. You cannot make an area like this digital by default unless you understand the basics. It has to be reduced to plain language, in so far as that is a feasible proposition, so there is a real imperative to do it at the moment.

**Lord Brennan:** May I ask about the word “immigration”? It is used holistically in the media, judicially and in the statutes, yet there are major differences. There are asylum seekers, economic migrants and refugees from conflict, yet the world we live in talks about immigration.

**Sir Ernest Ryder:** Sometimes, when listening to expert commentary in this arena, you do not hear sufficient distinction of the asylum claims that we all agree should be dealt with within 12 weeks maximum and with clarity. Take the unaccompanied children we are dealing with in asylum claims at the moment; there is absolutely no basis on which they should wait a minute longer than necessary. There are very clear distinctions to be drawn between somebody in that category and somebody who is an economic migrant who has committed offences, may have had indefinite leave to remain and then stayed on as an overstayer and committed offences. There are policies that cover them, but multiple appeals from them will still be discovered in the system.

**Judge Michael Clements:** As you may recall, there was something called the fast-track procedure, and the 2014 rules were struck down as ultra vires. As a result, I set aside a fair number of asylum decisions. What is perhaps more concerning is that the fast track was meant to mean that you had an appeal and were then removed within so many days. I now have a number of applications from people who had their appeals under the 2005 procedure rules and who are making application to set aside. They are still in the country. If the Home Office felt that those people, who were asylum seekers and were detained, could be removed quickly, one wonders why they are still in the United Kingdom. I do not mention that as a political matter, but obviously judges sometimes feel concerned that they have made decisions dismissing appeals and nothing seems to happen as a result. Those people are detained for various reasons and come back before us on bail applications. It is a concern. Certainly, the Court of Appeal is about to hear the 2005 procedure rules fast track. I do not know which way it will go, but there are a number of people waiting in the wings for another hearing if those procedure rules are set aside.
Judge Julian Phillips: Sir Ernest was talking about consolidation and simplification. The feeling I am sure we are getting from you and you are getting from us is that consolidation and simplification is in everybody’s interest, but we have to be very careful when we are deciding how it is to be done. It is very easy for us to say that we should simplify and consolidate. It is not so easy to do it. A perfect example is the points-based system. We heard years ago that we should in this country have an Australian-style points-based system. That phrase is still bandied about politically. A points-based system was introduced in 2007 to 2009 for non-family migration: students, work permits, entrepreneurs and so on. The most complex part of the immigration rules now is the simple points-based system. If we try to simplify again and go for, say, a points-based system for family members, the danger is that it will become another behemoth that we do not know what to do with.

Q48 Lord Morgan: We have discussed aspects of this already. What kind of changes do you think might be proposed in the Government’s approach to immigration legislation? I have in mind the large categories of people, some of whom are not immigrants at all, who will, it seems, nevertheless come within the scope of the Immigration Rules. There is the separate case of overseas graduate students who many people think should not be in the total at all. What do you suggest should be the Government’s basic approach to this? Do you feel that the Government have adequate political and legal expertise and competence to deal with these matters?

Sir Ernest Ryder: I will avoid straying into the policy arena, and I declare an interest in the educational sector, so I well understand your Lordship’s point about the effect of policies on that sector. It is without doubt open to the Government to spend more time in the pre-legislative discussion and consultative arena to look at the unintended consequences of individual, piecemeal problem-solving. If there were to be one clear recommendation it would be that, whether or not we are doing it in the context of consolidation.

I can give you an example of consolidation that has worked. Most of the examples we have given you today, sadly, have been things that are perhaps not at their best. If you look at the Immigration (European Economic Area) Regulations 2016, there is an example of bringing together piecemeal change in one provision. That provision has a destination table of equivalence so that the user or judge can find what they are looking for. It is possible; these things can be done.

It is right to flag up that, both on policy and legal questions, the advice available to government outside the consultation arena is much less than it used to be. We see that in the appropriate bilateral discussions that we have with government. The changes to personnel and the lack of senior personnel involved in those debates are marked. That does not mean that there are not high quality people still in the system, but their workload is such that they are not able to give as much time to these issues as they used to. I see that in the tribunal’s procedure committee, for example, where the separate rules relating to how the tribunals are run procedurally are recommended, discussed and eventually made with the Lord Chancellor’s consent. One can wait a long time for legal advice from government to that body in order to get something to the stage of being
drafted. That is unsatisfactory when there are things that we know need to be done.

I can give you one example in the policy arena that is not contentious. We still do not have rules for the immigration and asylum tribunal relating to children and vulnerable adults who are witnesses or parties who come before the tribunal and need assistance by way of litigation friends or otherwise. I am put in a position where there is no funding, because there is no rule, and that leaves people exposed. As a judge, I am entitled to comment that that is not an appropriate circumstance for those tribunals to find themselves in.

Judge Julian Phillips: In answer to Lord Morgan’s question, this is a political matter. Beware thinking that there is a simple answer to a simple politically loaded question.

Judge Michael Clements: I have nothing to add.

The Chairman: That brings us to the end of our round of questions. I thank you most warmly for participating and bringing us enormously informative answers. Although it was a short session, it was intensely valuable and, taken with previous witnesses today, it makes the Gordian knot look like a piece of cake. Thank you very much indeed. You have contributed enormously to our studies for our report.
Professor Richard Susskind OBE FRSE—Written evidence (LEG0031)

A Submission to the Legislative Process Inquiry

1. In this note, I offer some preliminary observations on the potential impact of technology on the legislative process. I am President of the Society for Computers and Law and, since 1998, have been IT Adviser to the Lord Chief Justice. I write here, however, in a personal capacity. My background and training is in both law and technology, I have specialised in the interaction of these two disciplines since 1981, and have written numerous books on the subject.

2. I have two general messages. The first is that the legislative process, in the UK and around the world, has been subject to much less computerisation and analysis by technologists than other aspects of the law such as the courts and the legal profession. The field of what might be termed ‘technology-enabled legislating’ is in its infancy. Second, it has nonetheless been clear to me for some time that there is great potential here for the imaginative application of technology. There are existing and emerging systems that could greatly improve the legislative process. This is a field in which the UK could take a lead. However, to explore the potential thoroughly would be a significant project in its own right.

3. I note that the Inquiry is being undertaken in four distinct parts. From a technology point of view, there is a risk here of failing to identify systems that might operate across the entire legislative process. This is a common problem in systems analysis – if the analysis is undertaken in terms of traditional categories, this can limit the scope for fundamentally new thinking.

How to think about technology

4. Technology (by which I mean information technology) can be used in two quite different ways. The first is ‘automation’, when systems are introduced to streamline and improve existing ways of working. The second can be called ‘innovation,’ when technology fundamentally changes past practices or allows us to work in ways that simply were not possible before. The cash dispenser, for example, did not substitute or replace a bank teller sitting behind a hole in a wall, 24 hours a day. Instead, the technology enabled an entirely new way of providing a basic domestic banking service.

5. While automation is reassuringly familiar, the dominant trend in technology is very clearly towards innovation and transformation. This is apparent, for example, in transport with the advent of driverless cars, in manufacturing with its deployment of robotics, in banking and
finance with the introduction of systems like Blockchain, in the professions with the increasing use of artificial intelligence, and across government with the growing interest in machine learning. In the current context, the technical details of these technologies are less important than recognition that technology is bringing fundamental change across society. It is not simply automating our practices of the past.

6. All respectable investigations of trends in computer science confirm that the underpinning technologies (such as processing power and storage capacity) are evolving at an explosive rate. In turn, our systems are becoming increasingly capable. This means that they are taking on more and more tasks that could only have been undertaken by human beings in the past, or indeed tasks that could not have been undertaken at all. In relation to the legislative process, it is clear that this a data-intensive and document intensive enterprise, that there is a great deal of communication involved, and that it affects very large numbers of people - on the face of it, this suggests that the process is well suited to the application of technology.

Specific questions

7. I note that little evidence has been given to the Committee on the question of technology. This should not be construed as a lack of potential. Nor indeed does it betray a lack of interest elsewhere. There is a growing literature that addresses the possible impact of technology on democracy. Moreover, there is much research on the impact of social media on the democratic process. And there are events devoted to this subject too – for example, the recent Hansard Society meeting on 'Future Parliament: Hacking the Legislative Process'.

8. With regard to Question 6 in the Call for Evidence, my preliminary investigations suggest that the level of use of technology in Parliament and Government is fairly modest today. Although there are promising new developments (such as the Parliamentary Digital Service and CommonsVotes, an app that shows how MPS have voted), the legislative process in the UK has not yet itself been directly affected a great deal by technology (which is not to say that Parliamentarians do not use laptops, handhelds, and the Internet).

9. Question 7, which asks how technology might support the development and scrutiny of legislation, is best answered under two headings: systems for the short and medium-term (leading to 2020) and systems for the long-term (in the 2020s).

Systems for the short and medium-term

10. Over the next few years, we are likely to see greater take-up of a first generation of system. By way of example:
For legislators, policymakers, and researchers

- Legislative information systems – an integrated (rather than piecemeal) set of tools, combining workflow, project management, calendaring, alerting, document production, bill tracking, online research, management information, secure messaging, and more (a tool-kit for legislators).
- Secure, collaborative, shared spaces for structured online debate of policy and legal issues.
- Computer-assisted drafting tools, including advanced tracking and comparison of revisions.
- The use of machine learning techniques to analyse the content of social media - systems that will undertake sentiment analysis across society or sectors of society in relation to policy proposals or bills in progress.
- Systems that allow users to run simulations (for example, economic, demographic, and policy models) to assess likely outcomes of proposed legislative changes.
- Predictive analytics to forecast reliably the views of voters.
- A closed social network of legislators worldwide (compare Sermo, a closed social network of 600,000 doctors in 30 countries), to share worldwide experiences of different policies and laws in action.

For citizens

- Apps for tracking the progress of bills and events in Parliament.
- The use of social media (such as Twitter) to enable greater participation – a ‘new’ channel to allow people to express their views on the need for legislation and to provide real-time feedback on bills passing through.
- Secure, collaborative, shared spaces for structured online debate of policy and legal issues (amongst themselves and sometimes with legislators).
- Secure, online voting.

Systems for the long-term

11. As we move into the 20s, and as artificial intelligence techniques become more refined, I predict more advanced applications:

- Automated drafting of legislation (work began on this in the 1960s).
- Automated textual analysis of legislation for inconsistency and ambiguity (using natural language processing techniques).
- Real-time monitoring of the actual impact of legislative change (using social media and machine learning).
• Systems that can, again in real-time, analyse the mood of the nation or of communities, and identify legislative defects and the need for legislative change (again, based on machine learning).
• Personalised updating - systems that will automatically notify people of new laws or changes in old law that directly affect them (Jeremy Bentham’s vision of full ‘promulgation’ will be realised).
• Embedded legislation – when legal provisions are integrated within organisations, buildings, working processes, thus not allowing non-compliance (for example, a car that cannot be driven above the speed limit).
• Dynamic laws and regulations – rules that automatically update themselves within parameters established by the legislators (triggered by the occurrence of events, as specified in terms of data).

12. Most policymakers and politicians will not be entirely familiar with such possibilities. But they are within our grasp. Alan Kay, a Silicon Valley pioneer, once said that ‘the best way to predict the future is to invent it’. This is apt. The challenge here is assuredly not crystal-ball gazing. It is finding the resolve to exploit emerging technologies in ways that specialists can already envisage.

Making progress

13. There is a temptation with technology, especially when the systems are not available off the shelf, to want to defer the whole topic for another day or perhaps to leave it to a younger generation. My feeling, on the contrary, is that technology is our generation’s legacy to 21st century voters and Parliamentarians. Whenever we are reforming, reviewing, or changing any current institutions or working practices, technology should be at the front of our minds. It may be, of course, and I fully sympathise, that some members of the Committee are not entirely at home with topics such as social media or artificial intelligence and, understandably, cannot comfortably see how technology might make a difference.

14. An analogy can be drawn here with current developments in the modernisation of our court system. I chaired the group of the Civil Justice Council that made the initial recommendations, in February 2015, for the introduction of online courts to England and Wales for the resolution of low value claims. Our proposals now have strong support from the Government and the Judiciary. Before we began our work, all focus was on automating the traditional court system. Few people beyond the small field of ‘online dispute resolution’ had any sense that there might be a workable technological solution. Our group came up with a fairly radical alternative; but that would never have come about had we not been given scope to think imaginatively by several very senior and open-minded judges.

15. Many organisations introduce new technologies with great success when they are going through the discontinuity of a physical move or
construction works. Thus, the refurbishment of Westminster may well provide an opportunity to introduce new working practices supported by technology.

**Concerns**

16. None of my enthusiasm should detract from the concerns that legislative technologies might pose. There will be justifiable worries about privacy, confidentiality, and security. There is the danger of information overload. We should be alive also to the needs of the digitally deprived. And we are all conscious that many public sector technology projects fail and that underinvestment in training often means that full advantage of new systems is not taken. But these are issues that need to be understood and evaluated. They do not justify rejecting the introduction of more technology in the first place.

**Conclusion**

17. We are living at a time of greater and more rapid technological progress than we have ever witnessed. It is highly unlikely that the legislative process will somehow be immune from technological change. While there is scope for automation in the short to medium-term, the 20s is likely to be a decade that will bring fundamental change to those legislatures that are prepared to engage in intensive, systematic, and open-minded study and discussion of the potential and limitations of technology-enabled legislating.

18. I regard your Inquiry as an unprecedented opportunity to consider the greater use of technology in the legislative process for the benefit of legislators and the public alike. I would be happy to give oral evidence or offer any help that is thought appropriate.

