House of Commons

Political and Constitutional Reform Committee

Ensuring standards in the quality of legislation

First Report of Session 2013–14

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The Political and Constitutional Reform Committee

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Witnesses submitting evidence to our inquiry were unanimous in calling for improved legislative standards. Having identified and analysed the problems with current legislative standards we agree with the Hansard Society's conclusion that "There is no single cause for this deficient legislation. The explanation lies in a complex confluence of factors primarily related to volume, attitude, preparation and deliberation."[1]

In this Report we have considered a number of different mechanisms to improve legislative standards and have made five key recommendations:

i. that there should be a Code of Legislative Standards for good quality legislation agreed between Parliament and the Government;

ii. that a Joint Legislative Standards Committee with an oversight role should be created;

iii. that a week should elapse between the conclusion of Public Bill Committee evidence sessions and the start of line by line scrutiny, to allow Members enough time to consider the evidence they have heard, and for amendments to be drafted and selected for debate;

iv. that a test for identifying constitutional legislation should be agreed between Parliament and the Government;

v. that the Government should publish the reasons why a bill has not been published in draft and cannot therefore be subject to pre-legislative scrutiny.

Our overall conclusion is that it would be beneficial for Parliament and the Government to work together to agree standards for what makes good legislation. As a starting point for discussion we have created a draft Code of Legislative Standards (which can be read at Annex A), which draws together existing practice and guidelines within Parliament and work already completed by groups such as the Hansard Society and Better Government Initiative, as well as academic writing and examples from other countries. We look to the Government to undertake work to perfect our draft Code, and to produce a new version for discussion and agreement with both Houses of Parliament.

We also recommend the creation of a Joint Legislative Standards Committee to provide oversight of the Cabinet's Parliamentary Business and Legislation Committee's approach to and use of the finalised Code of Legislative Standards, to ensure that the quality standards set out in the Code are met. The Committee would have the flexibility to look at individual bills before Parliament, but would normally focus its work on a selection of Acts that had recently received Royal Assent, scrutinising those Acts for compliance with the Code. We think that this oversight model would fit within the current parliamentary legislative timetable and would not be as resource-intensive as a committee scrutinising every bill.

1 Ev w18

We are grateful to have received detailed submissions from the Scottish Parliament, the National Assembly for Wales, and the Northern Ireland Assembly about their legislative processes. They have had the advantage of analysing the Westminster model and adopting, amending or abandoning processes to suit their needs; we think that there are parts of their procedures which could be adopted to improve legislative standards in the United Kingdom Parliament.

In addition, we commend and encourage the expansion of existing work by Joint and Select Committees of both Houses on pre- and post-legislative scrutiny, as well as considering additional changes.

1 Introduction

> Legislation is not primarily for the use of people who have common sense; it is to regulate people who have not got a great deal of common sense.[2]

1. There has been repeated criticism in recent years, from a variety of sources, about both the quantity and quality of legislation. This is despite changes to the legislative process in the House of Commons (Public Bill Committees), initiatives to consult on some legislative provisions in draft before their formal introduction (pre-legislative scrutiny) and the beginnings of a process for evaluating the effectiveness of legislation following its enactment (post-legislative scrutiny). It has also been despite the existence of a Cabinet Committee, the Parliamentary Business and Legislation Committee, charged with ensuring that bills are well-prepared before they are presented to Parliament.

2. Against this backdrop of criticism the Liaison Committee asked us to lead on this issue. We began our inquiry by asking whether there is a need for improved legislative standards and if so, what changes to existing processes in Parliament or Government would contribute to them. We wanted to know whether a new mechanism designed to ensure improved legislative standards (such as a Legislative Standards Committee) should be introduced, and whether there is a case for differentiating between different types of legislation. We are grateful to all those who took the time to contribute to our inquiry.

Scope of the inquiry

3. An inquiry on legislative standards is necessarily broad in scope. However, we have tried to focus on areas where improvements can be made, and on which there is a degree of political and academic consensus.

4. In order to narrow the scope of the inquiry, we have focused on primary legislation; this is not to say that standards in secondary legislation are less important, merely that there are already a number of parliamentary committees producing excellent work in ensuring standards of secondary legislation. Equally, we did not consider private bills, although we received a helpful piece of evidence on this subject from P R E Double, Remembrancer, UK Parliamentary Agent to the City of London.[3]

5. We received evidence on many of the different aspects of legislation, and have necessarily had to restrict our analysis and conclusions within this Report to issues which were capable of being turned into substantive, practicable recommendations for change. It is for this reason that we have not given consideration within the text of this Report to all the legislative standards issues that were raised and discussed in oral evidence with our witnesses or in the written evidence we received.

2 Andrew Stunell MP, Parliamentary Under-Secretary of State, Communities and Local Government. Debate on Co-operative Housing, HC Deb, 11 July 2012, col 145WH

3 Ev w38

Talks and lectures

6. Both the Office of the Parliamentary Counsel and the Law Commission are keen to increase their contact with Parliament, by providing briefing sessions, especially for new Members. In particular the Law Commission suggested that "at the point before any [Law Commission] bill is introduced into Parliament, again it might be appropriate for us to make presentations as to the nature of the proposals and that might result in a deeper understanding of the difficult matters that are often addressed in the matters we have to deal with."[4]

7. We have found it fascinating to learn more about the Office of the Parliamentary Counsel and the Law Commission and can see a real benefit in closer links being forged between them and Parliament. The Liaison Committee's Report on *Select Committee effectiveness, resources and powers* considered the professional development needs of Members. Whilst we acknowledge the pressures on Members' time, **we think that new Members would benefit from briefing sessions by the Office of the Parliamentary Counsel, and that all Members would be assisted by presentations from the Law Commission about bills before the House which have been drafted on the basis of, or substantially influenced by, Law Commission reports.**

4 Q 247

2 What are the problems?

8. Witnesses submitting evidence to us were unanimous in calling for improved legislative standards. The Hansard Society suggests that the problems with legislative standards are found in a "confluence of factors primarily related to volume, attitude, preparation and deliberation".[5] We wanted to establish whether this was correct, and have used these four factors as the basis for our consideration of the problems with the quality of legislation.

Volume of legislation

9. A concern of many of our witnesses was the increasing volume of legislation.[6] Whilst the number of Acts has decreased since the 1980s, the mean average number of pages per Act has increased significantly, from 37 and 47 pages during the 1980s and 1990s respectively, to 85 in the past decade. This continues a trend of an increasing number of pages decade on decade since the 1950s when the average was 16.[7]

10. Richard Heaton, First Parliamentary Counsel and Permanent Secretary at the Cabinet Office, however, urged caution in using the page numbers as a guide, partly because of changes in the style of drafting, and also because of changes to the way Acts are laid out, with increasing amounts of white space and bigger margins leading to 20% fewer words on a page.[8] The Public Bill Office warned against taking the volume of legislation as an accurate guide to the quality of legislation.[9]

11. "Omnibus", "portmanteau" or "Christmas tree bills" attracted particular criticism. These are large multi-topic bills, upon which a Department "hangs" a number of areas of policy, like baubles on a Christmas tree. Dr Ruth Fox, Director of the Parliament and Government Programme at the Hansard Society, highlighted some of the problems this type of bill can present:

> If you look at the size of the bills that are going through, the Conservative party, when it was in Opposition, would talk strongly against the number of large Christmas-tree, omnibus bills that the previous Government took through Parliament after Parliament, yet we are seeing some of that happening again. The Localism Bill had to be published in two parts, for example, with a lot of disparate provisions.[10]

She noted, however, that additional time had often been allowed to consider such bills at Report stage.

12. First Parliamentary Counsel noted that the Government "on the whole does not like big bills because the scope is broad and amendments can come in on any subject". He stated

5 Ev w18

6 Q 112 and Ev w53 (Ryan)

7 *Volume of Legislation*, LLN 2011/028, House of Lords Library, September 2011

8 Q 64

9 Ev w8

10 Q 150

that "[a]mendments can come in on new subjects late in a bill's passage and that is quite often an area where mistakes creep in, so you might see more of that in a multi-purpose bill than in a small confined bill".[11]

13. The Rt Hon Mr Andrew Lansley MP, Leader of the House, noted that "[t]here are substantially more candidates for legislation than there is time available."[12] Some caution therefore needs to be exercised in criticising large multi-topic bills, as they can enable Parliament to consider provisions that would not otherwise find a place in the legislative timetable. For example one of the amendments to the Crime and Courts Bill,[13] accepted by the Government, was to include section 24, Appeals relating to the regulation of the Bar. This section was originally included within a draft bill that the Ministry of Justice consulted on, but which was not taken forward because of lack of time.[14]

14. **We recognise that legislation is not made in a vacuum. The parliamentary legislative process reflects the inherent constraints and negotiations present in the process of turning policy into statute, and we accept that the introduction of large multi-topic bills is, on occasion, a legitimate and appropriate use of parliamentary time. We acknowledge that the greater breadth of such bills allows greater scope for amendments by backbench MPs, and that without such bills, some "worthy" but "unglamorous" statutory sections might not become law because of lack of parliamentary time. However, multi-topic bills risk becoming simply too big to be scrutinised effectively.**

15. **We recommend that for large multi-topic bills, the Minister in charge of the bill explain to Parliament why this large scale format has been chosen. If there is a good reason for the legislation being brought forward then Parliament can be confident that the Government has given proper consideration to the importance of parliamentary scrutiny.**

Attitudes towards legislation

16. A number of witnesses questioned whether all of the legislation passed by Parliament each year was necessary, and if not, how parliamentary time could be better used. Lord Maclennan of Rogart told us that the Government should be required to set out why legislation was necessary.[15] The Better Government Initiative noted:

> part or all of 77 Acts from 15 Departments, which were passed in the 2005-10 Parliament, have not been brought into force. This casts [...] doubt on the adequacy of current standards and current arrangements.[16]

17. We asked Daniel Greenberg, Parliamentary Lawyer, Berwin Leighton Paisner LLP, formerly of the Office of the Parliamentary Counsel, how problems with the quality of

11 Q 65

12 Q 283

13 Introduced in the House of Lords and received its first reading in the House of Commons on 19 December 2012

14 Official Report, 4 December 2012, columns 605 to 607

15 Q 212

16 Ev w10

legislation could be resolved by Parliament, given the dual pressure on Members of Parliament as parliamentarians and party members. Daniel Greenberg said that for MPs the real answer was: "at the end of the day [...] do you care or don't you?"[17]

18. The Constitution Society told us that the primary reason for poor-quality legislation was political: "There are very strong political pressures on governments, and individual ministers, to push through large quantities of new legislation on tight timetables and with insufficient preparation."[18]

19. The Rt Hon Mr Nick Raynsford MP noted that there was no consensus on the role of legislation:

> There is widespread confusion about the purpose of legislation, with many media and political commentators seeing it as evidence of action ("something must be done") or as a test of a government's political standing (the ability to secure passage through both Houses of Parliament) rather than its likely effect and impact.[19]

20. First Parliamentary Counsel said that he recognised the concept of "initiative-itis" where legislation is brought forward because a Minister wishes to be seen to be doing something. However, he suggested that most legislation was "pretty solid, worthy stuff".[20]

21. We asked witnesses whether there had ever been a golden age of legislative standards and scrutiny by Parliament. Lord Norton of Louth, Professor of Government, University of Hull, told us:

> there has never been a golden age, either in Parliament or particularly in legislative scrutiny,[...]. If anything, it is slightly less bad now than it was 30 or 40 years ago. The biggest change, I suppose, is the switch from Standing Committees to Public Bill Committees. There is slightly more time devoted to Committee Stage than there used to be, and the Government are slightly more willing to consider amendments, but the points are relative. In other words, you are starting from an incredibly low base of bills being rushed through and the Government not being willing to consider amendments.[21]

22. The Hansard Society considered the role of Parliament in setting and ensuring standards. It argued:

> Parliament should at least be a partner in the process of setting the standards of what constitutes a well prepared piece of legislation, rather than permitting the executive to determine this from bill to bill. If Parliament is serious about checking the growth of the statute book and improving the quality of law-making, then it must be both more imaginative and muscular in asserting its role and function vis-à-vis the executive. The goal should be to build in some incentives and constraints—some

17 Q9

18 Ev w16

19 Ev w1

20 Q 67

21 Q 203

> checks and balances—to the legislative process at the parliamentary end such that they might restrain the executive from bringing forward hastily prepared, ill-thought out legislation.[22]

23. The Better Government Initiative told us that "changes in Parliament and changes in the Executive [are a] single complementary package with two elements of equal importance. Both are needed."[23] Similarly, Lord Maclennan of Rogart emphasised the importance of improving the public's perception of Parliament and parliamentarians, and that this could be assisted by showing Parliament and the Executive working together effectively and efficiently to produce better quality legislation.[24]

24. An example of a recent legislative innovation which we were told merits further improvement was provided by Lord Norton, the Rt Hon Mr Nick Raynsford MP, the Hansard Society and the Parliament First All Party Parliamentary Group. They suggested that after oral evidence has been heard by a Public Bill Committee, there should be a break in the Committee's timetable to allow the Committee time to reflect upon what it has heard, as well as considering written submissions and any Public Reading Stage, rather than immediately beginning line by line scrutiny.[25] This would allow time for amendments to be drafted based upon the evidence heard, and submitted in good time, thereby increasing the likelihood of the amendments being selected for debate.

25. **We recommend that a week should elapse between the conclusion of Public Bill Committee evidence sessions and the start of line by line scrutiny, to allow Members enough time to consider the evidence they have heard, and for amendments to be drafted and selected for debate.**

26. We also received evidence from the Better Regulation Executive who suggested that the greater use of Impact Assessments by Parliament during the legislative process could help to improve legislative standards, and highlighted the importance of Impact Assessments[26] as a "genuine challenge" within Government.[27] The quality of Impact Assessments is overseen by the independent Regulatory Policy Committee (RPC), and it is rare for Ministers to proceed with measures that have not been cleared as acceptable by the RPC. We were told that "the existence of the RPC has ensured better analysis is provided for many policies and has caused some to be rethought entirely."[28]

27. Impact Assessments are also used effectively in the scrutiny of secondary legislation by the House of Lords Secondary Legislation Scrutiny Committee, but there is less information as to Parliament's use of Impact Assessments to scrutinise primary legislation.

22 Ev w18

23 Ev w10

24 Q 206

25 Q 214, Ev w19 and Ev w57

26 Impact Assessments are documents published with a bill which show the potential positive and negative consequences of an Act, and the weight that the Government has applied to each potential consequence.

27 Ev w38

28 Ev w38

28. **Parliament must have a stronger role as a partner with the Government in setting and monitoring standards of legislation. This will require a change of attitude by parliamentarians in asserting their role and "caring more" about legislative standards, and in using existing processes and documents, such as Impact Assessments, more effectively. It may also require the creation of new mechanisms to assist them in the performance of their legislative duties. A change in attitude by Government is also required in its work with Parliament.**

Preparation of and deliberation on legislative proposals

29. The Better Government Initiative highlighted preparation as key to ensuring high quality legislation. They separate the production of legislation into three stages: preparatory work by the Government; drafting by Parliamentary Counsel; and parliamentary scrutiny. They commented:

> Our concern is with the first and third stages: setting standards for preparatory work on policy development that will ensure that the instructions to Counsel are capable of being turned into high quality legislation and providing Parliament, as an input to the scrutiny process, with an explanation of how those standards have been applied.[29]

30. Ms Alison Seabeck MP thought one problem contributing to poor quality legislation was the limited amount of information given to Members:

> what frustrates me most is the fact that we are being asked to legislate time and again, 'blind'—without being able to see the relevant accompanying documents and guidance because they either aren't available at all or are the subject of a consultation running in parallel with the Bill.[30]

31. A number of witnesses highlighted the importance of timely and effective consultation, with the Better Government Initiative suggesting that once a bill has received a slot in the legislative timetable it is often too late in the legislative process to consult because by that point the policy is often fully formed.[31] Dr Ruth Fox argued that "a draft can only be as good as the policy that underpins it."[32]

32. Some of our witnesses criticised the omission of a specific reference to the need for legislation to be of a good standard in the Civil Service's *Guide to Making Legislation* and also within the description of the functions of the Cabinet's Parliamentary Business and Legislation Committee.[33] Adam Pile, Head of the Parliamentary Business and Legislation Secretariat, Economic and Domestic Secretariat, Cabinet Office, told us he had considered the criticisms, but did not think they were fair because in his opinion, the need for

29 Ev w10

30 Ev w3

31 Q 100

32 Q 166

33 Ev w23

legislation to be of a good standard was taken by the Civil Service as a "given" within the "real stress-testing process" undertaken on each bill.[34]

33. We asked Daniel Greenberg to set out what he thought was the ideal process for the passage of legislation. He highlighted the importance of allowing time for proper preparation, scrutiny and discussion of policy before a bill is introduced, including Green Papers, Select Committee inquiries, White Papers and pre-legislative scrutiny,[35] although he cautioned against overuse of consultation as "at the moment so many organisations outside Parliament are drowning in government consultations; [...] they find it impossible to respond to them."[36]