*November 2016*
**Professor Richard Susskind OBE FRSE—Oral evidence (QQ 113-121)**

Wednesday 11 January 2017

*Watch the meeting*

Members present: Lord Lang of Monkton (Chairman); Lord Beith; Lord Brennan; Lord Hunt of Wirral; Lord Judge; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

Evidence Session No. 8  
Heard in Public  
Questions 113 - 121

Examination of witness

**Professor Richard Susskind OBE.**

Q113 **The Chairman:** Professor Susskind, welcome to our Committee.  
Technology is an area that we have not explored very fully in our legislative process inquiry. If I may say so, your written evidence was very lucid and helpful to the Committee, most of whom I suspect have a slightly opaque view of technology and its application to legislation. That is what really stimulated our wish to ask you to come to answer a few questions from us.

We are keen to explore the subject in a broad sense, and we have a few questions that we would like to put to you. In your evidence, you say that “technology is bringing fundamental change across society” in ways that exceed the simple automation of current practices and processes. Could you outline for us some of the implications of technological developments for the process of developing and making law, and to what extent they offer improvements?

**Professor Richard Susskind:** Thank you very much for inviting me to speak to you. The context is that we live in a remarkable time. It is a time of unprecedented change in relation to technology. We are seeing more rapid advances than even specialists were imagining a few years ago. The broad context is that our machines and systems are becoming increasingly capable. They are now able to take on more and more tasks, many of which in the past we thought could only be undertaken by human beings. In the research I have done, not just in law but across the professions, what is remarkable is that even the most cerebral and challenging areas of our lives are now deeply affected by technology. My premise is that there is no obvious reason to think that the legislative process will somehow be immune from those changes.

I do not come to you today with a blueprint or a specification of the systems you need; I come to encourage you in some way to think further, to research in more detail and to consider the ways that technology might fundamentally affect all dimensions of the legislative process. I am as specialist on the subject as anyone in this country, but I make the point in
my paper that technology has been used far less in the legislative process than, for example, in the legal profession or the court system. You have been relatively unaffected by technology.

To answer your questions, and I have tried to divide them in my paper generally, the implications are in two categories. First, what does it mean for those involved with legislating, and, secondly, what does it mean for those who are being governed and who exercise their rights to vote? It seems to me, and this may seem slightly platitudinous, that one will look in the legislature to use technology to give rise to a system that is more efficient; a system that is clearly under pressure and can become more productive; a system that is more convenient for all participants; and a system whose quality increases through the use of technology. That is what one would expect. Whether one is using it in a law firm, a hospital or a school, one looks to identify inefficient processes and take out some of the cost and delay.

One looks at bottlenecks to see whether one can overcome them using systems and, therefore, be more productive. You work in a particular way, but I am also thinking of the next generation, and those who follow you, and having in place systems and processes and a working environment that is more convenient for you. Ultimately, whether it be through the assistance of computer-assisted drafting or other techniques, we can increase the quality of the work that you do. That is for those of you here, and it is in fairly general terms. Those are the benefits we would normally expect.

From the point of view of the voter, the citizens—we are already seeing great signs of this—it seems to me that technology, and the technologies I mention in my paper, could give rise to a more transparent system. I think that is important. It could give rise to a system that is more intelligible, which is crucial, and a greater opportunity to participate and have their voice heard for those who think that is a good thing—and I do.

By way of context, it is terribly important to remember one vital distinction in technology, which is the distinction between automating what you already do, so that you can look around your working environment and say, “Actually, that’s rather inefficient, so we can use technology there a bit”, by simply taking pre-existing processes and systemising and motorising them through technology. That is what I call reassuringly familiar. Then there is the use of technology that fundamentally challenges and changes the way you work. It might deliver the same output but in an entirely new way. Most of us feel uncomfortable with that. Doctors feel uncomfortable about it in hospitals. Lawyers feel uncomfortable with it in law firms, and in education we find the same thing.

I can give a couple of examples. It is remarkable that Harvard, when it launched online learning courses, had more people subscribe in one year than attended that physical university in its entire existence. It is not a question of saying, “Let’s have a screen in the lecture room”; it is an entirely new way of delivering an educational service. When I look at law and the way the due diligence process in major deals is now done by increasingly capable machines, it is not saying that junior lawyers should work in a new way; it is saying that we do not need them to work in that
way at all. I can go through a whole bundle of professions, industries and sectors and show that distinction.

We have to make a leap in thinking about the legislative process. It is not simply a question of thinking, “What’s a little bit annoying about how we have to work today, and aren’t our communications poor?”—if they are—or “We have far too much documentation”; the challenge is clearly to improve inefficiencies, but the real opportunity is to take a step back and say, “I wonder if we could do things entirely differently”. I do not have the answers to that, but in my research that is the mindset that I have found has succeeded in medicine, architecture, audit, education, journalism, consultancy, and even in the clergy—entirely new ways of professionalism and how they can work.

That is by way of background. Finally in my introduction, the least likely outcome in our world is that nothing will change as a result of technology. Yet that is the premise upon which many organisations base their future strategy. I am urging you to say, “We can expect considerable change, so the question is about the next step and how to take our thinking further—how we can both automate and innovate in the legislative process”.

**The Chairman:** Thank you very much. That is a very helpful way of opening up the subject. Let us now move into some of the detail.

**Q114 Lord Pannick:** I found your written evidence fascinating and thought-provoking, Professor Susskind, and not just because we know each other very well. I have heard you speak on many occasions publicly and privately about these subjects. You say in your written evidence, and you mentioned this morning, that the legislative process both here and around the world has been subject to far less computerisation than other aspects of the legal system, such as the courts and the legal profession. Why is the legislative process so far behind other aspects of the constitutional system?

**Professor Richard Susskind:** I do not think I can be dogmatic or definitive about it, but there are different forces at play. In the legal profession, we have market forces at play. The biggest driving force across much of the legal profession is the client’s hope of paying lower fees. The market is becoming increasingly competitive. Liberalisation in this country is allowing new players into the market, which requires lawyers to think about how they can be more efficient and work differently. The answer in the profession is market forces. That is in the private sector.

In the public sector the pressures are rather different. Rather cynically, as I heard a friend say in relation to the NHS, you can say that we are not going to change until we run out of money. It is often the running out of money that causes people fundamentally to rethink; otherwise there is no imperative. So too in law, where the drastic reductions in legal aid have encouraged people to think that it is not a question of tucking and trimming. We simply cannot deliver the service in the old way, and we have to think fundamentally differently. That has happened in the court system. We have a court system that, for most litigants in person, is too costly. It is unintelligible. It is full of delay and out of step with much else that we seem to be doing in society, where we use technology and so
forth. There has been an imperative, driven by a lack of public legal funding. Are there other ways in which we might deliver the court service? This is where I come in with online courts.

The burning platform for the legal profession has been competition. The burning platform in the public sector has been as a result of the reduction in public legal aid. I come to you with a question. I do not know if there is a burning platform here. As human beings—I put myself in that category—we suffer from inertia. We tend to carry on as we are. There will be an inclination around the room, “I get what he’s saying. He’s one of those people who comes along and talks about technology. I’m sure it will affect us in the future, but do we really need to do anything just now?” The answer is that probably you do not really need to do anything just now.

Lord Pannick: We are not subject to competition. We are subject, maybe not to the same extent as the courts, to financial pressures. My point is this: there is nothing inherent in the parliamentary process that prevents us advancing if we want to do it.

Professor Richard Susskind: Absolutely not. I agree fully with that. You may not have the same imperatives, but I do not see any particular obstacles that are unique to Parliament.

Q115 Lord Hunt of Wirral: First of all, I should declare an interest, although it is many years since I was made an honorary member of the Society for Computers and Law. I want to move on to consider how technologies could be used to support the development and scrutiny of legislation. You have separated the short and medium term, to 2020, from the long term, from 2020 onwards. Turning for the moment to the short and medium term, what are the barriers to adopting such systems? What do you think are the best ways to go about introducing such systems?

Professor Richard Susskind: By way of context, I have had the privilege of seeing some of the questions in advance. Those who are listening in who have not seen my paper will see laid out the technology systems that I think could be of benefit in the legislative process. The thrust of the questions—this is not a criticism but an observation—is quite negative: what are the problems, the risks, the barriers and the obstacles? It is absolutely clear that we need to address those, but I would not want to lose sight of the benefits that technology could bring. That is by way of context.

Lord Hunt of Wirral: You have given us a very long list. I am just trying to get a little more focus, if I may.

Professor Richard Susskind: Absolutely. Your question is about the barriers to adopting such systems. It is true right across all industries and all sectors, private and public, that unless you have leadership in the introduction of systems, and an individual or group of individuals who are driving ahead the change and the use of new systems, it never happens. Another obstacle, which is in no way unique to this institution, is the conservatism of professional people. By and large, our comfort zone is working in the way we have always worked. There is an argument in law,
which could be reflected in our enjoyment of precedent, that lawyers and the legislature suffer from this more than others. There is an inclination towards conservatism and a resistance towards change in the legal profession.

The unintended consequences worry me the most—the unknown unknowns. I have never been involved in a profound technology project that worked out in the way we thought it would. Sometimes untold benefits accrue that no one had expected, but equally problems and difficulties arise. To turn it in a more positive way, if you have strong leadership, and if a group can somehow overcome the forces of conservatism and have a clear vision of how a system could improve your own workload and benefit society, with ways and methods in place to monitor and manage the risks that arise from those projects, I do not see any insurmountable barriers to adopting those kinds of systems.

Indeed, when you look at the lists that I am talking about, many of them are in place. For citizens, I talk about applications for tracking the progress of Bills in Parliament. That already exists. They could be richer and more informative. There is the use of social media, for better or for worse. Sometimes their uses are wonderful and sometimes they are really rather troubling, but we already have in place a new channel to allow people to express their views on the need for legislation or changes in legislation.

I have not done detailed analysis of a legislative information system, but I am interested for you in a system that would acknowledge the huge amounts of documents in your working environment. You are very information intensive and there is a lot of communication, with very many people involved.

The traditional response to that in the world of technology is to introduce some kind of integrated workflow system that makes life a lot easier for you. It means that you have all the information—but only the information you need—at your fingertips. It means that you can easily communicate and collaborate with one another. It overcomes the inefficiencies of paper-based systems and can include calendaring. It could give updates and automatic document production. It could do Bill tracking.

My sense is that this organisation—if I may call this great institution an organisation—would benefit from organisation-wide technology and a workflow system for a whole set of facilities; but, as I said, unless you have strong leadership and a clear vision of where you want to go, and unless you can overcome the conservatism, most people will say, “We can carry on much as we are. The system is not broken, although it could be better”. I am saying that it could be a lot better.

**Lord Hunt of Wirral:** If we now provide the strong leadership that your vision seeks, what risks or dangers should we be aware of, should the mechanisms be adopted more widely?

**Professor Richard Susskind:** All of you will be familiar with the notion of public sector technology projects. We need to unpack that a little. The biggest risk with public sector technology projects in my view is that they become too ambitious. I come to you on the one hand slightly
evangelically saying that you should be ambitious, but on the other hand I know that if you try to boil the ocean, as they say, what will happen is that X years down the road you will have sunk a lot of money into a system that does not do what was ever envisaged. Although you can have a shared vision of what a system might look like, say in 2025, I implore you to proceed in an incremental Lego-like way. Almost every failure I have seen in public sector technology projects comes down to this: the ambition has been great and it has been dealt with as a large, monolithic, indivisible project that either succeeds wholly or fails wholly. Most of them fail substantially.

I worry a little, once I have converted people and they become very enthusiastic. I have to say that even among some of the judges and the officials in the online courts I am now becoming an advocate for saying, “I think we should slow down; we should start with very low value disputes in the first instance. Let us not get too ambitious”. The most successful projects I see in the private sector are developed incrementally. You learn from experience and you build on it. You do it in a step-by-step way, so there is a very clear map: “Within two years we will have this and within four years we will have that”. The minute I hear people saying, “By 2023”, for example—this is many more years ahead—I have the feeling of a revolutionary rather than an evolutionary approach. The biggest single danger is how the project is managed.

Q116 Lord Judge: You spent five years advising me. I was showing off before you came. I got a gamma treble minus from you for my abilities, but that was probably ambitious; it was probably delta minus.

We are investigating the legislative process. One of the things that I find impossible, judges find impossible, and I think parliamentarians find impossible, is our habit of legislating by sticking bits of new legislation into old legislation, and sometimes into three or four older bits of legislation going back almost to eternity. What sort of investment would be required to enable us to produce each Act as a complete Act, with all the bits and pieces squared off in a single place? Just give me a rough idea.

Professor Richard Susskind: That has been an aspiration for many years.

Lord Judge: What is holding us up if it has been an aspiration for many years?

Professor Richard Susskind: It is a very complex project, but it has already been done in the private sector. I think it is true to say that both LexisNexis and Westlaw have delivered systems that do precisely that. In fact, even more ambitiously, you can say, “I would like a view of the law as it was in 2005”, and you can see what law was in force then. As you say, for the average citizen, and in fact for the average lawyer, when you see a piece of legislation online, you do not know if it is in force; in many of the current systems, you do not know if it has been repealed or amended.
I should be better informed, but my understanding is that HMSO, under the auspices of National Archives, has been working for many years on the development of such a system. My understanding, and this is often true with technology, is that it has worked forward from current legislation but there is a large backlog that—

**Lord Judge:** Forgive me for interrupting, but I just want to take the moment when the legislative process has been completed, all the scrutiny has happened, and all the argument and debate, and we end up with the new Act. Part of the new Act says, "In the 1933 Act, so and so, and in the 1975 Act such and such". In technological terms, what is there to stop the end process of a new Act being a complete document on its own with everything in it?