34. **Proper preparation of policy is crucial. Clear, coherent policy which has been subject to challenge and revision will aid Parliamentary Counsel in drafting comprehensive and comprehensible bills. To require a formal draft to be produced before the policy preparation process has finished is to put the cart before the horse, necessarily increasing the risk of error and need for parliamentary time to be taken up with amendments.**

35. **Good quality preparation should begin at an early stage and include proper consultation, timetabled to conclude before a bill is introduced; such consultation may need to be targeted to avoid overloading individuals and organisations with Government consultations. Responses to consultations should be available for Parliament before first reading.**

36. **We think that a legislative process that involves a Green Paper, followed by consideration of expert advice, a White Paper and pre-legislative scrutiny prior to introduction would produce high quality legislation. We do not think that this is achievable or desirable for every bill because of the time and resources required to complete all of the stages. However, we consider that, as stated in our Report on the *Fixed-term Parliaments Bill*, the Government should and can utilise the potential greater certainty provided by fixed terms for effective and efficient legislative planning. This would allow enough time for these preferred processes for legislation to be adopted for the majority of bills.**

37. We were interested in the suggestion that for the Civil Service the need for legislation to be of "good standard" is "a given".37 However, there is a difference between something being "a given" in principle, and "a given" in practice. This means that a civil servant should know what good law looks like, not simply that good law is a good idea. **We recommend that the Cabinet Office's *Guide to Making Legislation* should adopt and set out a Code of Legislative Standards as agreed with Parliament, and emphasise the need to work with Parliament to ensure those standards are met.**

34 Q 302

35 Ev 90

36 Q 2

37 Q 302

Drafting and the Office of the Parliamentary Counsel

38. We commend the Office of the Parliamentary Counsel for its clear commitment to the pursuit of excellence in drafting.[38] Previous reports on the quality of legislation have focused on the quality of legislative drafting.[39] However, our witnesses did not consider that technical drafting skills were the principal cause of or contributor to poor legislative standards.[40]

39. Richard Heaton, First Parliamentary Counsel, and David Cook, Second Parliamentary Counsel, described some of the changes made by the Office of the Parliamentary Counsel to improve legislative standards. They told us that the Office has worked to make legislation more accessible, by focusing on plain language drafting techniques. They have also made changes to the formatting of legislation, including breaking down sentences into shorter paragraphs, together with increasing amounts of white space to improve readability.[41] They emphasised that this was an ongoing process, and that they remain open to new ideas for improvements.

40. Parliamentary Counsel are civil servants employed by the Government, not employees of Parliament; but they do have a particularly important relationship to Parliament, acting as a bridge between the Civil Service and Parliament and parliamentary Authorities:[42] for example, discussing the scope of a bill and the grouping of amendments tabled to a bill, and liaising between Parliament and the Civil Service Bill Team.[43]

41. We asked First Parliamentary Counsel whether there would be advantages in creating parliamentary counsel for Parliament to advise on and draft amendments and legislation. He suggested some pros and cons:

> a. You would need to consider value for money quite carefully. Drafting resource is quite expensive, and [...] amendments and bills are prepared to a high level by this office already before they reach the statute book, there is a risk that the extra resource would be spent on drafting to a professional standard things which are not destined to become law. There is indeed an advantage in non-government amendments being drafted in non-technical and readily understandable terms, [...]
>
> b. You would need to manage expectations of what a professional drafting office would deliver. Drafters cannot by themselves guarantee a high standard of amendments or bills: policy and legal analysis is also needed.
>
> c. On the other hand, a system of exchanges between my office and a parliamentary drafting office would certainly improve our understanding of the pressures and

38 Q 29

39 Report of the Renton Committee on the Preparation of Legislation (Cmnd. 6053)

40 For example, Q 104

41 Qq 34-35

42 Q 43

43 Ev w7

> demands on parliamentarians (and vice versa). It might in time lead to a greater sense of ownership by Parliament of the legislative process.[44]

42. The Northern Ireland Assembly told us about a new system it had introduced that "has been operational since September 2011 under which the Speaker will grant access to professional drafting services conditional upon the Member adhering to guidance."[45] We asked the Leader of the House for his view on whether such resources should be made available to Parliament. He told us that he did not see the Office of the Parliamentary Counsel as being reserved for Ministers. He saw the relationship of Counsel with the House authorities as an instrumental part of enabling the House to do its job properly, as well as Government.[46]

43. We were also interested in the role of Parliamentary Counsel at the Law Commission, where Parliamentary Counsel are embedded. The Law Commission explained how helpful this was:

> The embedded Parliamentary Counsel team is responsible for drafting the Law Commission's law reform bills on the instructions of the relevant law reform team.
>
> [...] the discipline of translating our ideas for law reform into legislation is also of enormous benefit in our development of good law, in that it provides us with an opportunity to test the viability of our provisional proposals.
>
> Our Parliamentary Counsel are also available to give advice on questions relating to legislation and parliamentary procedure arising in the course of the Commission's work. This has been particularly valuable on the occasions when we have supported the implementation of Law Commission bills.[47]

44. In considering the role of the Office of the Parliamentary Counsel in ensuring standards, Richard Heaton, First Parliamentary Counsel, told us:

> I think there is something my office can do in terms of promoting quality of legislation and good law principles within government, talking to parliamentarians, talking to users, talking to judiciary. I think there is a role for Parliamentary Counsel in saying, "This is what good legislation looks like and these are the upstream things that will help make better legislation." There is an area there that I would like my office to be a bit more visible and to have a greater leadership role in. It is early days and we are treading quite cautiously, but I do think there is a good law championship role that this office can help to lead.[48]

45. On 16 April 2013, the Office of the Parliamentary Counsel launched its "Good law" Initiative to consider and analyse the challenges of producing legislation and, as a first step, published a review into the causes of "complexity" in legislation. The Initiative aims to:

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44 Ev 92

45 Ev w50

46 Q 275

47 Ev w30

48 Q 55

- build a shared understanding of the importance of good law;
- ensure that legislation is as accessible as possible, and consider what more can be done to improve readability;
- reduce the causes and perception of unnecessary complexity;
- talk to the judges who authoritatively interpret the law and to the universities which teach it, to avoid confusion and facilitate interpretation.[49]

46. **We agree that there is a "good law championship role" for the Office of the Parliamentary Counsel and welcome the launch of their "Good law" Initiative. Their position as specialists in the drafting of legislation and knowledge of parliamentary procedures, as well as their connection to the Law Commission, means that they are ideally placed to undertake this championship role. We look forward to working with them to take forward the recommendations in this Report, and to build upon the preliminary work of the "Good law" Initiative.**

The effect of poor quality legislation

47. Throughout our inquiry witnesses have provided examples to explain how the procedural and parliamentary problems they identify can create bad quality legislation. Dr Ruth Fox provided some case studies for us; for example, the Department for Communities and Local Government, which did not consult other relevant Departments on the 2008 Planning Bill and as a consequence produced 70 pages of late technical amendments at Report stage, or the Coroners and Justice Act 2009, which she suggested was too large to be properly scrutinised by Parliament. [50]

48. From the examples provided by our witnesses we have identified some common principles which, if applied to legislative proposals, would minimise the risk of such problems occurring:[51]

a) Policy should be well-tested, for example, through the use of internal and external consultation;

b) Pre-legislative scrutiny is an important stage in refining a bill and in ensuring that changes made post-consultation have been effectively and appropriately incorporated. It should also minimise the occurrence of late substantive amendments;

c) Legislation must be necessary, without duplicative powers or remedies;

d) Legislation should be to the point, with proper justification for extraneous material or large multi-topic bills.

49. It is important to determine the practical effect of "bad quality" legislative standards once an Act has received Royal Assent. We were told that judges were making increasing

49 Cabinet Office and the Office of the Parliamentary Counsel, *When laws become too complex*, March 2013

50 Q 165

51 The detailed response provided by Dr Fox can be found at Q 149

use of the "Inco rule" which allows Courts to correct obvious drafting errors by, in suitable cases, adding, omitting or substituting words to discharge the Court's interpretive function.[52] Lord Nicholls of Birkenhead set out the test. He said that the power was confined to "plain cases of drafting mistakes":

> Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance.[53]

50. The recent judgment in *R (Noone) v The Governor of HMP Drake Hall*[54] provides an example of a case where poor quality legislation resulted in what should have been a simple question necessitating an appeal to the Supreme Court. The case concerned the inter-relationship between the sentencing provisions of the Criminal Justice Act 1991 and the Criminal Justice Act 2003 for prisoners serving consecutive sentences of above and below 12 months. The Court was attempting to work out the date on which the Appellant became eligible to be considered for a home detention curfew. The answer was dependent upon which of the two schemes contained in the two Acts applied, or whether a third scheme pursuant to the transitional provisions applicable between the two Acts applied.

51. The Supreme Court held that an interpretation of the transitional provisions had "wholly implausible and unacceptable consequences". Lord Judge commented:

> Ill considered commencement and transitional provisions, which have to negotiate their way around and through legislation which has been enacted but which for one reason or another has not or will not be brought into force, add to the burdens.
>
> [...]The explanation for the problem is simple. For too many years now the administration of criminal justice has been engulfed by a relentless tidal wave of legislation. The tide is always in flow: it has never ebbed.
>
> [...]It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date.

52. This case is a clear example of bad quality legislation requiring time and money to be expended to rectify problems which could and should have been identified during the preparation of the policy or at the very least rectified during the Bill's passage through Parliament.

52 Q 25, *Inco Europe Ltd. v First Choice Distribution* [200gvb0] 1 WLR 586

53 Ibid p.592F

54 [2010] UKSC 30

53. **We conclude that the majority of poor quality legislation results from either inadequate policy preparation or insufficient time being allowed for the drafting process, or a combination of the two. This is not to point the finger at the Office of the Parliamentary Counsel, which neither produces policy nor determines the speed with which policy is to be transformed into legislative proposals.**

3 A draft Code of Legislative Standards

54. Sir Nicholas Monck, on behalf of the Better Government Initiative, stated: "What is needed is [...] some standards – preferably agreed between Parliament and the Executive – against which what is presented to Parliament [...] can be judged."[55] The Hansard Society, represented by Dr Ruth Fox, agreed, and recommended a two stage process of agreeing a list or code of legislative standards: pre-discussion and dialogue, followed by translation into practice by the Executive and Parliament.[56]

55. **Overall there is a level of consensus amongst our witnesses that part of the solution to improve legislative standards is to formulate a set of standards which legislation should meet. We do not think that legislative quality will improve without an objective set of quality standards against which to compare and judge bills and Acts, agreed between Parliament and the Government. Without such a list the decision that a piece of legislation is or is not of bad quality remains highly subjective. As a first step in the process of reaching such agreement, we have drawn up a draft Code of Legislative Standards (see Annex A), which we urge the Government to consider.**

56. The Better Government Initiative and the Hansard Society argued that an agreed code of legislative standards should be used by a Legislative Standards Committee to scrutinise compliance of bills with agreed quality standards, and we discuss the concept of a Legislative Standards Committee in the next chapter. Given the comments made by the Leader of the House about the introduction of a Legislative Standards Committee, we have drafted the draft Code so that it can be used with a Legislative Standards Committee, or stand on its own without a Legislative Standards Committee, as guidance for Departments and a yardstick for parliamentary scrutiny of quality standards. Our draft Code presents a neutral Code of Legislative Standards, albeit shaped by discussion about a Legislative Standards Committee.

Scope and remit

57. Before attempting to draft any code of legislative standards it is important to draw together the criteria that it must meet, the problems it must address, and the type of document that we would wish to see produced. In doing so, we note that the idea of a checklist to aid scrutiny is not new; there are a number of examples and much preparatory work has already been done.[57]

58. Our draft Code is necessarily shaped by the evidence we heard on both the problems posed by, and the need for a Legislative Standards Committee (as discussed in the next chapter). Those arguments suggest that any code must:

a) Be politically neutral in tone and style of questions;

55 Q 108

56 Q 154

57 Ruth Fox and Matt Korris, *Making Better Law: Reform of the legislative process from policy to Act* (Hansard Society, 2010); House of Lords, *Report of the Leader's Group on Working Practices*, Session 2010-12, HL Paper 136; Better Government Initiative, *Good Government: Reforming Parliament and the Executive* (2010)

b) Encompass a mixture of easily-supplied factual information and longer opinion-based explanations;

c) Require policy to be explained by reference to the contents of the bill, without questioning the substance of the policy;

d) Allow a succinct, workable document to be produced by the Government, which can be scrutinised by Parliament easily without the need for evidence to be called.

e) Not trespass upon the remit of existing Committees, including Committees considering secondary legislation;

f) Be sufficiently flexible to adapt to the challenges to legislative quality presented by emergency legislation.

59. In addition, any code must attempt to answer the criticisms of the current legislative system that we discussed in the previous chapter.

The draft Code of Legislative Standards

60. In producing our draft Code we drew on a number of sources, set out at Annex B. We have adopted a number of the detailed criteria suggested by our witnesses for inclusion within our draft Code.[58] We have also made the requirements as objective and politically neutral as possible in order to avoid straying into the realms of debating policy or the principles of a bill – debate which is more appropriately conducted by those charged with scrutiny of the bill during its passage through Parliament.

61. For instance, where proposed or existing scrutiny list criteria suggest requiring "justifications" to be provided or comment upon the "necessity" of provisions, we consider that such terms risk creating the appearance of subjectivity and have therefore altered the wording to be more neutral, or have adopted similar criteria from a different existing scrutiny list. By way of illustration, as part of the scrutiny role of the House of Lords Delegated Powers and Regulatory Reform Committee, that Committee requires the Government to supply a memorandum to the Committee on the delegated powers in Government bills, to include an explanation by the Government of the purpose of every provision for delegated legislation.[59] This requirement is objective and more neutral than a requirement to "justify" a provision, and its successful use indicates that it has not been deemed to stray into subjective areas such as consideration of policy. We adopt similar wording within our code.

62. Some of the recommendations made by our witnesses, or included within existing scrutiny lists, relate to secondary legislation and information that is already being provided to existing Committees. We have modified these recommendations so that the information is provided to inform Parliament and for the sake of completeness, but the presentation is in the form of a list without explanation, thereby not duplicating the role of the existing

58 Ev w22 For example, the Hansard Society's evidence suggested including questions such as, "Why the bill has not been subject to pre-legislative scrutiny".

59 As published in its *Guidance for Departments on the role and requirements of the Committee*

Committees. The exception is for "marker clauses"[60] where because of their clear link to questions of preparation of legislation, we consider it appropriate for a short explanation to be provided.

63. The House of Lords Secondary Legislation Scrutiny Committee suggests in its guidance to Departments that they provide an Explanatory Memorandum that follows a set format. The Guide specifies that in the Explanatory Memorandum, "Plain English should be used to explain to the lay reader in two or three sentences what the instrument does and why. This is to help the reader to identify what the instrument is about and whether it is the item they are looking for." **We consider that the exercise of distilling what a bill does, and why (or for large multi-topic bills each part of a bill), into a short paragraph would provide clarity and assist both the Executive and Parliament; the better quality Explanatory Notes already do this. Paragraph B of our draft Code encapsulates this as a requirement.**

64. When drafting the draft Code it also became clear that for some standards there was consensus that a particular process or providing specific information could be deemed an agreed quality standard that should be met. For example many of our witnesses favoured the inclusion of review and sunset clauses in order to improve scrutiny of fast-track and emergency legislation. The frequency of use of fast track and emergency legislation is also an area of concern to other Committees.[61]

65. Daniel Greenberg, in discussing methods of improving legislative scrutiny more generally, gave two examples of where sunset and review clauses are being used effectively to provide an opportunity to return to and consider correcting bad quality legislation:

> I think a sunset clause is a fantastic way of ensuring that people have to come back and look at whether the circumstances are the same. How has it worked in the meantime? [...] as we used to with the Northern Ireland legislation, [...] you had to come back and debate it every single year or every period and you had to brief the minister on how it had worked in the interval, because if you didn't you wouldn't get your extension. I am very strongly in favour of them.[62]
>
> The Government have increasingly introduced review clauses into secondary legislation that implements European Union legislation. They are not sunset clauses because they don't carry a cut-off, but they do require formal review of the legislation at particular intervals and a report to Parliament, so that is another way of doing it.[63]

66. A further example which we have included within our draft Code of Legislative Standards is a requirement, suggested by the Hansard Society amongst others, that the

60 A clause which, although containing a plausible legal proposition in itself, for example, "The Minister may make provision for X...", is destined to be replaced by more detailed provision in due course.

61 Joint Committee on Human Rights, 9th Report of Session 2012-13, Legislative Scrutiny Update, HC 1077, HL Paper 157, at para 25 and 43

HL Select Committee on the Constitution, 12th Report of Session 2012-13, *Jobseekers (Back to Work Schemes) Bill*, HL Paper 155, at para 7.

62 Q 7

63 Q 19

Government provide a "Keeling-like" schedule for bills which propose to make substantial amendments to an earlier Act, in order to assist Members and the public in their scrutiny.