**Professor Richard Susskind:** Technologically, it has already been achieved. That is what the subscription-based services around the world will give you. The question is about the systems that are delivered as a public service or available to you by HMSO, which used to print documents and now makes them available online. My understanding is that some of the facility you are talking about is available, but we do not yet have what the technology calls complete coverage. That would require you to go back historically. I cannot remember the year from which that facility is available, but I am pretty sure that for certain categories of legislation that system already exists. Technologically, there are no barriers. It is complicated and difficult. As you can imagine, writing a system that allows you to have different views of pieces of legislation at different periods of time, and which integrates them, is technically difficult.

**Lord Judge:** If the process is available and could be available when the parliamentary process had ended, of course it could be available before the parliamentary process starts, so that when we scrutinise and debate we can see everything that we have to bear in mind without shuffling through three or four different Acts of Parliament.

**Professor Richard Susskind:** Forgive me asking you this. How do you do it today?

**Lord Judge:** With difficulty. You open up the Act; it refers back to another Act, and you look at different bits of legislation in different books. That seems absurd.

**Professor Richard Susskind:** I accept that, but are any of you doing that online? The system you are using may or may not be one of the commercial systems. The commercially available systems are very powerful, but they may not be available.

**Lord Judge:** What is the Committee to recommend about this?

**Professor Richard Susskind:** It seems very clear to me. You articulated it yourself. A vital tool for any modern legislator is the ability to view the law that is valid at any moment in time, and perhaps even say, "If we change this, what would the knock-on effect of that be?", which is more
sophisticated again and requires, as you can imagine, a whole new level of facilities. Is that not what you would want? When scrutinising, presumably you are looking not just at the form and substance of an individual instrument but at its coherence across a whole body of instruments. I would have thought that you could have a system, as I say, that is not just used for publication and promulgation once the law has been passed but should allow you to do what technology calls a “what if” analysis: “What would be the knock-on effects if we removed this piece of legislation?” Perhaps that is what you are anticipating.

Listeners will correct me if I am wrong, but I do not think that kind of system exists. What you would need is a level, in the jargon, of meta-knowledge. For each section of an Act, you would not only need that section articulated, but its various connections, dependencies and interrelationships also to be noted. That could be partly done in an automated way. It would require quite a lot of manual handling as well. It seems to me—forgive me if I am wrong in thinking so—that the ability to do that more speculative analysis, to find out the knock-on effects of changes and amendments, would be very powerful. I do not think that exists.

In summary, because I have perhaps not been entirely clear, the technologies already exist in the private sector and are in place for you to look at all the law that is valid at one moment in time, with interrelationships to amendments, repealed instruments and so forth. The technology is also in place to allow you to do that historically. I do not think that technology has been fully rolled out right across all legislation in this country. A lot of that is what they call in the jargon a back capture—how you capture past data and apply technology to that. We might be talking about something more powerful, which is the ability when you are considering the impact, speculating on the impact and thinking through the impact of changes in the new law to see what the ripple effect and knock-on effect would be. Again, that is technically feasible. It is just a big project. There is no reason to think we cannot set that as a goal for legislators many years hence.

Q117 Lord Judge: That would be the process. Can I move slightly, or quite a lot? In your very interesting and valuable paper, you speak about automated drafting of legislation work that began in the 1960s. Then you speak about systems to analyse the mood of the nation and the community as a whole, and identify the need—an interesting word—for legislative change, and citizens receiving personalised information. How should we, in the legislature, be preparing for the capacity that technology will give us? Do we just wait for it to come or do we think ahead, and, if so, how?

**Professor Richard Susskind:** I would want you to be more proactive than that. It is not unlike the question for any organisation. “We see all this technology coming through, but should we be reactive or proactive?” In the commercial world, people often talk about first-mover advantage. It goes back to Lord Pannick’s question about the drivers of change. In the commercial world, the reason one wants to introduce technology before others is that it gives you some kind of advantage in the marketplace. It seems that that driver is not necessarily present here.
Many people in the commercial world, in law firms, say, “I want to be a fast second”—there is a book called *Fast Second*—which means that we observe what all the best are doing and then take advantage of that thinking. We do not need to be the pioneers. Amazon did not invent online bookselling; someone else invented it. Amazon saw the idea and exploited it.

One of the things that would be fascinating to do is not necessarily a detailed survey but to get a sense, as I would advise all clients to do, of what has been achieved in other legislatures around the world. It would be quite interesting to look at some less advanced legislatures.

**Lord Judge:** Which particular ones? Which advanced ones do you have in mind?

**Professor Richard Susskind:** Intuitively one might think, “Let us look at the United States, Canada or Australia”, but one of my clients over the years has been the Government of Jersey. You learn a lot from looking at very small jurisdictions. The kinds of technologies that we have been talking about, and the whole body of legislation in Jersey, are relatively modest. Jersey introduced very advanced technology in four or five years. It would probably take 15 or 20 years in another country to do that. Intuitively one thinks we should go to the high-tech countries to see how they are doing it, but, as I travel the world, I find that in many ways many developing economies are leapfrogging the technologies of more advanced countries. There is certainly a need to have a look at what has been done in legislatures around the world.

A second thing, which may seem slightly foreign or unusual but is fundamental—it is not a huge project—is that you would benefit from some detailed process analysis. This is emerging as an absolutely vital discipline. Someone comes into a complex organisation and analyses what goes on. The first task is to draw, if you can visualise it, a detailed map. You have diagrams and flowcharts at quite a high level within Parliament, but this would be a very detailed map showing from start to finish all the processes, tasks and activities people are involved in. Once you have that, and it would probably fill a wall, you can start doing the analysis of where the bottlenecks are, the inconveniences, the inefficiencies and the concerns. You can start thinking about what is known as process redesign. “We could change that bit. There are the four or five areas where we could make a difference”. Whenever you have that challenge in an organisation with technology coming along, the first thing you should do is ask what else is happening around the world, and benefit from other people’s thinking. The second thing is that you have to subject your working practices to detailed process analysis.

I came here today to say to you that this is phase one of the project that I would recommend to you. It involves those two stages, but you can begin to have a shared view of how it might be. You can use words like “visions” or however you want to express it, but once you have been exposed to what is achieved elsewhere you can say it is like a buffet: “We would like a bit of that, that and that. Within 10 years, would it not be wonderful if we had this?” Then we do the analysis of what the obstacles are, and the benefits and so forth. I am saying that it is time to do a
feasibility study or a scoping study; there is a whole bundle of names that one can append to it. However, if you want to take a strategic long-term view, you do not jump in and take one little part of the system and introduce new technology. In the context of what you are doing, which is a broader review, you need a more phased approach.

**Lord Judge:** Lord Chairman, as Baroness Taylor is dealing with social media, I will leave that question.

**Q118 Lord Beith:** Perhaps I could follow on from Lord Judge’s earlier line of questioning and what you say in your written evidence, Professor Susskind. You go rather further than Lord Judge was asking for, because you go to the idea of dynamic laws and regulations that automatically update themselves within parameters established by legislators on the occurrence of certain events. At the moment, that tends to be done by giving Ministers powers to update, which we refer to as Henry VIII powers, and this Committee often gets concerned about them. Would it not be creating a Henry VIII machine in this case, which just churns out changes to legislation? There may be very good arguments for it, but constitutionally it is a cause for concern.

**Professor Richard Susskind:** You are questioning the constitutional acceptability of granting delegated powers to a robot, as it were. I see the point, but I had something rather different in mind. There are all sorts of different ways of imagining this. The mindset issue is important. Let me tell you a little story first—one of my favourite stories—to get you in the right mindset. It is a story about Black & Decker, which manufactures power drills. Apparently when Black & Decker recruits new executives, it takes them off on a course. The trainers put on the wall a slide of a gleaming power drill. They say to the new executives, “This is what we sell, isn’t it?” All the executives say, “Of course that’s what we sell; we are Black & Decker”. The trainers, with some satisfaction, say, “That’s not what we sell, because that’s not really what our customers want. This is what our customers want”, and up comes a slide—a photograph of a hole neatly drilled in a piece of wood. They say, “That is actually what our customers want, and it is your job to find ever more creative, imaginative and competitive ways of giving our customers what they want”.

The lesson is that the temptation when you are thinking ahead is to have a power drill mentality; to tend to think, “We have this power drill. How can we make it quicker, cheaper or better?” Maybe there is not enough taking a step back and asking, “What is the hole in the wall? What is the real problem, issue or challenge we are sorting here?”

When we think of the issue of delegated legislation—forgive the oversimplification—where Parliament cannot foresee all possible outcomes and when details emerge and circumstances change, it is only practical that the responsibility to make rules is delegated, and the mindset of automation is to ask how we can automate the process of delegation. I wonder whether there might be other ways in which we can somehow deal with the specificity that more detailed regulation requires that we do not yet have sufficient knowledge or experience of when we are involved in the generation of primary legislation.
Let me make it concrete by taking you to some other technology, to give you an idea of the kinds of changes we are seeing. One of the most important emerging areas of technology is known as the ‘internet of things’. We are used to the concept of the internet as something to which we are all connected—our laptops, our handhelds—

**Lord Beith:** I am sorry, but we are drifting away a bit from the question.

**Professor Richard Susskind:** I can see that you think I might be, but if you will give me a bit of latitude I will be back with you in a few minutes. That way of thinking is important, because there is a broad context.

The internet of things allows, for example, everyday objects to be connected to the internet. Combining that with the idea of self-driving cars, I want to think for a second about the idea of legislating for self-driving cars. It seems to me entirely likely that there will be some primary legislation but there will be a lot of gaps to fill, and we will delegate that power. One way we could deal with variable parameters for self-driving cars would be to think about the law on speeding. It is a question of embedded law. You will not really need—

**Lord Beith:** That is in your written evidence. It is a different point from the one I am trying to get at. Can we really contemplate giving law-making powers to a robot?

**Professor Richard Susskind:** If your question is about whether I am suggesting that robots have discretion to fill gaps that Parliament could not foresee, my answer at this stage is no, that is not what I envisage. It might not be a technical answer, but for me it is a constitutional and jurisprudential answer. However, we can envisage that in certain circumstances the rules governing self-driving cars would change and that Parliament would introduce legislation permitting self-driving cars. We do not know a lot of the details but we can embed some of the details in the system. For instance, we are used to the idea that there is a speed limit of 40 miles per hour, so self-driving cars simply would not go faster than the speed limit. What about the idea that, if weather conditions were fair, we would allow the car to go at 45 miles per hour, or, if conditions were poor, it was not allowed to do more than 30 miles per hour? That is what I mean by dynamic legislation. You are not legislating dogmatically and definitively for specific events; you allow some movement depending on circumstances.

**Lord Beith:** That is a decision to create a law that has a lot of flexibility.

**Professor Richard Susskind:** That is what I mean when I talk about dynamic laws and regulations. Perhaps my answer could have been a lot shorter. If your question is whether machines should draft delegated legislation, my answer, as I said, is no. Can we have rules that automatically update themselves when events change? Yes. If we have the legislative system that Lord Judge was after, it seems to me that in financial services, for example, on the occurrence of a particular level of interest rate or some kind of event where we anticipate the rule would change, that could automatically be propagated through the system. It
may be less ambitious than you were thinking, but my specialism is artificial intelligence and the law, and I am absolutely not here today to say that you take discretion, judgment, creativity and constitutional and legislative responsibility away from human beings and give it to machines. I am saying that we can probably adopt a rather different view of how we make the law available and how we change and update it.

**Lord Beith:** That conveniently answers my other questions.

**The Chairman:** It is a very sensitive area for Governments and politicians.

**Professor Richard Susskind:** Yes, I can see that, and I am really not as radical as one might think.

**The Chairman:** One thinks of the David Walliams comedy sketch that always ends with, “Computer says no”. That would not work with the Cabinet.

**Professor Richard Susskind:** “Computer says maybe” would be more worrying.

**Q119 Baroness Taylor of Bolton:** This has been very interesting. We all found interesting things in your paper and in what you have said, and we probably all accept that there is potential for more use of technology to make us more efficient, or for our convenience—for example, the points you made about Bill tracking. That is an issue we have to deal with. To a certain extent, I dispute what you said about legislators being relatively unaffected by technology. You mentioned Twitter and social media. I am quite concerned about the way politicians—Members of the upper House in particular—have to respond on social media. I find it quite alarming that most days a tweet goes out saying, “The MP who tweeted most today is”—and names them. That distorts the priorities of MPs, because they feel that they have to be responsive immediately to that kind of pressure, and it may take them away from doing some of the detailed Committee work that is a core part of the job but is not glamorous and is often not noticed. Being social media-driven is not necessarily good.

You talked about robots drawing up laws. I do not think we have touched on the fact that we have a representative democracy, not a direct democracy. People may sit in on Saturday night and press a button to vote for Ed Balls, or whoever, on a programme, but that is not how governing your country works. It is a representative democracy, and there is a great danger that you build expectations; if people sign a petition and it will be debated in Parliament, or we consult them on an issue and they press buttons to say yes, no or whatever, you are actually making the citizens you talk about expect immediate results. Governing the country and making legislation is not that simple. That can lead to alienation from a parliamentary system rather than making it more inclusive. That is a real danger that needs to be taken into account in these issues.
Professor Richard Susskind: All the points you make are tremendously important. They are also the subject of detailed academic study just now. At the Oxford Internet Institute, to which I am attached, two of the leading professors are looking intensely at the impact of social media, both on the legislative process and on citizens and their feeling of connectedness and so forth. I want to give you reassurance that many people who work in that world are giving the issue serious and rigorous thought. This is not an accusation against you, but we all tend to have quite strong intuitions in this area that often are not borne out by the research. If yours is a call for a deeper understanding of the impact, risks and benefits, I am absolutely in support.