67. A Keeling schedule is part of the bill showing the text of an existing Act as it would look if amended as proposed by the bill. Lord Norton suggested that draftsmen do not like them because they create opportunities for confusion if the amending clause and Keeling example are not consistent, as both form part of the Act and both are legally enforceable. A "Keeling-like" schedule, on the other hand, shows the same information, but is produced independently of the bill and is therefore a useful explanatory guide, but is not legally enforceable. Lord Norton said that Keeling-like schedules were "helpful to Members, as they can see straight away the scale of the change and how it has been changed."[64]

68. Our witnesses discussed the pros and cons of certain drafting techniques, but without a clear consensus emerging. For instance, in relation to purpose clauses, Daniel Greenberg, former Parliamentary Counsel, was in favour of the inclusion of "a clear statement of purpose on the face of [an] Act."[65] In contrast, as David Cook, Second Parliamentary Counsel explained, the view of the Office of the Parliamentary Counsel has been historically against purpose clauses, because they risk introducing "a conflict between the specific provision and the purpose as expressed and therefore creating some sort of legal doubt".[66] The Law Commission told us that purpose clauses were sometimes useful, but that this was really a matter of judgment for the draftsman. They were persuaded, however, that there were "real advantages in publishing somewhere a statement of policy objectives."[67] This is an example of an area where it could not be said that a "standard" currently exists, but where the provision of information about the use of such clauses could be used to aid consideration of whether they help create good quality legislation and should be added to the Code of Legislative Standards as an agreed standard.

69. **We present our draft Code of Legislative Standards as the basis for discussion and agreement between Parliament and the Government as to legislative standards. We recommend that the Government undertake work to refine the draft Code, and produce a new version for discussion and agreement with both Houses of Parliament.**

Presentation of information about standards

70. The Leader of the House suggested that information about standards could be presented to Parliament in a new style of Explanatory Notes.[68] The Hansard Society has suggested that "the quality of [Explanatory Notes] is highly variable and they do not require departments/ministers to provide parliamentarians with detailed information about many of the decisions taken, particularly in relation to the legal context and technical standards of the legislation."[69]

64 Q 237

65 Q 25

66 Q 88

67 Q 265

68 Q 311

69 Ev w26

71. **We recommend that information and answers required by a finalised Code of Legislative Standards are provided to Parliament in the Explanatory Notes to a bill. We think that this is the simplest and most logical place for details to be provided by the Government, rather than a further category of parliamentary document being created. It also has the advantage of firmly and clearly linking standards to the bill. We acknowledge that the best Explanatory Notes already include many of the details we suggest in our draft Code, but the quality is variable. We hope that compliance with the finalised Code of Legislative Standards will help to improve the overall quality of Explanatory Notes.**

4 Legislative Standards Committee

The concept

72. A number of witnesses favoured the creation of a new parliamentary Legislative Standards Committee to ensure that bills comply with agreed technical and procedural criteria.[70] While their views on its precise operation varied slightly, a basic format emerges from their evidence:

a) The Minister in charge provides a statement or certifies to Parliament that the agreed standards have been met;

b) The Legislative Standards Committee scrutinises the bill against the agreed standards;

c) The Legislative Standards Committee reports to the House (or Houses) whether the standards have been met, and (if not) recommends remedies. If the Government is not prepared to accept the remedies, the Government must ask the House to overrule the Legislative Standards Committee.

Why would a Legislative Standards Committee ensure good quality legislation?

73. We were told by witnesses who support the creation of a Legislative Standards Committee that such a committee would benefit Parliament and ensure high quality legislation. Lord Butler commented "it would be a useful thing that Parliament could do to press government in the right direction, because ministers do not like being criticised by a committee for not having maintained the standards that they themselves have set."[71]

74. Supporters of a Legislative Standards Committee point to the effectiveness of Select Committee scrutiny, Reports and guidelines to Departments in promoting and forcing change upstream in Whitehall. For example in 1995 the Treasury and Civil Service Committee drafted a Code of Practice for civil servants which was adopted by the Government and became the Civil Service Code.[72] These witnesses also commend the work of existing Joint Committees and Committees in the House of Lords which use standards checklists and guidance to Departments effectively.[73] For example, the Hansard Society considers that the Delegated Powers and Regulatory Reform Committee in the House of Lords provides an excellent example of how Parliament can add value and influence Government:

> The Cabinet Office Guide makes clear that it is usual for the government to accept most, if not all of the Committee's recommendations, and consequently there 'is, therefore, benefit in departments anticipating the views of the DPRRC when drafting the bill to avoid the need for amendments. The DPRRC's advisers are willing to be

70 For example, Ev w10 and Ev w18

71 Q 116

72 Q106

73 Q 206

consulted informally before introduction.' Again, this is indicative of how this type of Committee approach can add value to the legislative process and influence legislative development up-stream in Whitehall. As such, these committees perform a constructive and valuable role in the legislative process.[74]

Critique of the concept

Policy

75. One of the main objections to a Legislative Standards Committee is that in order to perform a scrutiny role, it would need to consider the merits of policy, and would therefore be drawn into a political critique, rather than answering purely objective questions about standards. The Leader of the House told us:

> I do not understand how you scrutinise a piece of legislation without understanding the policy as well as the drafting. [...] When I engage with my colleagues, [...] I do it on the basis that my first job is to understand the policy. I do not try to have a discussion with them about the quality of legislation without knowing what it is that they are trying to achieve, and I do not see how a legislative standards committee could possibly embrace the expertise and give the time in order to understand the policy on this volume of legislation coming through.[75]

76. We put the Leader of the House's points to the Better Government Initiative. They answered:

> We think it is perfectly possible to judge whether there has been a serious policy process without attempting to judge the merits of the proposed policy. Our proposals for the content of standards [...] were designed to show how this can be done. For example [...]: "define the substantive problem; explain why new legislation is operationally necessary (not declaratory)".
>
> Both concern the preparatory process. The answer to the first is not an assessment of the policy but whether a clear definition of the problem (or perhaps problems) to be fixed is available. If it isn't, it strongly suggests that the preparation has been inadequate.[76]

77. On the other hand, Professor Dawn Oliver, Emeritus Professor of Constitutional Law at UCL, advised:

> it is important not to be too chary of getting into substance or merits because obviously there are matters to do with human rights compatibility, international law requirements and constitutional issues that are important and substantive. Often, they are not that political. I think it would be a pity if those in charge of scrutiny felt

74 Ev w24

75 Q 306

76 Ev w15

> that they could not go into that sort of thing because it looked too much like substance.[77]

78. Objectivity was deemed highly necessary by the Constitution Society, as its Director, Nat le Roux, commented:

> if a Legislative Standards Committee is to be effective, what it is doing has to be as objective as possible in terms of standards. If there is a grey area that is somewhere between policy content and standards of legislation, that has to be conceded to government.[78]

Votes on recommendations

79. We heard evidence from the Better Government Initiative and Hansard Society about how the Legislative Standards Committee's reports could be used to amend bills where the Committee decided that quality standards had not been met. The Hansard Society suggested that in the event that the Legislative Standards Committee concluded that a bill did not meet the standards, there should be two options. The first is to invite the Government voluntarily to withdraw its bill and remedy the deficiencies identified by the Committee. If the Government declined voluntarily to withdraw its bill, the second option is that the Legislative Standards Committee's findings could be referred to the House where the bill had been introduced, and that House would then be invited to vote on whether or not to endorse the LSC report and defer the bill pending improvements, or reject the LSC recommendation and allow the bill to proceed to the next legislative stage in the normal way.[79]

80. The Rt Hon Mr Nick Raynsford MP suggested that there was a danger of conflict between a Legislative Standards Committee on this model, and the Government. He thought that it could come to be seen by the Government "as an obstruction to the elected Government's mandate to carry out its policy."[80]

Tick-box exercise

81. A further criticism levelled against the idea of a Legislative Standards Committee is that, far from creating change "upstream" in Whitehall, the exercise would become a tick-box process with no value and certainly without any impact on the quality of legislation. Daniel Greenberg summarised the doubts of many opponents of a Legislative Standards Committee when he said that there was a danger that the Committee would not in itself address real issues of legislative quality:

> If the committee were to be a mere checklist of purported compliance with a new set of procedural or administrative requirements—such as the production of impact assessments—it is hard to see how it could have real influence on the quality of

77 Q 170

78 Q126

79 Ev w20

80 Q 219

> legislation. But if it were required to satisfy itself that compliance with new requirements had been rigorous and effective, and had influenced the overall result in a reasonable and proportionate way, it is hard to see how it could avoid considering questions of policy and drafting.[81]

82. The Leader of the House agreed: "It is the language [of a code] that drives you to the tick-box approach. If you treat it as a code, you say that somebody must be the enforcers of the code, and so on."[82]

83. Dr Ruth Fox told us that there was a risk that it could become a tick-box exercise, but by trialling the Legislative Standards Committee process any tick-box problems could be resolved, or if they could not, the process could be stopped.[83]

84. Professor Dawn Oliver considered that the inclusion of special or legal advisors to report on and draw committee members' attention to areas where quality standards were not met, could guard against a tick-box mentality and processes.[84]

Overlap with pre-legislative scrutiny

85. The evidence we received from Mr Hugh Bayley MP echoed the suggestions of many of our witnesses that pre-legislative scrutiny should become the norm for all Government bills. He was not convinced that a Legislative Standards Committee would "be more effective in producing better legislation than pre-legislative scrutiny".[85] Many witnesses, including the Leader of the House, were in favour of pre-legislative scrutiny, but accepted that it could not be applied to every bill.[86] We put the question of the Legislative Standards Committee's potential overlap with pre-legislative scrutiny to Dr Ruth Fox of the Hansard Society, who answered:

> Pre-legislative scrutiny will look at policy in a way that this wouldn't. There is an issue, for those bills that do get pre-legislative scrutiny, about how to manage the procedural side. You would have to think carefully about the interface there. You also have to think about the interface of a legislative standards committee with other committees that are looking at some of the technical aspects, such as delegated legislation.[87]

86. In addition, the Leader of the House set out a number of questions which he suggested would have to be answered satisfactorily before an effective Legislative Standards Committee could be established:

> ...let us take one or two pieces of legislation that have come through the House recently and ask, at what point would the legislative standards committee have

81 Ev w51

82 Q 301

83 Q 153

84 Q 186

85 Ev w4

86 Q 278

87 Q155

> looked at it: at introduction or after introduction? How much time would they have taken? How would that have interacted with the scrutiny that took place? Would it not have been duplicatory? Would it not have added delay? Where would the time have come from? Who would have sat on the Committee looking at it? How would the Members have interacted with the Bill? Who would have been their advisers, and how would that have worked? Probably, the more you looked at it, the more you would have ended up saying that, in order to do that job properly, you would have imported into the legislative standards committee exactly the kind of people, expertise and time that is the stuff of pre-legislative scrutiny now anyway.[88]

87. The Hansard Society suggest that the Leader of the House's answer "lays bare the key dilemma [...]: Is the Committee and Parliament as a whole prepared to continue to 'take it on trust' that the Government (of this or any future political complexion) is committed to continuous improvement of legislative standards?"[89]

Is it practical?

88. The Leader of the House's comments question whether a Legislative Standards Committee is a practical proposition. We have examined this from several perspectives.

Timing

89. The Hansard Society suggested the creation of a new parliamentary stage between first and second reading: "A bill would therefore be formally introduced to the House by the Government but whether it progressed to the second reading stage would be dependent upon successfully navigating an examination by this new LSC [Legislative Standards Committee]."[90] It has calculated that although it "is difficult to judge exact timings [...] government departments would likely need to build in up to four weeks for the LSC stage".[91]

90. The Leader of the House made clear his opinion that legislation must not be delayed[92] and that any solution we put forward must explain how much time would be taken and from where.[93] Lord Norton told us that the key question was how far back in the legislative timetable the Committee could start the process. He considered that an option where the Committee considers a bill the moment it is introduced "is extraordinarily tight in terms of the time available to be able to report to the House." He therefore suggested that one solution would be to refer the bill to the Committee before first reading "so that when it is actually introduced, it carries, if you like, a certificate that it has been considered by the

88 Q 310

89 Ev w23

90 Ev w20

91 Ev w25

92 Q 306

93 Q 310

committee." He suggested this had the advantage that any problems identified could be resolved with the Department and Minister before Introduction.[94]

91. Existing parliamentary scrutiny committees do fit within the legislative timetable and are rightly praised for their work; for example, the House of Lords Secondary Legislation Scrutiny Committee normally comments on statutory instruments within 12 to 15 days of their being laid before Parliament. The Joint Committee on Statutory Instruments also processes instruments promptly: under Standing Orders, no motion may be moved for an affirmative resolution of the House of Lords in connection with any statutory instrument subject to scrutiny by the Joint Committee until the report of the Joint Committee has been laid before the House. However, as Parliament has already endorsed the principle of the statutory instrument, this process cannot be considered truly analogous to scrutiny of primary legislation.

92. **We are not convinced that the extra time needed to assess the quality of legislation can be built into the legislative timetable after first reading and before second reading. If bills were to be presented to the Committee before first reading, with the aim of suggesting amendments be made to the bill by the Government, then that bill would necessarily be a draft bill, and the process would be, in effect, a form of pre-legislative scrutiny.**

Staffing

93. The Hansard Society suggested that the Legislative Standards Committee would need to be staffed similarly to the Joint Committee on Statutory Instruments:

> The Committee would be resourced on similar lines to other committees performing technical, criteria based scrutiny functions. Taking the JCSI as an example, the Committee would probably need, at a minimum, two clerks (one from each House [if it is a Joint Committee]), a couple of committee assistants, and between six to eight advisors/counsel. Additional support might be provided, as needed, by the Scrutiny Unit. The Committee would also have access to support from the team of media officers in each House, [...]. One advantage of a Joint Committee would be that the resource implications of the LSC could be shared jointly by both Houses, thus making the investment more manageable. The advisors/counsel need not be directly employed by either House but could be contracted on a consultancy basis as and when required.[95]

94. **We agree with the Hansard Society that a standards committee on its model would require a committee staff similar in size and expertise to that of the Joint Committee on Statutory Instruments. We do not think that, in the present economic climate, funding would be available for a committee staff of this size and expertise.**

94 Q 242

95 Ev w25

Our proposed mechanism

95. **We conclude that the overall concept of a Legislative Standards Committee is a good idea. We consider that, whilst Parliament and the Executive could agree standards without such a Committee, the introduction of a Legislative Standards Committee would have the following benefits:**

a) **It enables Parliament to be a full partner in ensuring standards;**

b) **It provides parliamentary oversight of the standards process, thereby encouraging change;**

c) **It allows for a continuing process of investigating and refining standards;**

d) **It provides a public face for scrutiny of legislative standards, rather than relying upon the closed procedures of the Cabinet's Parliamentary Business and Legislation Committee.**

96. **It is clear that the proposed Legislative Standards Committee should:**

a) **Avoid consideration of the merits of policy;**

b) **Use an agreed set of standards drafted and applied in a manner so as to prevent a tick-box approach;**

c) **Be objective in its critique and recommendations;**

d) **Meet the concerns raised by the Leader of the House as to delay and duplication.**

97. The Rt Hon Mr Nick Raynsford MP suggested a different model for ensuring legislative standards, and of a Legislative Standards Committee. Building upon the concept of a list of standards, he places the role of overseeing compliance with those standards with the Cabinet Committee responsible for approving proposals for new legislation (currently the Parliamentary Business and Legislation Committee). He considers that this removes the need for a Legislative Standards Committee in the format suggested by the Better Government Initiative, although he suggests that such a committee might have a role in overseeing whether standards are met as a whole, rather than concentrating on individual bills. He prefers this modified version of the Better Government Initiative's mechanism, because he thinks:

> The Committee's authority would be enhanced by not being part of the process of commenting on individual bills, where there would be a risk of the Committee being sucked into short-term party political conflicts. For that reason, it would, in my view, be best for the Legislative Standards Committee, if established, to be given a clear remit to oversee the whole process, but not themselves to evaluate the standards of any bill presented to the House, nor conduct the post-legislative evaluation of its effectiveness. [96]

96 Ev w2

98. We favour a variation on the model set out by the Rt Hon Mr Nick Raynsford MP. **We recommend the creation of a Legislative Standards Committee to provide oversight of the Cabinet's Parliamentary Business and Legislation Committee's approach to and use of the finalised Code of Legislative Standards. The Committee would have the flexibility to look at individual bills before Parliament, where a failure to adhere to the Code of Legislative Standards was obvious from the Explanatory Notes, but would normally focus its work on a selection of Acts that had recently received Royal Assent, scrutinising those Acts for compliance with the Code. This oversight model would fit within the current parliamentary legislative timetable and would not be as resource-intensive as a committee scrutinising every bill. We think that this model answers the questions proposed by the Leader of the House.**