For every argument against the use of social media, many politicians say that they have never felt more connected to their voters. Voters feel similarly connected. It is a fascinating issue, and I am sure that the question whether we can now have a more diluted version of representative democracy will be played out in a number of jurisdictions. It is not something I advocate. One of the most common subjects among people who write on the politics of the internet is whether it should require us to revisit our concept of what democracy is or should be, and what our rights and freedom of speech should be. The new technology raises key issues, but that should encourage us to be vigilant rather than inactive. It should encourage us to be cautious and alive to the risks as well as the benefits. It seems to me that even some of my more modest suggestions would give rise to a more efficient machine here. It is not an all-or-nothing set of propositions. I am just giving you a flavour of what might be available.

Social media both excites and worries me. I am a fairly big user of Twitter. I have quite a large following. I am not that active a user in my own tweeting, but personally I find it a very powerful way of keeping in contact and keeping up to date. At the same time, it worries me deeply that it seems that freedom of speech on the internet has become freedom to abuse through Twitter. For every great strength, there is also a great weakness. What we are doing at this time of great turmoil is feeling our way as a society and establishing new sets of legal and cultural norms. I urge those in positions of seniority not to default necessarily to the status quo.

Baroness Taylor of Bolton: But you are talking about real-time feedback, and that is part of the problem we have because it allows more potential for media manipulation. It allows the loudest voice to put the greatest pressure on. That pace is not necessarily conducive to making sensible, long-term decisions.

Professor Richard Susskind: I was talking about sentiment analysis, using these systems. We are very much at the first generation of these systems, where they are unfiltered in a way. You are right that some people seem to have a far louder voice and far greater impact. More sophisticated systems will allow us to analyse right across social media what the real sentiment is. Someone who sends out 5,000 messages a day that are broadly the same message does not seem to be the same as a person who sends out one message a day. The next layer of systems
will help. That is why sentiment analysis systems are tremendously important. They will be able to take the social media feeds, as we are doing in Oxford already, and discard the repetition, the noise and so forth. That is why we have to urge more sophisticated use. What is entirely clear is that these systems are not disappearing; they are becoming ever more important. How do we impose upon them a set of processes, regulations and technologies that allow us to use them to their greatest advantage?

The issue of representative democracy and direct democracy is fascinating. I am not for a second suggesting that we now have direct democracy in place, but it is interesting that around the world we have a feel—probably inaccurate at this stage because the systems are primitive—for people’s sentiments in a way that we never did in the past.

I want to raise a concept that might help you—the idea of a ‘filter bubble’. There has been a book of that title. For me, one of the most profound dangers of social media is that you tend to follow people and connect to people who think quite similarly to you. Quite a lot of them have stated predictions about the outcomes of recent political events, and because of this your views from social media tend to be that of like-minded individuals. You do not tend to sign up and follow people who hold diametrically opposite views. If you are a Guardian reader or a Telegraph reader you know that, but the culture and patterns of behaviour within social media are still very much in their infancy. We have to be aware of the filter bubble.

Lord Pannick: Social media obviously adds immediacy. It adds volume to communications, but is it really different in nature from the traditional means of communication between the constituent and the MP? People have always turned up to Central Lobby to express their views. They phone their MPs and go to constituency surgeries. Is it really different from that?

Professor Richard Susskind: I am not sure it is qualitatively different. I think it might be quantitatively different. The general view is that a wider range of people express their views. You are absolutely right that people participated in the ways you mentioned, but it seems that many more people are inclined to express their view in a tweet who would not go to a surgery. You might think, “Surely we only really want the views of people who are prepared to walk along and visit, and the ill-considered and untutored views of people who just tweet at random are less significant”. I personally take the view that it is valuable input. It is quite interesting to hear and take account of as one of a whole bundle of different inputs of views expressed on social media. It is human beings communicating with one another, so it is still the same basic inter-human contact, but the scale is unimaginable.

If you consider tweeting about a political issue to be engaging in the political process—I do not know whether you do, and I am not sure that I do—there are now immeasurably more people engaging in the political process than there used to be. The contrary argument is that it is not really engaging in the political process; it is just people expressing their views as they might do in the pub. It is quite interesting to be able to tap
into that if, which is the concern here, we can reliably tap in, and if from social media we can determine a balanced view of the views that have been expressed.

**The Chairman:** Is it not sloganising, though, with a limited number of words or syllables, as opposed to arguing? In a pub, you can at least argue and debate.

**Professor Richard Susskind:** Yes, but of course there are other social media platforms, and no doubt many more will emerge, which do not have restrictions on the number of words. Twitter happens to be the one that dominates today. My guess would be that, if we reconvened in 2025, systems that have not yet been invented will have changed our way of thinking about political issues.

Q120 **Lord Brennan:** The potential for people to communicate with the legislative process through technology is extremely important in an educational sense in both directions: people from outside Parliament talking and people from inside Parliament listening, and vice versa. The question arises with this kind of use of technology as to when you move from the ability to participate to the capacity to determine. Our representative democracy presumes time and consideration, not rapid response. Is the technology a danger to that representative system, not just in a technical sense but in a democratic sense as to who is deciding? I was struck by an example of that this week. The RAND Corporation in the United States has just produced a major report on technology and the criminal justice system, and its constitutional consequences. One wonders, no matter how well informed some people are, whether the majority of ordinary citizens will understand the significance of constitutional consequences. That is an example. What do you think? Are we at risk?

**Professor Richard Susskind:** If you are asking me whether I prefer representative democracy to direct democracy, given that technology allows us, in a way that we could barely imagine a few years ago, to put in place direct democracy, my own personal view is aligned with your own, which is that I prefer representative democracy. I believe that the business of legislating requires deep expertise, extensive reflection, considerable experience and the ability to analyse a complex and wide range of materials. Without in any sense being patronising, I think it is very hard for specialists, never mind lay people, to get their heads around most issues that come through this House.

I know RAND well. Coincidentally, when I first worked with RAND in 1983 it did a wonderful report on technology in civil disputes, and published about 500 copies. I think I was the only person in England who had a copy because I had happened to visit the company in the United States. It is wonderful that, now, the distribution capability means that anyone who is interested in technology and the criminal justice system can go online and have a look at it. I am engaged just now in discussions with various parts of the criminal justice system and I will go online and draw people’s attention to that report.
I find that wonderful, and I think that at some level it increases the level of debate and insight, but if your question is whether the average lay person can master that kind of document, and frankly the same on education, transport, health and so forth, it seems to me that the answer is assuredly no. That is why we delegate the responsibility for governing and legislating to people who have time, expertise and insight.

This is a personal view and it is no more valuable than anyone else’s view. None of the advances in technology draws me away from my confidence in representative democracy. I think we can improve the way we run the systems that underpin and support the representative democratic process. Are you comfortable with that?

Lord Brennan: I am comfortable with your response, but I am not so comfortable about what would happen with society and the media. We can now use these phones in the Chamber for reading things. During a debate on a critical issue—a yes/no debate—the media could be running a programme asking people to express their view, yes or no, which Members of Parliament and Members of the Lords could be looking at during the course of the debate.

Professor Richard Susskind: It therefore seems to me incumbent on this House to educate every Member to understand the potential and limitations. One of my roles in the last few years has been speaking to and training judges up and down the land on technology, not on technology in the courts but understanding social media. I give an hour’s presentation so that people really understand the potential and limitations of Twitter, Facebook, LinkedIn, Instagram and so forth. Often for people of our generation and older, the tendency is to think that they are for young people. I share your concern that people’s exposure to and use of such technologies is probably rather untutored. It seems to me that regular briefings on the potential and limitations of those technologies, and on systems that are powerful and useful, is very much needed.

It is all part of the same programme of work. One can imagine that in one sense you will say, “Let us not do much and continue as we are”, but the external factors are so powerful that no matter what you do, social media will be used more rather than less. It seems to be about embracing what is appropriate, and educating and understanding where the limitations lie. If we did the process analysis—the process map—one might ask at what stage in the process it makes sense for people in this House to research or recognise the view of the people as being expressed on social media. You are saying that it is probably rather random—you might be sitting there looking at it before you go into a meeting—but I think that should be integrated in the process.

We should think clearly about what is best practice and try to spread it around the House. Very often in business meetings, people now say, “Leave the mobile phone at the door and no one should use email”. We can put in place sensible practices, but unless you think about it in process terms, you will have different Members of the House dipping into these systems at different periods of time. It may be that at time A the views are 40% and 60%, and at time B 60% and 40%. You are dealing with different data. That needs to be part of the process.
Q121 **Lord Norton of Louth:** I have two questions. The first may have been answered in your last few comments. One might distinguish what are called the digitally unsophisticated—those who have access to social media but are not particularly good at interpreting the data—and what you refer to in your paper as the digitally deprived, essentially those who do not have access to it anyway. If the digitally deprived are those who are supposed to be the decision-takers, how would you ensure that the process is not captured by those who are serving them and have access?

**Professor Richard Susskind:** I love your distinction, incidentally. The category of digitally deprived is relatively small. By and large, of course, in western countries about 85% of people now have access to the internet. The bigger point we always make in the Oxford Internet Institute is that it is not even so much whether I am a direct user; it is whether someone can use it on my behalf. I was going to say that granny does not use the internet so she will get her grandson to do it, but now granny often uses the internet. Many people who do not have the technology nonetheless have a relative or a friend, or public advice agencies, to support them.

I worry less about people not having access to the technology because most of the technology is delivered through the handheld in any event. The point that struck me when you articulated it was that simply having access to it does not mean you have the wherewithal to use it well or in an informed way, or to come to reasonable decisions on the basis of the data before you. Using Lord Pannick’s phrase, I am not sure there is anything different here. It might be more accessible and there might be far more of it. The problem of people coming to ill-informed, untutored views is not that different in the internet society, but you can express those views more widely.

**Lord Norton of Louth:** I will express it slightly differently; it is not really recognising the potential.

**Professor Richard Susskind:** Were you euphemistically talking about your own working environment? Are you saying there is wide disparity of use within this legislative body? Is that your point?

**Lord Norton of Louth:** The point is that Ministers may be relying on officials. They have some idea of what can be delivered, but the officials may have greater awareness of what the potential is. You may come back to the situation of “Computer says no” because you are not sufficiently sophisticated about the system to know whether that is accurate or not.

**Professor Richard Susskind:** It is a different line of discussion, but it is incumbent on each and every one of you as legislators not necessarily to be users but to be familiar with this technology and not to feel disadvantaged. It is a horrible, alienating feeling when some people have facilities you do not have. It goes back to the observation that was made in relation to the judiciary, and in a sense that was the response; it is important that you have a more, if I can put it this way, technically astute community. That does not mean you are active users. For example, I barely use LinkedIn. I use it a little bit, but I know exactly what it does and I know what it could do for me. I understand when a message comes
through, or I hear when there has been a post. That level of knowledge

In a word, you probably need some training programmes. Probably a two-

Lord Norton of Louth: Part of the challenge is getting people to
recognise that it is not such a huge task.

Professor Richard Susskind: That is right.

Lord Norton of Louth: I have a separate question related to that, looking ahead. You were identifying potential, which was interesting, but you referred to real-time monitoring of the actual impact of legislative change. What were you getting at?

Professor Richard Susskind: I know so many different ways one can model that. I had in mind the idea that when a piece of legislation was introduced you could set up in parallel an economic model. If a piece of legislation is introduced on the basis of a set of assumptions built into the system, you can monitor it—the purpose of this legislation was to keep this level up and you could monitor what happens. It might be demographic. It seems to me that part of the legislative process should be the introduction of systems and methods for monitoring impact. You get that a lot in the private sector. Strategic decisions are made and people say, “How are we going to monitor and measure the impact?” They do it very carefully. They say, “We are going to report back in this way”. What I was saying was not speculative, but it seemed to me that it would follow quite naturally that we could introduce computer-based models linked to legislative change.

Lord Norton of Louth: That would be useful in imposing discipline on government when it introduces legislation—to identify what the purpose is and identify when it has been successful.

Professor Richard Susskind: Yes. A very interesting basis for political discussion would be that it was very clear that the policy thinking behind a piece of legislation was to deliver certain outcomes. We have four simulations that are running and monitoring, and none of the outcomes is being delivered. That is an interesting premise for a discussion. It is not computer-assisted legislating, but it is talking about other tools one might use.

The Chairman: Professor Susskind, we have imposed on you for about 20 minutes longer than advertised. That reflects the extent of the interest you have stimulated through your written evidence to us, and the extent to which we found your responses informative and equally stimulating. It has been a very useful session. Thank you very much indeed for coming to see us.
**Professor Richard Susskind:** It has been a great pleasure; thank you. I am more than happy to help in any way, because this is a tremendously important opportunity. If you need any further input, please get in touch.

**The Chairman:** That is most helpful. Thank you very much.
Tobacco Manufacturers’ Association—Written evidence (LEG0014)

Introduction
1. The Tobacco Manufacturers’ Association (TMA) is the trade association for the UK tobacco industry. The TMA’s members are British American Tobacco UK Ltd., Imperial Tobacco Ltd. and Gallaher Ltd. (a member of the Japan Tobacco Group of companies).

2. The tobacco industry supports the employment of approximately 60,000 high value jobs, either directly or indirectly, throughout the UK. Tobacco manufacturers contribute around £12 billion in taxation (excise duties plus VAT) to the Exchequer each and every year, which equates to £400 for every taxpayer in the UK.

3. The tobacco industry invests in the region of £158 million per annum in research and development, much of which is dedicated to next generation products like e-cigarettes. The industry also spends approximately £54 million a year in capital expenditure. For every £1 million spent by the tobacco industry, an additional £1.7 million of spending is supported in the UK economy.