99. **Our recommendations suggest the following process for ensuring legislative standards:**

a) **A Code of Legislative Standards is agreed between Parliament and the Government (and we suggest our own draft Code as a basis for discussion, as set out in Annex A);**

b) **The Cabinet Committee responsible for approving proposals for new legislation checks the information provided by the relevant Department and certifies (by internal process) that the standards are met. The Minister in charge of the bill is responsible for the quality of the bill at all stages of the legislative process, and for post-legislative review. The Leader of the House is responsible to Parliament for the decision to certify the bill as having met the agreed standards, and should expect to answer questions about the Government's approach to legislative standards in the Chamber;**

c) **The information required by the Code of Legislative Standards is provided to Parliament within a new model of Explanatory Notes;**

d) **The Legislative Standards Committee would principally provide oversight, analysing a selection of Acts that have recently received Royal Assent to ascertain whether the standards, as certified by the Cabinet's Parliamentary Business and Legislation Committee, are generally being met. The Legislative Standards Committee's findings can then be used by parliamentarians to ask questions of the Leader of the House or Minister in charge of the bill.**

e) **The Committee should have discretion, in exceptional cases, to:**

   i. **Analyse compliance of individual bills and report before second reading depending upon the time available;**

   ii. **In rare cases, analyse compliance of individual bills and report later in the legislative process when public and parliamentary scrutiny may have revealed quality issues.**

f) **The Committee should also be charged with regularly reviewing and recommending revisions to the Code of Legislative Standards.**

100. **We recommend that, initially, the Legislative Standards Committee follow an established model in terms of its procedural rules, such as that of the Joint Committee**

on Statutory Instruments, producing short analytical reports, and not seeking to bind either House or force votes on its recommendations. We think that there are benefits to starting with a more collaborative approach with the Government. Once the Committee is established, Parliament can investigate and evaluate the effectiveness of the Committee and Code of Legislative Standards, and consider whether there is a need for new procedures, including voting on the Committee's recommendations where the Government has declined to amend a bill.

101. **The disadvantage with our model is that there is no immediate sanction normally available to improve the quality of individual bills. The advantages are that it fits within the current parliamentary timetable, is politically neutral, involves Ministers in the Parliamentary Business and Legislation Committee, and not simply Civil Servants, analyses themes and isolates general problems leading to continuous improvement of the Code of Legislative Standards. It is also less resource intensive in terms of Committee staffing than alternative models.**

102. It is part of the adversarial nature of the United Kingdom parliamentary system that the course of action taken by the Government in producing legislation, from the earliest stages of formulating the policy, will not satisfy all Members. What is crucial to effective parliamentary scrutiny is that at each stage it can be clearly seen that thought has been given to why a particular decision is made: for example, whether or not to consult or conduct pre-legislative scrutiny. A Legislative Standards Committee operating on our model would ensure elucidation in this area.

Procedural details

Membership

103. The House of Lords Leader's Group on Working Practices[97] and the Hansard Society[98] suggested that the Committee should be a joint committee. **We recommend that the Legislative Standards Committee should be established as a Joint Committee.** This would help to ensure that the Committee did not stray into party political issues, and remained focused on legislative standards. In addition, it would prevent the need for two Committees, one for legislation introduced in the House of Commons and one for legislation introduced in the House of Lords. It would also make the best use of the different skills and experience that Members of each House bring to the legislative process.

Ministers

104. There is a divergence of views as to whether a Legislative Standards Committee should invite Ministers to give evidence.[99] **We recommend that the Committee should not normally invite Ministers to give evidence, as the Committee should remain focused on standards and be non-party political. It is also important to make it clear that legislative standards are a matter for Parliament as a whole, and the appropriate place**

97 House of Lords, Report of the Leader's Group on Working Practices, Session 2010-12, HL Paper 136, para 96

98 Ev w24

99 Q 142 and Ev w20

for questions to be asked, to hold the Government to account for legislative standards, is in the Chambers of both Houses.

Maintaining the Code of Legislative Standards

105. The Committee's secondary role of regularly reviewing the Code of Legislative Standards would fit well with the Civil Service's annual lessons-learned exercise on legislative preparation and process, which was described to us as "almost a stock-take".[100] The Hansard Society suggested that the Legislative Standards Committee:

> [...] in addition to setting out its thoughts in its annual report, could helpfully convene a private seminar once or twice a year with ministers, departmental bill team officials and Parliamentary Counsel to discuss their mutual concerns – based on exact legislative case studies to illustrate their points – with a view to seeking improvements in the process and facilitating better partnership working between Parliament and the executive in the future.[101]

106. **We recommend that the Legislative Standards Committee hold informal meetings with parliamentary officials, Ministers, departmental bill team officials and Parliamentary Counsel at least annually, to discuss the Committee's recent reports, and to identify and recommend amendments to the agreed Code of Legislative Standards.**

Examples of oversight in practice

107. Recommittal is the parliamentary process of sending clauses of a bill back to a committee after the bill has completed its initial Committee stage, normally because the Government would like to amend the bill further, and those amendments are considered to be so substantial in number, significance or complexity, that a further period of scrutiny in committee is warranted. Recommittal is an area where our oversight model Legislative Standards Committee could add value to the legislative process and enforce standards.

108. In considering a selection of recent Acts, the Legislative Standards Committee will be able to assess the final Act against the agreed Code of Legislative Standards, and compare those findings with an analysis of the bill and the Government's certification at first reading that the agreed quality standards had been met and requested information provided within the Explanatory Notes. The Committee might then decide to publish a short analytical report detailing its findings. Where problems are identified as a result of late amendments and no recommittal, the Legislative Standards Committee's report can be used as a basis for questioning legislative standards or post-legislative scrutiny by either individual Members or Committees in either House; for example, to ask why no sunset or review clause has been included in a section inserted by late amendment.

109. The production of short analytical reports, whether because an Act should have been recommitted, or because other weaknesses in legislative standards have been identified,

100 Q 285 "We sit down with Bill teams, Bill Ministers, Parliamentary Counsel lawyers and the business managers. We discuss what worked well and what did not work well, identifying examples of best practice"

101 Ev w28

would also be a useful tool for Committees in either House in deciding whether to undertake post-legislative scrutiny on a particular Act.

5 Pre- and Post-legislative scrutiny

Pre-legislative scrutiny

110. Our witnesses were in favour of pre-legislative scrutiny. Richard Heaton, First Parliamentary Counsel said that "on the whole it is a good process and it helps to improve the quality of legislation that hits the statute book."[102]

111. Pre-legislative scrutiny enables parliamentarians to consider and suggest amendments to a draft version of a bill or draft clauses from a bill, before the bill has its first reading. The number of draft bills or draft clauses published for the period 1997 to 2010 and under the Coalition Government has varied from Session to Session. In addition, of the draft bills or draft clauses published, not all of them will have been the subject of pre-legislative scrutiny by a Committee.[103]

	Number of draft bills published	Number of draft bills scrutinised by a committee
1997-98	3	2
1998-99	6	5
1999-2000	6	3
2000-01	2	1
2001-02	7	6
2002-03	9 **	10
2003-04	12 ***	10
2004-05	5 ****	2
2005-06	4	3
2006-07	4	3
2007-08	9	7
2008-09	4 #	2
2009-10	4	2

112. In the 2010-12 Session, which at 296 sitting days, was longer than a normal parliamentary session, 11 bills were published in draft, and as at 21 March 2013, 14 draft bills had been published in the 2012-13 Session.[104]

113. The Coalition Agreement gave no commitments on pre-legislative scrutiny. However in July 2010, the then Deputy Leader of the House, Mr David Heath MP, told the House

102 Q 33

103 *Pre-legislative scrutiny under the Coalition Government*, SN/PC/05859, House of Commons Library, 21 March 2013

* Session refers to the Session in which the draft bill was published.