Scope of Response
4. Of the six sections of the Call for Evidence, the TMA is well-placed to answer questions in regard to four: ‘Creating Good Law’, ‘Brexit’, ‘Public Involvement and Engagement’ and ‘Parliamentary Involvement’. What follows in the remainder of this submission will, therefore, relate to the questions listed in these sections alone.

Creating Good Law
5. The creation of so-called ‘good law’, defined as ‘law that is necessary; clear; coherent; effective; [and] accessible’, is dependent on both the content and context (legislative) of the law in question. These two considerations also determine whether a particular piece of draft regulation is ‘clear, coherent, effective and accessible’ at the point at which it is introduced into Parliament. That is to say, they

183 http://www.the-tma.org.uk/about/
186 http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf
187 http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf
188 http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf
determine whether the purpose of a draft law is evident; if it fits into the context of existing regulation; if it will achieve its purpose alone or in combination with existing regulations to which it is related; and whether it is comprehensible.

6. In light of the above definitions, the experience of the TMA shows that draft regulations are ordinarily clear and accessible, but all-too-often neither coherent nor effective. In part this is the result of a ‘big bills’ incentive that is appealing to Ministers and moves them to act. The House of Lords’ 2004 report on \textit{Parliament and the Legislative Process Volume I} highlighted this issue.\footnote{189} However, it is also the nature of a pre-legislation process in which the impact of related existing regulations is not assessed in the round.

7. The experience of the tobacco sector between 2010 and 2015 offers a good example of this sort of pre-legislation process. Successive pieces of tobacco-related legislation were introduced over the course of this period, including a ban on vending machine sales, a prohibition on the display of tobacco products in retail outlets, the prohibition of smoking in cars carrying children and the introduction of standardised ‘plain’ packaging. On top of this, the European Union’s Tobacco Products Directive, which contains measures such as the prohibition of cigarette packs of fewer than 20 cigarettes and hand-rolling tobacco pouches of less than 30 grams, was adopted in this period.

8. No formal process of independent post-implementation impact assessment was carried out to assess the effectiveness of these measures. This cavalier approach to understanding the consequences of legislation is not restricted to regulation concerning tobacco products. The House of Commons’ Committee of Public Accounts found in its recent report on \textit{Better Regulation} that ‘Once departments have implemented a regulatory decision, they do not do enough to monitor and evaluate its impact.’\footnote{190}

9. For example, of the 83 regulatory decisions taken in 2011 within the scope of the Business Impact Target, for which reviews are due in 2016, only two reviews have been submitted to the Regulatory Policy Committee (RPC) for scrutiny.\footnote{191} In response to these findings, Michael Gibbons, Chair of the RPC, stated that he is ‘concerned about

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the lack of post implementation policy reviews coming to us [the RPC] for scrutiny - I fear that crucial lessons are not being learned and opportunities missed to elicit best practice for future policy-making.”

10. Clearly, this sort of approach hinders the development of high quality proposals in the pre-legislation phase of regulation development. Without a proper understanding of the impact and effectiveness of existing regulations, it is difficult to create new legislative proposals that are fit for purpose. Moreover, this approach is not supported by the public, of which 61% think it is important to carry out an independent review of previous measures before introducing new ones.

11. A second, broader problem inherent in the pre-legislation phase of the development of regulation stems from the relationships between government departments and arm’s-length bodies, such as non-departmental public bodies or publicly-funded charities. The importance of such bodies to the policy making process increased between 2010 and 2015 even as their number declined. This was largely the result of the loss of in-house departmental expertise as a result of central government retrenchment. However, it has led to a situation in which policy development is informally contracted out to other organisations.

12. The Institute for Government discussed this phenomenon in a recent paper. Its author stated that ‘some [government] departments are facing up to the fact that sometimes the expertise they need to work up policy is located outside of the department – often in their stakeholder network’. The author highlighted an ‘extreme example’ of this practice, in which ‘the in-house policy function [of one department] was being scaled down to a coordinating hub, with much of the detailed policy work being ‘bought in’ from a network of stakeholders’.

193 Populus (2016)
13. This approach to policy making has the potential to introduce serious and concerning problems into the pre-legislation process. The most significant of these is the regulatory capture of government departments that have been denuded of their policy expertise by politically-oriented and often taxpayer-funded campaign groups. For example, anti-alcohol and tobacco lobby groups Balance North East and Fresh (North East), which were awarded £2.8 million in 2013 (to be spent over the course of two years), have ‘the primary purpose of campaigning for legislation’ and are not ‘involved in health provision’. Furthermore, information published under the Freedom of Information Act shows that Action on Smoking and Health (ASH) lobbied the Department of Health on 64 separate occasions over the course of a 26 month period on a single issue: standardised tobacco packaging.

14. The influence of minority interests on policy development offers a good illustration of ‘public choice’ theory economists’ concerns about the power of organised pressure groups. Professor Colin Robinson stated in a paper published some years ago that such groups ‘have an influence on government policies out of all proportion to the extent to which they represent general opinion. Indeed, they can become a means of forcing minority views on the populace at large through the medium of government.’ This is certainly the case in regard to tobacco control measures, which, according to recent polling, are a high priority for no more than 13% of the UK population. In fact, 55% of respondents to the same survey stated that policies to tackle smoking had gone either too far (34%) or far enough (21%).

15. The consequence of the disproportionate influence of single issue pressure groups like those above is clear: it skews the policy making process and makes it unrepresentative of public, not to mention business, opinion. Furthermore, when minority interests come to dominate the policy making process, as in the examples given above, the ethicality of parliamentary procedures is significantly undermined.

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198 Populus (2016)
199 Populus (2016)
16. A third problem inherent in the pre-legislation phase as it stands at present relates to inter-departmental co-ordination. The Organisation for Economic Co-operation and Development (OECD) states that although the ‘initial development of policy proposal is the task of the ministries’ and that these ‘ministries have the essential expertise in their own domains to prepare policy proposals’, it is important that initiating ministries co-ordinate across government because ‘most policy cuts-across the domains of more than one ministry.’

17. The National Audit Office (NAO) reported on the level of integration across government in 2013. It found that government departments ‘vary in their commitment to integrated working and their ability to work collaboratively.’ In the experience of the tobacco industry, there is an extremely poor degree of co-ordination between government departments on the issue of tobacco control policy. Business concerns (via the department formerly known as Business, Innovation and Skills) and enforcement concerns (via HM Revenue & Customs and the Home Office) are given little consideration in policy proposals emanating from the Department of Health.

18. The Government could improve the clarity, coherence, effectiveness and accessibility of draft legislation by:

- Committing to commission independent reviews of the impact (including the cumulative impact) and effectiveness of existing pieces of related legislation, which can be used to assess the necessity or otherwise of subsequent proposals in the pre-legislation phase;

- Reviewing the role and funding of arm’s-length and other such bodies that are funded by the taxpayer in an effort to determine whether that money could be spent more effectively on improving in-house expertise;

- Exploring the option of giving the RPC greater powers, such as those possessed by the Office for Information and Regulatory Affairs in the United States;

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202 OECD, Implementing Regulatory Reform: Building The Case Through Results
Implementing rigorous cross-governmental scrutiny processes in the pre-legislation phase of regulation development through the formation and use of inter-departmental working groups; and

Putting in place a series of tests that departments must satisfy (internally) before bringing forth new proposals for legislation, such as the ‘five tests’ approach adopted by the Department for Education.\textsuperscript{203}

Brexit

19. The wake of British voters’ decision to leave the European Union (EU) has highlighted the extent to which the United Kingdom has relied on a transnational institution to develop a great deal of the laws under which the populace now lives. However, Professor Roger Scruton identified some time ago transnational institutions other than the EU, such as the United Nations and the World Health Organisation (WHO), that ‘are increasingly exercising their legislative powers, in order to bypass the constraints to which national legislatures are subject.’\textsuperscript{204}

20. The WHO’s Conference of the Parties (COP), which is due to enter its seventh session and deals only with tobacco policy, offers a good example of the sort of policy influence that unaccountable transnational bodies exercise. This forum is responsible for the development of the Framework Convention on Tobacco Control (FCTC). The FCTC contains provisions related to, among other things, the supply and demand of tobacco products, environmental protection and the relationship between national governments and tobacco firms.\textsuperscript{205}

21. The influence of the WHO over tobacco control policy raises serious questions about accountability and transparency. This is particularly relevant to the pre-legislation phase of policy development because, as Professor Scruton highlighted, the WHO refuses to discuss its tobacco proposals ‘with anyone outside of its

\textsuperscript{203} \url{https://quarterly.blog.gov.uk/2013/07/12/the-policy-tests-transforming-policy-in-the-department-for-education/}
\textsuperscript{204} \url{https://iea.org.uk/publications/research/who-what-and-why}
\textsuperscript{205} \url{http://www.who.int/fctc/WHO_FCTC_summary_January2015_EN.pdf?ua=1}
narrow circle of committed activists.’ This, in his view, demonstrates the WHO’s ‘clear intention to impose its legislation come what may.’

22. The role of transnational institutions as initiators of UK legislation will be reduced as a result of the voters’ decision to leave the EU. However, as has been shown above, the EU is not the only transnational body that exerts an influence over UK Government policy. In order to ensure that government policy is entirely transparent, future legislative proposals should:

- Clearly identify the source of each proposal contained within a given Bill, Act or piece of Secondary Legislation; and

- Commit to consulting with all relevant stakeholders on all policy proposals that emanate from transnational bodies, especially where such proposals affect a particular industry.

**Public Involvement and Engagement**

23. Widespread engagement in the pre-legislation phase is essential to the development of ‘good law’. However, the tobacco sector has encountered significant barriers to engagement from some government departments. The reluctance of government departments to engage with the tobacco sector is counterproductive, because it contains a range of business types – from tobacco manufacturers to product designers, wholesalers and retailers – that are able to provide regulators with a significant amount of information and expertise on the impact a measure is likely to have. Tobacco manufacturers also have the resources to commission in-depth economic, social and opinion-based research on issues of interest to legislators.

24. However, the process of pre-legislation engagement with the tobacco sector is wrongly limited by the insistence of some departments of state that they cannot engage with the tobacco sector as a result of the WHO’s FCTC. Article 5.3 of the FCTC states that ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’

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207 [http://www.who.int/tobacco/wntd/2012/article_5_3_fctc/en/](http://www.who.int/tobacco/wntd/2012/article_5_3_fctc/en/)
25. Article 5.3 of the FCTC, to the extent it can be implemented subject to National Law, promotes transparency and accountability in setting and implementing public health policies with respect to tobacco control. In other words, nothing prevents government departments from engaging with the tobacco sector in a transparent and accountable way. As a result, tobacco manufacturers and other related organisations, such as retail groups, should be consulted at the outset of any regulations intended to affect tobacco products. In the absence of this sort of widespread consultation, any subsequent policy proposals will not benefit from a balanced, well-rounded evidence base.

26. The Government could improve engagement with the tobacco sector, as well as any other sensitive sector, by:

- Depoliticising its approach to the tobacco sector by issuing guidance to government departments that they are free to engage with this sector on issues unrelated to public health policy; and

- Committing to engage with all interested stakeholders on a transparent basis, which would include the publication of meetings with official transcripts and a record of any actions decided upon.

**Parliamentary Involvement**

27. The sovereignty of Parliament was a crucial issue in the debate about the UK’s membership of the EU. However, the information cited above in relation to the influence of other transnational organisations on the British legislative process raises wider issues about the sovereignty of the UK’s principal law making body. That ‘Parliament is central to the legislative process’, as the present Call for Evidence suggests, is a questionable assertion. A range of organisations – including transnational bodies, think tanks, charities, lobby groups and government departments – shape the legislation of this country to an unprecedented degree. This denudes Members of Parliament of their principal function: to be the source of all UK legislation.

28. The way in which such groups use parliamentary institutions marginalises MPs to an even greater degree. A good example of the sort of conduct that has come to dominate to a significant degree the legislative process is the (mis)use of the powers of Peers in the House
of Lords. Specifically, the practice of the ‘Christmas treeing’ of Bills during their passage through the House of Lords, in which internally consistent regulatory proposals are adorned with often unrelated amendments that benefit particular groups or special interests.208

29. Clearly, this practice is undemocratic and fundamentally undermines the influence of elected MPs in the pre-legislation phase of regulation development. The ‘riders’ that are added to Bills by Peers acting on behalf of special interest groups do not benefit from pre-legislative scrutiny, discussion or debate. Greater independent scrutiny of Lords acting on behalf of such interests is required if this practice is to be eliminated or, at the very least, made entirely transparent.

30. Another example of questionable conduct in the pre-legislation phase can be seen in the misuse of all-party parliamentary groups (APPGs) by certain extra-parliamentary groups. An investigation into APPGS in 2011 concluded that they have been ‘comprehensively invaded by vested interests seeking to buy access to our legislators.’209 No more successful example of this phenomenon exists than the APPG on Smoking and Health, the secretariat of which is provided by ASH, the anti-smoking charity.210 ASH uses this forum and the small coterie of MPs that belong to it to disseminate lobbying materials and policy proposals, which are set out in an extensive manifesto211, to all MPs. In other words, the APPG on Smoking and Health provides ASH with a platform to manipulate the pre-legislation phase of the parliamentary process.

31. Parliament and parliamentarians especially should be concerned about the disproportionate influence that such groups exercise over the pre-legislation process. There is significant scope for improvement in regard to the degree of scrutiny that these bodies are subjected to. In order to improve the level of scrutiny and degree of involvement of MPs at this stage of the legislative process, Parliament should:

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208 The term ‘Christmas Tree Bill’ was coined in the United States to describe such practices in the Senate. For more information, please see: http://www.senate.gov/reference/glossary_term/christmas_tree_bill.htm
209 http://www.robinfenwick.org.uk/2012/12/15/3488/
211 http://ash.org.uk/information-and-resources/reports-submissions/reports/smoking-still-kills/
- Increase the number of MPs required to form an APPG on any issue and amend APPG rules to require a higher minimum level of attendance from MPs to constitute a quorum;

- Consider banning outside groups, particularly pressure groups, from providing the secretariat function for APPGs;

- Regularly review the influence of transnational bodies, lobby groups and other external organisations on the legislative agenda; and

- Establish and publish (on an annual basis) a list all organisations that have influenced the introduction Bills, Acts or pieces of Secondary Legislation.

**Conclusion**

32. In the House of Common’s Reform Committee’s 2009 report *Rebuilding the House*, the authors concluded that the ‘legislative process is already significantly influenced at all stages by public opinion, organised through interest and pressure groups.’\(^{212}\) This statement requires significant revision. The legislative process is significantly influenced by professional interest and pressure groups, which all too often obscure public (not to mention business) opinion.

33. Such groups demand exclusivity in order to marginalise the influence of legitimate business and other organisations on the legislative process. This is particularly significant in the pre-legislation phase of policy development, because it is at this point that the objectives and delivery mechanisms of legislation are decided upon. The adoption of Article 5.3 illustrates the success of anti-smoking lobby groups’ in achieving an unparalleled degree of exclusive influence over the tobacco control policy making process.

34. The ability of government departments to scrutinise the policy proposals of arms-length bodies and other influential organisations, such as transnational bodies, charities and lobby groups, has been significantly degraded as a result of cuts to their in-house policy-specific expertise. This has reduced the quality of legislation emanating from government departments. This is further hindered by the lack of co-ordination between government departments, which

\(^{212}\) [http://www.publications.parliament.uk/pa/cm200809/cmselect/cmrhofc/1117/1117.pdf](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmrhofc/1117/1117.pdf)
reduces the Government’s understanding of the real impact of policy proposals on businesses and other sectors of the economy.

35. Parliament and parliamentarians’ centrality to the pre-legislation phase of regulation development is hindered by the influence of unelected, unaccountable bodies. This unwarranted influence places into question the sovereignty of Parliament as a law making body.

36. In order to rectify these problems, the Committee should seriously consider the proposals set out above, which would go some way to redressing the issues of concern set out in this submission. A representative from the TMA would be happy to give evidence in person to help inform the Committee’s deliberations.

16th October 2016
Preparing legislation for introduction to Parliament

Introduction

1 The Committee have asked for comments on Parliament and the Legislative Process Inquiry.

2 The initial question is why a piece of legislation needs to be enacted. For each of the political parties, this is as a result of the democratic process. The parties put forward their manifestos to transform society which is the basis of their legislative programme should they form the next Government.

3 The Coalition Government in 2010-15 as part of their negotiations, agreed between the two parties, a set of policy areas that each side regarded as non-negotiable. Whilst people were struck at how quickly the Coalition Government was put together, it was clear that there was a list from each of the two parties on their individual legislative must-haves rather than consolidating areas of policy.

4 If there are future coalition governments this may result in a different set up with support for individual pieces of legislation.

Creating Good Law

5 Once an incoming Cabinet decide on their legislative programme, it will be a matter for the Secretary of State, should they have a Bill, to then ask their department to facilitate that legislation.

6 To make legislation effective and ultimately make good law, any Government has to be very clear what their broad policy is and enable civil servants to draw up evidence-based policy.

7 At that stage there will be some consultation with interested parties, and the legal advisors of the department will then draft instructions to Parliamentary Counsel to draft the Bill. It is hoped that The Office of Parliamentary Counsel who describe good law as law that is necessary, clear, coherent and accessible can revert to Ministers if new legislation does not conform to those principles.

8 The public have to understand new legislation. This would have
been flagged up in the Manifesto and then the Queen’s speech.

**Brexit**

9 Other than an announcement by the Prime Minister, of a “Great Repeal Bill” it is unclear how this would work legislatively. Some clarity from the Government after discussing with leading constitutional and legislative experts should be done as a matter of urgency.

10 It is not clear whether the Government will be transferring all the European legislation into domestic law, which currently applies or whether the Government will proceed to enact those laws which they wish to enact and repeal those that they do not want as UK Law.

11 Leading Counsel should be engaged as soon as possible. The public can be made aware of this Opinion by leading Counsel. Lack of clarity on this issue given the Government’s reported timetable to trigger Article 50, is not helpful in my view.

**Technology**

12 Those who have access to the internet would be able to access Parliamentary and Government websites to find out about legislation. Not all of the members of public do access these websites and senior citizens and other citizens have a different way of working and some cannot afford it. Public Libraries are important in accessing and disseminating this information.

13 Factual political programmes on the media can inform people of forthcoming legislation. This could be another call for the public to put in their views to forthcoming legislation at Green Paper or White Paper stage. A statement to Parliament should not substitute the Green Paper/White Paper process.

**Public involvement and engagement and information provision**

14 What inhibits public involvement is the sheer volume of legislation that is enacted. However civil society is well organized in the UK. Therefore using media to announce forthcoming legislation and the start of the consultation process on pre-legislation, may be useful.

15 There are now many organisations in civil society and other organisations with specific interests including All Party Parliamentary Groups could also play a part in feeding in evidence on new legislation
that affects their specific interest.

16 When civil servants are looking at evidence for a particular policy prior to consultation, and drafting legislation, they have contact with interest groups/academics/charities/ngos to get an idea on who to consult.

17 ‘A call to new legislation’ on the department’s website and parliament’s website would also facilitate dissemination.

18 The public does become engaged when select committees have enquiries, in my experience. Whilst there is limited time for oral evidence, there is a wealth of written evidence, and this has been a good way of informing a select committee’s inquiry.

Parliamentary involvement

19 I was a member of the Health Select Committee from 2010-15. My experience of the Health and Social Care Act was that the Government failed to consult widely with stakeholders and even the NHS. As a result, as part of our initial public expenditure report, the Committee heard evidence from expert witnesses who were finding it difficult to give their evidence based on what was going to be in the Health and Social Care Bill as it was not clear what the Government were setting out in the Bill. It was not in the Manifesto and the Government were keen to protect their position.

20 As a result the Bill had to be paused because of the controversial nature of the legislation. If Governments are going to put through such legislation, it would be appropriate to have a Green paper and a White paper before the draft Bill.

21 It is possible for joint committees to look at legislation but committees are not able to alter the policy. If a government has not consulted properly, this would be amended in Bill Committees but this is not always agreed by a Government keen to protect its legislation. It would be possible to limit the unreasonable outcomes of a particular policy.

Conclusion

22 In my view there is a balance to be struck between the volume of legislation and good legislation. It is clear from legislation such as the Dangerous Dog Act, which is often cited as legislation that was enacted too quickly without proper scrutiny. However, sometimes
Governments feel that they need to legislate often, a continual stream of legislation, to be seen to be carrying out their manifesto.

23 Added to this the Law Commission is tasked with consolidating outdated/outmoded legislation. All the Commission’s law reform projects involve thorough public consultation. The consultation papers and often a summary of responses are available on the project pages of the website, as are the final reports and Parliament gives the final approval.

24 Evidence-based policy is public policy informed by rigorously established objective evidence. An important aspect of evidence-based policy is the use of rigorous studies to identify programs and practices capable of improving policy-relevant outcomes. This is would be followed by the consultation on the principles set out by the Cabinet Office, which provides guidance on type and scale of consultation, duration, timing, accessibility and transparency.

25 I consider publishing a green paper and white paper together with impact assessments built on evidence based policy would be a route to good legislation and all form part of the pre-legislative stage.

8 November 2016
Andrew Walker QC, Vice Chairman-Elect of the Bar Council and the Vice Chairman of the Bar Council Law Reform Committee—Oral evidence (QQ 57-62)

Transcript to be found under Michael Clancy, Law Society of Scotland
Chris Walker, Independent Housing Consultant—Oral evidence (QQ 29-35)

Transcript to be found under Emran Mian, Social Market Foundation
The Rt Hon Steve Webb, former MP and Minister of State for Pensions—Oral evidence (QQ 76-88)

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

Wednesday 7 December 2016

Watch the meeting

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

Evidence Session No. 5 Heard in Public Questions 76 - 88

Examination of witnesses

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

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

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

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

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

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

**Steve Webb:** It varies enormously, not surprisingly. One key criterion is whether it is the start or the end of the five-year Parliament. There is a problem on day one, particularly when there is a change of government. A new Government come in and they have, as it were, campaigned in poetry and now have to govern in prose. They have to have something for the House of Commons and the House of Lords to do within a few weeks of being elected.

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

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

In short, you need to be most aware at the start and at the end. The other thing is the Treasury; everyone else has to fight for a legislative slot but the Treasury gets a guaranteed Finance Bill every year—often two. The Treasury, because of its position in government, is beyond challenge and of course does not get challenged much at this end of the building. It is probably guilty of some of the worst legislation.
Professor Paul Burstow: I certainly echo what Steve has just said. That variability is also partly contingent on the source of the legislation. I was involved in chairing the scrutiny of legislation that was the product of departmental drafting, but based on work by the Law Commission. A Committee I served on some time prior to that dealt with the mental capacity legislation, which again had come from the Law Commission. Quite a lot of the detail had been worked through, but Steve is absolutely right; parliamentary drafts, when people work them through into legislation, do not always produce something that is clear and easy to understand, or that necessarily delivers the stated intention.

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

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

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

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

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

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

We had a Green Paper; we had a White Paper; we had pre-legislative scrutiny; and we then had oral evidence at the start of the Public Bill Committee. The Bill obviously then went through its normal process. From my point of view, it added almost nothing. Instinctively and emotionally, I am really in favour of pre-legislative scrutiny. Why would you not be? I guess the argument for pre-legislative scrutiny is that it is a point when the Government are less wedded to stuff. It is less of a climbdown; it is not a defeat and you can just have open discussion.

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

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

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

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

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

**Steve Webb:** Progress.

**Martin Hoskins:** A number of the witnesses were delighted to come along to the Joint Committee because they had been speaking to the Minister for a long time, and they thought that the Minister simply was not listening to their arguments. They were desperately keen to find another audience to play out their arguments with. The pre-legislative Committee was extremely impressed with the quality of the evidence from an awful lot of people. One of the members of this Committee, Lord Judge, gave evidence. I found it an incredibly important and useful thing to do.

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

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

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

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

**Martin Hoskins:** In setting out the business case for the legislation, that is incredibly helpful, not only for this Parliament but for other Parliaments as well. I am slightly involved in some work at the moment with the Telecommunications Regulatory Authority of Bahrain, looking at some of the issues that the draft Investigatory Powers Bill examined. It is extremely useful to have a solid body of evidence from which not only this legislature but other legislatures can draw.

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

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

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

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

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

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

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

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

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

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

Lord Beith: Did either of you have moments, when taking Bills through, when you had to defend the wording as it stood and you thought, “Actually, they have a point, but we have looked at it and it really is time we got this Bill through so we will just have to wait and see whether they are right”?
Steve Webb: Very rarely. Certainly at the DWP, because pensions law is so technical and because, as part of the cuts, we were sacking lots of people, including lawyers—astonishingly, it got to the point where we did not have enough lawyers, which is a sentence I never thought I would say—we drew heavily on the profession. There is something called the Association of Pension Lawyers, and we often ran drafts by them and consulted them. Basically, we got freebies.

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

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

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

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

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

Martin Hoskins: I think that would be the case, yes. Having said that, I remember in 1991 being involved with the Association of British Insurers on a very small seven-page Bill. The Association of British Insurers was given 24 hours to have a quick look before it was rushed through Parliament. That quick look was at the Dangerous Dogs Bill. I have to confess that I barely understood what was in those seven pages, and I am sure that lots of other people did not understand what was there. That is a reason why sometimes the more work done at the preparatory stage, the less time may need to be spent on the formal ones.
The Rt Hon. Steve Webb, former MP and Minister of State for Pensions—Oral evidence (QQ 76-88)

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

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

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

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

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

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

**Steve Webb:** Just a thought; the Select Committee that did pre-legislative scrutiny of the Pensions Bill asked for lots of analysis, which it felt it did not have. I sometimes think that asking Parliamentary Questions is a cat-and-mouse game. I asked one of our former colleagues, now an ex-MP and ex-Minister, “Is there anything you would do differently in opposition now that you have learned from having been
on the other side of the fence?” The one thing he said was, “I would table fewer parliamentary questions and more freedom of information requests”, because PQs were always a game: “Can we avoid telling the person anything, or as little as possible?”

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

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

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

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

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

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

I want Committees to be able to look in much more granular detail at the assumptions that sit behind impact assessments that Ministers sign. They ought to form a much more forensic part of the examination of the deliverability of legislation than they do currently. I certainly agree that there is some merit in occasionally having expert questioners to
challenge. That can be a useful piece of the puzzle. When it comes to Select Committees and their ability to scrutinise legislation, another point is that if it is to be meaningful, with so much of our legislation being skeletons on which regulations are subsequently hung, it is important to have some idea at least of what the outline of the regulations is likely to be. Without that, the discussion can often be quite misdirected because you do not know what the final intention will be.

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

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

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

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

**Steve Webb:** There is the concept of an evidence base—things we know. When you are doing social reform there is the “What if” question. Committees, at best, might know the impact of what the Government have chosen to do, but Committees do not have the potential to model alternatives, and that might well be a value added. It is not that there is a sitting evidence base and they just need to be told what it is. If there are three different things the Government could have done, and all the
information is about the thing the Government have decided to do, you cannot really see how different options would have worked because the Government have all the models and data and so on. Looking at the alternatives is an area where Committees might be able to gain more insight.

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

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

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

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

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

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

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

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

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

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

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

Baroness Dean of Thornton-le-Fylde: That presupposes that Parliament takes an interest in a piece of legislation it has passed. Is it not the case all too often that it is job done and they move on to something else?

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

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

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

**Steve Webb:** I think I am busy that day.

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

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

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

If you are going to use it more—there is still scope for it to be used more than it has been so far—you have to look at some of the other stages of the process. If you have had pre-legislative scrutiny, do you still need to have the evidence-taking session in the Commons at the beginning of the Standing Committee? I do not think you do. If you had pre-legislative scrutiny and you have had the Government’s response, and for the sake of the argument they have taken on board some of the recommendations, that is a material consideration in the negotiation that takes place between Whips about the amount of time that is to be allocated for the Committee stage. Of course, the Government want to have it as short as possible and the Opposition want it to be as long as possible. I understand that, but it is a legitimate part of the debate, and Whips setting the business timeline ought to be a part of it. Currently we cannot underestimate the extent to which government departments, which are downsizing significantly—Steve has already referred to using external resources to get legal advice—have less capacity to manage this sort of
process from end to end. That is more likely to make them advise Ministers not to have pre-legislative scrutiny, because it adds to the burden of doing the piece and getting legislation through.

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

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

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

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

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

**Martin Hoskins:** I cannot think of anything.

**Q85 Baroness Dean of Thornton-le-Fylde:** Clearly in this age of transparency, accessibility and all the rest of it, the issue of new technology or existing technology has come up. We have received written evidence from the Bingham commission, which says that this would be a
The Rt Hon. Steve Webb, former MP and Minister of State for Pensions—Oral evidence (QQ 76-88)

very interesting way of involving the public and external stakeholders in pre-legislative scrutiny. The Law Commission has very interestingly said that it is currently in active discussions with the National Archives regarding ways in which legislation.gov.uk could be used to involve public and external stakeholders in looking in different ways at draft versions of legislation. What is your view? Two of you have been at both ends of the pipe, as it were. Could we use new or existing technologies better to promote it, if you think the public and external stakeholders should be involved in pre-legislative scrutiny? If they should be involved, what do you think are the barriers, apart from capacity, for organisations helping to scrutinise draft legislation?

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

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

Martin Hoskins: There were two technologies that were extremely useful to the Committee as we went through the draft Investigatory Powers Bill. The first technology was that of videoconferencing. It was not convenient for Sir Bruce Robertson, the New Zealand Commissioner of Security Warrants, to come to Westminster to give evidence. He was happy to get up at five o’clock in the morning and provide evidence on a videoconference link. It is extremely helpful to know that people do not physically have to come to the building for their evidence to be heard and tested. Secondly, because so many of the proceedings were broadcast, a great many of the usual suspects, who might otherwise have been in the room, were tweeting about the events, making comments and passing emails back to the secretariat or other members of the Committee with their impressions of what had just gone on. I think that influenced further Committee sessions. Those two technologies were extremely helpful.
Steve Webb: An elephant in the room is what the scrutiny is trying to do. There are two completely different things. One is the big picture—the policy and what they are trying to achieve. Then there is the nitty-gritty of legislation. The public absolutely engage on the first, but they are no more qualified than most MPs on the second, which is how you write a law to do what you want to achieve. Pre-legislative scrutiny is a bit of a hybrid. A bit of it is the big picture, the vision and the plan for what you are trying to achieve; but you have a Bill in front of you, so surely it must be a bit like, "Clause 72, line 3 does not work". Maybe the point where we really need public engagement is earlier than pre-legislative scrutiny, when you have a draft Bill in front of you. It may be at the Green Paper or White Paper stage when you have the Select Committees, and they get the public in while it is still big picture stuff. Interestingly, we had the general public come in, not at the pre-legislative scrutiny stage but at the Bill Committee stage for the Pensions Bill. Of course, what they had to say was big picture stuff. It was a really interesting session, but it was much too late for the big picture stuff, which had come a lot earlier.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Steve Webb:** I think it would be madness—utter madness. Why do I say that? This is an issue on which there are absolute ultras on both sides—obsessives—and you will just give them two goes. They will say exactly the same thing. The Government will be entrenched. This is utter high octane political stuff. Every tweak will be a victory for one side, so the willingness to listen will be minimal. You will have to go through it all again. I imagine that the legislation will be a telephone directory, and you could get absolutely sunk in it.

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

The crucial thing for me for Britain’s interest is to get on with the negotiations. If the legislation has to come first, slowing down the legislation is not in our national interest and will add nothing; you will just get obsessives on both sides.
Professor Paul Burstow: I think I agree with the analysis and the conclusion. My one point of hesitation is that, because of the sheer breadth and scope of EU legislation and how it impacts on our legislation, the potential for things either wilfully or not wilfully to be missed in that process has to be significant. Steve says we can come back to it. That is true. Once you have spotted that there is a flaw or a gap, you can fill it later on with other legislation, assuming that at that point it is a government priority and there is time made available for it. There are those considerations as well.

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

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

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

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

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

1. This submission responds to a key section of the inquiry from the perspective of information systems: the social study of information and communications technologies. It focuses on the role of technology when addressing Questions 1–3 on creating a good law. There are, however, also implications for Questions 6 and 7 (on the role of technology).

2. For questions 1–3, the submission draws on research that questions the idea of technology–neutral laws and argues instead that technological issues should not be left for codes of practice, regulations and statutory instruments. This because apparently neutral technological decisions can, in fact, have a significant impact on the way a law is implemented and, as such, should be subject to proper, detailed scrutiny. In particular, these decisions can be such a key part of the proposed legislation that they should be subject to more scrutiny than codes of practice and statutory instruments typically receive.

Against technology–neutral laws.

3. “Would you say that, done right and should the codes come out right, the clauses in the Bill have the potential to improve public services through better use of data?” [Question from Matt Hancock, Digital Economy Public Bill Committee, 11 October 2016].

4. I was asked this question as part of the scrutiny of the Data Sharing clauses in the Digital Economy Bill. Implicit in the question is the idea that the Bill provides the high level description of the government’s intentions (around data sharing to improve public services in this case) and that the detail about how this should be achieved (and the oversight mechanisms associated with it) are not that important and can be left to codes of practice that may not even be scrutinised properly by Parliament.

5. This can be seen as intending to produce a form of “technology neutral” legislation. The view that technology is neutral has been
described as “one of the most dangerous of all modern mantras”\textsuperscript{215}

As Koops\textsuperscript{216} notes technology neutral legislation is often a response to the classic concern that technology specific regulation might rapidly become out of date or obsolete. Concerns about the role of technology can include technology indifference (i.e. how it is formulated or in terms of its intended effects), implementation neutrality (i.e. implementation is not tied to particular technologies) and potential neutrality (i.e. its effects do not hinder particular developments). The final approach focuses on technology neutrality as a legislative technique that allows laws to be sufficiently sustainable in order to provide certainty but also explicit about which technologies they are intended to cover (and why) so that whenever there are fundamental changes to the technology it is possible to trigger a revision in the law.

6. I believe that it is becoming increasingly problematic to produce technology neutral legislation of this latter kind. Instead, there are growing requirements for the specifics of the technology to be provided at the start of the legislative process. There are three reasons for this: a) Legislation should be based on clear user needs; b) Implementation decisions are always choices; and c) Implementation decisions need proper scrutiny and should not be left to lower profile scrutiny such as statutory instruments, regulations or tabled codes of practice.

7. To illustrate these points, I draw on the clauses in Part 5 of the Digital Economy Bill. Unfortunately, as I noted in my oral evidence to the Public Bill Committee, this Part of the Bill is lacking the kind of detail that I believe is necessary. I therefore draw on the clauses present in the Bill alongside indications as to the government’s thinking as found in the “Better use of data in government” consultation on data sharing\textsuperscript{217}.

**Legislation should be based on clear user needs**

8. Clauses 38–39 of the Digital Economy Bill relate to the sharing of civil registration data (i.e. data on births, marriages and deaths) within Government. The consultation document helpfully provides an example of the kind of data sharing that might arise with this data: “A couple have recently had a new baby daughter. Following registering the birth of their daughter they applied for Child Benefit. They were really pleased to find out that they no longer had to send their child’s birth certificate to HMRC as a new digital

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\textsuperscript{217} https://www.gov.uk/government/consultations/better-use-of-data-in-government
service would match their daughter’s birth records against birth information held by the General Register Office. The whole experience was far better than their previous experience of claiming Child Benefit when they had to purchase a new birth certificate to send to HMRC in the post to replace a lost certificate. As a result they had to wait a number of weeks before receiving their entitlement letter and birth certificate. This time the process of claiming Child Benefit was straightforward, secure and hassle free”.

9. A real world example of how this kind of data sharing might benefit citizens relates to a local authority offering a nappy collection service\(^\text{218}\), a clear user need.

10. Immediately after this, however, the consultation asks about bulk data sharing of civil registration data. “Question nine: Do you think bulk registration information, such as details of all deaths, should be shared between civil registration officials and specified public authorities to ensure records are kept up to date (e.g. to prevent correspondence being sent to families of a deceased person)?”.

11. Whilst such receipt of such correspondence can be distressing, this is already covered by the existing Tell us once service\(^\text{219}\). No guidance is provided, however, about the other user needs that might be addressed by these bulk data sharing provisions, nor is there any evidence of what the Government Digital Service describes as “discovery” work (“A short phase, in which you start researching the needs of your service’s users, find out what you should be measuring, and explore technological or policy-related constraints”\(^\text{220}\)).

Implementation decisions are always choices

12. The government has stated that their approach to data sharing would have “positive benefits on privacy and security” there are different ways of implementing the data sharing proposals around civil registration. It is possible to implement data sharing in a way that is privacy enhancing, for example by using attribute checks. Here a local authority offering the nappy service only needs to check the “attribute” of whether a household has a child under 4 years of age—the answer is either Yes or No. They do not need to know the child’s actual age\(^\text{221}\) nor see their birth certificate\(^\text{222}\). Other implementations of data sharing, however,
Dr Edgar A. Whitley, London School of Economics and Political Science; and co-chair Cabinet Office Privacy and Consumer Advisory Group (PCAG): Part 1—Written evidence (LEG0019)

can be much more privacy invasive and increase data handling risks\(^{223}\) with significant consequences for public trust.

13. Similar implementation decisions can be found in the clauses about addressing fuel poverty. Here the consultation notes that “Automatic [fuel discount] rebates can only happen if the state can inform energy companies (through a data match) which of their customers should receive it” (emphasis added), yet a few paragraphs later, the consultation states “The only information shared between energy suppliers and Government would be a simple ‘eligibility flag’ [Y/N] along with customers’ names and addresses (or equivalent unique identifiers)”.

14. Having energy companies checking an eligibility flag is a very different approach to government informing (all the) energy companies about which of their customers should receive an energy rebate.

15. There will be operational advantages and disadvantages to both approaches and it is important that Parliamentarians are fully informed about the implementation choices they are implicitly or explicitly endorsing when scrutinising the legislation.

Implementation decisions need proper scrutiny

16. The case of the data sharing provisions add further complexity to the situation by seeking to resolve some of the concerns about technological issues through the use of Codes of Practice issued by the relevant Minister and to which persons to whom the Codes apply must have regard. Unfortunately none of the Codes of Practice were ready for the Public Bill Committee, despite requests for such detail being made since the earliest stages (2013) of the policy making process.

17. This point has been made a number of times before. For example, the Joint Committee on the Draft Investigatory Powers Bill\(^{224}\) made specific recommendations about the publication of codes of practice: “Above we have demonstrated the importance of codes of practice in containing much of the detail about the way the powers in the draft Bill will be exercised. This point was also underlined recently by the House of Commons Science and Technology Committee. This is particularly the case in relation to the definitions of communications data (see paras 69–70), ICRs (paras 120–122), the removal of electronic protection (paras 263–264), and Equipment Interference (paras 292–295). The Codes of Practice will provide essential further details on how the powers in the draft Bill will be used in practice. We recommend that all of them should be published when the

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\(^{224}\) http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/9302.htm
Bill itself is introduced to allow both Houses to conduct full scrutiny of their contents. (Recommendation 84)” (§697–698 emphasis added).

18. As Mr Edward Garnier noted in relation to the Identity Cards Act (another piece of legislation that sought to be technology neutral) a particular problem with secondary legislation such as statutory instruments and codes of practice is that, in practice, the debates are often poorly attended and so effective scrutiny of the details will be limited, raising the prospect of “legislation by statutory instrument” [18 October 2005, Column 804].

19. A similar point was made by the House of Lords Constitution Committee in 2009: “We are concerned that primary legislation in the fields of surveillance and data processing all too often does not contain sufficient detail and specificity to allow Parliament to scrutinise the proposed measures effectively. We support the conclusion of the Joint Committee on Human Rights that the Government’s powers should be set out in primary legislation, and we urge the Government to ensure that this happens in future. We will keep this matter under close review in the course of our bill scrutiny activities” (§474 emphasis added).

20. In 2014, the Australian Law Reform Commission noted that privacy laws be “sufficiently flexible to adapt to rapidly changing technologies and capabilities without the need for constant amendments. At the same time, they should be drafted with sufficient precision and definition to promote certainty as to their application and interpretation” (§2.30 emphasis added).

21. Scrutiny of a separate part of the Bill (about age verification and access to online pornography), involved discussion of precisely the kind of detail that I am advocating (“On age verification, attention has been drawn to the consequences of failing to think through plans, including the possibility that information on passports and driving licences could be misused when collected as part of an age verification system”).

22. In that case, however, the relevant clauses of the Bill are primarily concerned with the designation and funding of an age verification regulator.

23. There is reference to the regulator publishing guidance about “types of arrangements for making pornographic material available that the regulator will treat as complying with [the relevant] subsection” and a detailed draft BSI Publicly Available Specification (PAS 1296) is currently subject to a public consultation.

Responding to your specific questions

24. **Q1)** How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

25. In this context, the current practices are not particularly effective as they do not provide sufficient detail for proper scrutiny of proposals.

26. **Q2)** Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of 'good law'?

27. If these details are not on the face of the Bill I believe that the absence of the detail found in Codes of Practice makes effective scrutiny impossible.

28. **Q3)** Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

29. If the detail is not provided on the face of the Bill then it must be published ahead of Parliamentary scrutiny, for example, by issuing draft Codes of Practice.

30. **Q6)** How effectively do Parliament and the Government make use of technology at this stage of the legislative process?

31. As my submission makes clear, my main issue is not with regard to the use made of technology rather it concerns the details about legislative proposals.

32. **Q7)** How could new or existing technologies be used to support the development and scrutiny of legislation?

33. As noted above, provision of detailed Codes of Practice / Statutory Instruments would help the development and scrutiny of legislation.

18 October 2016
Dr Edgar A. Whitley, London School of Economics and Political Science and member of the Quality Assurance Group for the Consultation on Better use of data in government, part of the Open Policy Making Process: Part 2—Written evidence (LEG0023)

Executive summary

1. This submission responds questions 8–10, and draws on my experiences with the Open Policy–Making (OPM) process associated with the data sharing provisions that then formed part of the Digital Economy Bill. It also draws on my experiences as a member of the OPM “Quality Assurance” group for the analysis of responses to the consultation about the proposal.

2. The evidence presents my own views on the issues and not those of members of the QA Group. Nevertheless it is inspired by, and reflects on, conversations amongst the group.

3. I am supportive of the use of the OPM process for developing policy but identify significant operational concerns with the way the resulting consultation on the proposals was undertaken and analysed.

4. I make a series of suggestions for addressing these concerns.

Involve and the Open Policy–Making process

5. An innovative feature of the broad discussions around data sharing in government was the decision to facilitate an “Open Policy–Making process” (henceforth OPM process). As noted in the 2016 consultation on the resulting proposals227: “In response to repeated calls from public authorities to review the data legislative landscape as well as the Administrative Data Taskforce recommendation specifically to improve researchers’ access to data, officials within the Cabinet Office began work on developing new policy in 2013” (§15).

6. “An open policy–making approach provided the opportunity to ensure that the views of those outside of government could shape the development of policy in an iterative way at an earlier stage” (§ 16).

7. “Involve, a not for profit organisation established to improve government engagement with the public, helped facilitate an open policy–making process and external engagement. The open policy–making process was open to any interested organisations to join and was designed to ensure that all voices were heard from the outset. Groups engaged in the process included those with a specific interest in individual privacy and rights, academics, statisticians, researchers and their funders, charities, government officials and some private

Dr Edgar A. Whitley, London School of Economics and Political Science and member of the Quality Assurance Group for the Consultation on Better use of data in government, part of the Open Policy Making Process: Part 2—Written evidence (LEG0023)

sector organisations. The strength of the open policy process has been to identify areas of consensus, but also to better understand areas of disagreement. As such, the groups and individuals who have participated in the process have helped to significantly shape a number of the proposals. Where there was a divergence of views, these have been factored into the consultation questions. The whole process was transparent, with key information and updates posted on www.datasharing.org.uk, a non-government website, to act as a repository and audit trail of the work” (§17).

8. This work occurred between April 2014 and March 2015 in the run up to the general election. The OPM process looked at the suitability of data sharing for three purposes:

- enhancing the availability of high quality research and statistics from administrative data;
- preventing fraud and helping citizens manage the debt they have with government; and
- ensuring the right services are offered to the right person at the right time.  

9. Given my role in the Cabinet Office Privacy and Consumer Advisory Group and my general academic research interests in this area, I participated in a number of the OPM meetings.

10. After the 2015 General Election, the Cabinet Office continued to develop the proposals “in the spirit of what was agreed” and announced their intention to go to public consultation in late January / February 2016. They held two further meetings in January 2016 to present the policy updates.

The Better use of data in government consultation and the “Quality Assurance” process

11. The consultation was launched on 29 February 2016 and consisted of 20 questions covering the three high level policy areas that would finally be found in Part 5 of the Digital Economy Bill: Improving public service, tackling debt and fraud, allowing use of data for research and for official statistics. The closing date for responses was 22 April 2016.

12. In the spirit of the OPM process, Involve were asked to create an external Quality Assurance (QA) Group of individuals from civil society and academia to review the government’s analysis of responses to the consultation. It is believed that this is the first time this part of the process has been opened up.

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http://datasharing.org.uk/
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13. The Terms of Reference of the QA Group were published and shared with participants in the OPM process. This included a proposed timeline for the work of the group:

- 13th April to 18th April 2016: Review and comment on government’s proposed approach to analysing responses
- 18 April 2016: Agreement on proposed approach to analysing responses by Quality Assurance Group and Cabinet Office?
- 28 April 2016: Quality Assurance group to receive consultation analysis (in person)
- 28 April 2016: Quality Assurance session and collaborative review of consultation analysis
- w/c 2nd May 2016: Quality Assurance review to be drafted by Involve
- w/c 2nd May 2016: Revision and comment on draft Quality Assurance Review report
- w/c 2nd May 2016: Final version of report shared with Cabinet Office
- Tbc May 2016: Publication of government’s analysis and Quality Assurance report

14. I nominated myself for the group and was invited to join the group on 14 April 2016. The full membership list is available in the final report of the group.

15. The first meeting of the group was scheduled for 28 April 2016 however on 26 April 2016 we were informed that the meeting needed to be postponed. “At the middle of last week, we had received less than 30 responses and were on track to upload and analyse in line with our proposed approach. By consultation close on Friday we had received over 280 responses, with a large number not using the format of form/questions we posed in the consultation document. This means that our initial triage and analysis is taking a lot longer than anticipated and unlikely to be ready for Thursday” (Email from Sue Bateman, Cabinet Office, 26 April 2016).

16. The rescheduled meeting took place on 9 May 2016. As the QA Group’s report notes, by this time “The Cabinet Office team had only been able to collate the responses, carry out an initial coding of the answers, and carry out a preliminary thematic analysis of the data presented”.

17. It was therefore not possible for us to undertake a detailed examination of the analysis in terms of Quality Assurance and the Terms of Reference of the Group were therefore adapted to reflect what we were able to assist with. In particular, we took on more of an advisory role and provided a set of key recommendations on how

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230 https://docs.google.com/document/d/1u6pWerRMvt0KMdo8aPtl0JjsDZWvfgCPWN4Ykn9h0JQ/edit

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the full analysis should be approached, rather than undertaking a Quality Assurance review of the analysis.

18. A major problem that the analysis team faced was, as noted above, that many of the responses did not use the format of the questions presented in the consultation document. It soon became apparent that in many cases this was because of problems with the wording of the consultation questions. In particular, the QA Group noted that analysis would be more difficult for:

- Questions that assume assent or do not ask the question that people want to answer (Questions 11, 14, 18);
- Compound questions, where two or more questions are asked but only one answer is allowed (Questions 15, 5, 16);
- Questions where the interesting results will be in the free text rather than the yes / no response, for example where suggestions were asked for (Questions 7, 1, 2, 10); and
- Complex questions that the respondent may have difficulty in understanding or answering, but where their answer will shed light on their views about this issues within the consultation (Question 9).

19. These problems would appear to have arisen because the consultation brought together a wide ranging set of proposals from across government and no attempt had been made to standardise the questions. In addition, it was clear that no pre-testing of the consultation questions with a small group of likely respondents had been undertaken. Both of these measures would have resulted in questions whose responses could be analysed with greater ease.

20. Such poorly designed consultation questions may also have affected the quality of submissions. A poorly designed set of consultation questions suggests limited competence in survey design and, by implication, limited competence in survey analysis.

21. The Government has published principles about effective consultations232. In the context of this inquiry, it may be worth supplementing these principles with specific guidelines about the practicalities of consultation design and analysis.

22. A non–exhaustive list would include:

- Most consultation responses are received on / near the deadline.
  - It should not come as a surprise that only 30 out of a final 280+ submissions were received a few days before the deadline.
- There is value in government sharing experiences about the volume of responses to different consultations. This is likely to vary according to the scope and contentiousness of the consultation content. This will allow for proper resource planning for the consultation analysis.
- Consultations need clarity as to whether they are seeking to determine a general sense of support or dissent for proposals.

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(whose Yes / No or quantitative measures might be most appropriate) or whether the purpose of the consultation is to draw on the expertise and insights of respondents.

- In this case, given the two year OPM process, one might have expected that most insights should have already been gathered and so most questions could have been drafted to minimise the need for qualitative analysis of free text.

- There need to be clear rules on late submission handling (A Monday 23.59 deadline is suggested)
  - This consultation concluded on a Friday. It is not clear if any responses that might have been received over the weekend were included in the analysis.

- All consultation responses potentially contain useful contributions. No proper responses should be discarded
  - This consultation noted that “we will therefore only consider your response if you complete the information page”

- There is merit in separating distinct topics into separate “mini-consultations”
  - In this consultation, for example, a large number of responses from individuals related only to the proposals about sharing civil registration data but the whole of the consultation response (by default an 11 page document) needed to be checked for any responses to other sections.

- There is an obvious need for capacity building in survey design and survey analysis. This skill is widely taught in Universities so support for this is readily available, as are commercial survey organisations.
  - I have suggested this consultation to colleagues at LSE who teach survey design as an exemplar of how not to write survey questions.

- There is a need to pre-test questions before the consultation is sent out. Failure to do this wastes the time of respondents as well as making the analysis of the consultation process either more time consuming than necessary and may hamper the full elicitation of insights from the consultation.

Further specific concerns with the Data sharing consultation.

23. Despite the consultation being the culmination of a two year OPM process, two sets of proposals were added to the consultation (and resulting legislation) at a very late stage. Government is, of course, able to introduce any legislative proposals it wishes and it makes sense to consult about them. Nevertheless, given the spirit of the OPM process, such late additions are unfortunate.

24. The first meeting in early January 2016 introduced some new proposals from the General Registrar’s Office (GRO) and a second, follow up, meeting was held on 15 January 2016 to present the proposals in more detail including “areas that were not
comprehensively covered in the session on the 6th [January 2016]”. Fuller details of the GRO proposals were circulated on 14 January 2016.

25. Members of the OPM process expressed surprise at the introduction of new proposals and Involve responded: “We continue to emphasise the importance of giving civil society time to understand proposals and respond to them; we have made it clear through-out this phase our concerns about the speed and volume of new proposals, as you would expect. As part of this we have made clear the risks to the process overall of moving forward with new proposals in limited time. At this point the government wants to spend a bit of extra time looking at this proposal in particular because they feel that it wasn’t well understood last week. I would expect them to take any concerns about either the proposal itself or the process seriously, and we will continue to emphasise the different views that we are aware of” [Email from Simon Burrall, Involve, 11 January 2016].

26. I was able to attend the meeting that discussed the GRO proposals in more detail and I shared my concerns that the proposals were still at a very early stage of development (and detail) compared to other proposals.

27. The consultation also included proposals about data sharing to address fuel poverty. The consultation notes that this proposal from the Department of Energy and Climate Change (DECC) “was not part of the open policy process”. The data sharing to address fuel poverty proposals are, however, remarkably similar to proposals that were shared with the Cabinet Office Privacy and Consumer Advisory Group (PCAG) in December 2013. It is not clear why they were not included in the OPM process.

28. Given all the issues that the analysis of the consultation responses was going to face, including the large number of responses (the published responses to the consultation consists of 1134 pages—although this figure is affected by the size of the initial consultation response document (11 pages)), the proper analysis of this data would be a significant amount of work.

29. The QA Group meeting with the Cabinet Office was held on Monday 9 May 2016. The data sharing provisions were included in the details of the Digital Economy Bill233 which was announced in the Queens speech234 on Wednesday 18 May 2016. Given that Ministerial sign off of the consultation response was presumably needed before the proposals were included in the Queens speech, this suggests a very limited period for the detailed analysis to be undertaken. A short and / or rushed analysis of the consultation responses before the

Queens speech raises concerns about the use of the consultation response in the scrutiny process\textsuperscript{235} of the Digital Economy Bill. It is unclear whether further analysis of the consultation responses was undertaken before the Government summary was published on 5 July 2016.

Specific inquiry questions

30. **Q8)** To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?

31. As a process, I believe that the OPM process worked well. I was able to participate in a number of meetings and felt that the process was performing as intended. Civil servants were made aware of and listened to a range of concerns about a wide range of issues around the data sharing proposals being considered. It was instructive to see where various government departments saw the problems with effective data sharing as well as the assumptions that were driving different policy agendas. I believe that it is a model to be copied for appropriate pieces of legislation.

32. **Q9)** What factors inhibit effective engagement?

33. As noted above, I have concerns about the quality of the resulting public consultation and the analysis of the consultation responses. Thus, much of the good work (and good will) generated by the OPM process is affected by poorly designed and implemented later stages.

34. **Q10)** What mechanisms could be used to increase or improve engagement with the public and stakeholders?

35. See recommendations above. In addition, as noted in my related submission to this inquiry about technology neutral policy, there is a strong case for undertaking technical “discovery” work along side the broader discussion of policy objectives and concerns.

21 October 2016

\textsuperscript{235} For example, Nigel Huddleston: “There were 282 responses to that consultation, with the majority of them being broadly supportive. You have raised quite a few perfectly valid concerns, but do you accept that there is broad public support for the sharing of data when there is a clear social upside?” https://hansard.parliament.uk/commons/2016-10-11/debates/cc664aca-a5c4-4a4b-b174-0b448660a979/DigitalEconomyBill(SecondSitting)