** includes draft clauses of the Police (Northern Ireland) Bill.

*** some clauses of the draft Gambling Bill were published in Session 2002-03.

**** includes draft clauses of the Company Law Reform Bill, further clauses were published in Session 2005-06

The draft Antarctic Bill and the draft Immigration Bill were both published in the week of prorogation

104 *Pre-legislative scrutiny under the Coalition Government*, SN/PC/05859, House of Commons Library, 21 March 2013

that "The Government aim to publish legislation in draft whenever it is appropriate to do so. However, it will not be possible to do so in all cases."[105] The Leader of the House told us:

> We do things on the basis of pre-legislative scrutiny. The publication of draft Bills is more frequent now than it has been in the past. That gives an active process of engagement for parliamentarians and the public in getting the legislation to the right stage, even before the formal scrutiny begins, and the formal scrutiny is an active partnership in getting legislation right.[106]

114. We asked him if he agreed that the Government should publish the reasons why a bill is not to be published in draft. He told us:

> at the point of introduction, one of the things that we could sensibly do within the explanatory notes is look at the kind of legislative standards that we are talking about and demonstrate how they have been met. For Bills, that will include how they have been scrutinised, by what processes and why. If there is a reason why they have been subject to consultation but do not require formal pre-legislative scrutiny, that will be the kind of point that would be made in those explanatory notes. On one or two occasions, I have encouraged a written ministerial statement to be made at the point of introduction. For example, that was done—I thought rather helpfully—with the HGV Road User Levy Bill in order to explain to the House the processes that the Bill would follow. We will look carefully at whether, from time to time, the House should have that kind of formal statement that accompanies a Bill's introduction.[107]

115. **We welcome the Leader of the House's commitment to pre-legislative scrutiny. Whilst we accept that not all bills are suitable for pre-legislative scrutiny, we note that it is still only a minority of bills that are published in draft. We consider pre-legislative scrutiny to be one of the best ways of improving legislation and ensuring that it meets the quality standards that Parliament and the public are entitled to expect. Our draft Code of Legislative Standards would require the Government to publish the reason why a bill has not been published in draft.**

Post-legislative scrutiny

116. Similarly our witnesses were in favour of post-legislative scrutiny. In particular, the Law Commission drew our attention to its 2006 Report on post-legislative scrutiny in which it had concluded that the reasons for having more systematic post-legislative scrutiny included:

- to see whether legislation is working out in practice as intended;
- to contribute to better regulation;
- to improve the focus on implementation and delivery of policy aims;

[105] HC Deb 26 July 2010 col670W

[106] Q 277

107 Q 311

- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work. [108]

The 2006 report concluded with the Law Commission recommending the creation of a joint committee on post-legislative scrutiny.[109]

117. In its response to the Law Commission's 2006 report, the Government accepted that there were clear benefits in selective post-legislative scrutiny of Acts; however, it considered that any new process for post-legislative scrutiny should begin with the Commons departmental Select Committees.[110] It envisaged a process in which departmental Select Committees would scrutinise Acts on the basis of Memoranda submitted by the relevant Government Department and published as a Command Paper, to decide whether to conduct post-legislative scrutiny of the Act in question.

118. Since publication of the Law Commission's report, the number of post-legislative scrutiny inquiries and reports has remained low. The Leader of the House told us that:

> since the election we have published 51 post-legislative memoranda on previous Bills—now Acts. Eight of those projects have been carried through by parliamentary committees or are in progress. There is a big gap. I am not demanding that every post-legislative memorandum should be taken up by a select committee, and I am not suggesting that, if they are not, they are not of some value to us—they are. However, when you look, for example, at the way in which the Justice Committee has taken up the post-legislative memorandum on the Freedom of Information Act [...] that gives you an indication of the value here, which I suspect is not being realised.[111]

119. The Liaison Committee, in its Report on *Select Committee effectiveness, resources and powers* comments that post-legislative scrutiny is likely to be a greater demand on committee time in future.[112] In its response to that Report, the Government comments on the low numbers of post-legislative memoranda taken up:

> The Government remains committed to publishing post-legislative assessment memoranda in respect of Acts between three and five years after their passage. This commitment necessarily requires the allocation of significant resources. [...] The Government will keep under review the use made of these memoranda; if only a small minority of them are proving to be of value to select committees it may be a more efficient use of resources to adopt a more targeted approach, on the basis of discussions between departments and committees.[113]

108 Law Commission, *Post-Legislative Scrutiny*, Law Com No 302

109 The Parliament First All Party Parliamentary Group agreed with the Law Commission in their written evidence. Ev XX

110 *Post-legislative Scrutiny–The Government's Approach*,Cm 7320, March 2008

111 Q 296

112 Liaison Committee, Second Report of Session 2012-13, *Select Committee effectiveness, resources and powers*, HC 697

113 Liaison Committee, Third Report of Session 2012-13, *Select committee effectiveness, resources and powers: responses to the Committee's Second Report of Session 2012-13*, HC 912

120. **We consider post-legislative scrutiny to be an important process in improving existing legislation for both the Government and Parliament; indeed this is a point on which everyone would appear to be agreed. The difficulty seems to be in translating this support for the concept into actual examination or inquiries by Select Committees. We observe that post-legislative scrutiny memoranda have been used in general oral evidence sessions, followed up with written questions, discussed informally with Ministers, or taken up as elements in the course of other inquiries.**

121. **The reasons for the seemingly low take-up of post-legislative scrutiny memoranda by Select Committees are not clear. We note that the Government intends to keep the use of post-legislative scrutiny memoranda under review. We urge the Government to continue to produce these useful memoranda. In return, we will undertake, and we take this opportunity to encourage other Select Committees to undertake, more visible post-legislative scrutiny work when opportunities arise.**

6 The approach of the devolved legislatures

122. A number of witnesses commented that the devolved legislatures had had the advantage of analysing the Westminster legislative model, and deciding which aspects to adopt, adapt or abandon.[114] We were interested to see whether there were examples of good practice that we could learn from, and we are grateful to the devolved legislatures for their submissions to our inquiry.

Northern Ireland Assembly

123. The Northern Ireland Assembly's legislative procedure draws heavily on the Westminster model but, as it explained to us, "key differences are evident, due to the statutory limitations of a devolved, uni-cameral legislature but also arising from the political settlement which created a multi-party Executive, currently comprising 5 parties, and cross-community voting arrangements in the Assembly".[115]

124. We were interested to be told that the Assembly "has no 'emergency procedure' for legislation" but does have a procedure for the accelerated passage of certain bills, by which the Committee Stage is excluded. Apart from Budget bills, Members resist the use of this process on "the basis of the diminished opportunity for scrutiny, and the number of bills proceeding on that basis has reduced in recent years". Where the process is used, a Standing Order imposes additional requirements; as the Assembly explained, "These include the Member in charge giving an explanation to the Committee of: the reason(s) for the request; the consequences of accelerated passage not being granted; and any steps taken to minimise recourse to this procedure. A motion seeking accelerated passage must then be passed by cross-community support,[116] in the House."[117]

125. Of particular interest to us was the ongoing process of review and reform being undertaken by the Assembly, which includes:[118]

a) Establishing a Financial Scrutiny Unit which is designed to contribute to a more detailed analysis of the financial implications of legislative proposals being made available to Members, to assist in the scrutiny of bills;

b) An effectiveness review:

> In 2010 the Assembly sought to measure a number of qualitative and quantitative measures of 'effectiveness' drawn from the Inter-Parliamentary Union Self-Assessment model on parliamentary benchmarking. [...] the focus was on maximising the impact of the Assembly in its current form on, inter alia, the quality

114 Ev 88, Ev w57 and Q 102

115 Ev w44

116 A type of weighted majority defined in section 4(5) of the Northern Ireland Act 1998.

117 Ev w46

118 All information taken from Ev w48

of legislation passed by the Assembly; and enhancing the tools available to committees without significant additional resource impact or structural change.

c) Further enhancing Members' skills:

> The Assembly has taken the view that not only internal structures, but also the skills and experience brought by Members to the analysis and improvement of legislation, are important in achieving high legislative standards. [...] In the longer term, the Assembly's Legislative Strengthening Trust, supported by an external grant, seeks to enhance the capacity and capability of the NI Assembly by supporting a programme to build and enhance political leadership capacity for Members.

d) Technical scrutiny of bills:

> Committees have delegated technical scrutiny of statutory instruments (in Northern Ireland, called 'statutory rules') to the Examiner of Statutory Rules (ESR). The ESR carries out technical scrutiny of Bills against broadly the same criteria as the Joint Committee on Statutory Instruments and advises the relevant committee accordingly.
>
> In addition, the Assembly began to consider delegated powers in legislation (against criteria similar to those used by the Delegated Powers and Regulatory Reform Committee) in 2007. This function is also generally delegated to the ESR, who reports to the appropriate committee.

e) Standards-based scrutiny:

> A pilot project is currently being undertaken to examine means by which to increase the expertise of committees in testing bills against particular legislative standards. Consideration has been given to, for example, scrutiny of bills against human rights, in particular the ECHR, similar to that performed by the Joint Committee on Human Rights; and against legislative standards such as those set out in the Legislative Standards Act 1992 enacted by the (unicameral) Parliament of Queensland, Australia. Depending on the outcome of this programme, additional briefing on bills against these standards may be provided to committees in appropriate cases.

Scottish Parliament

126. The Scottish Parliament told us that its legislative procedures had their origin in the Report of the Consultative Steering Group on the Scottish Parliament ("CSG") whose remit was to report on the "operational needs and working methods" of the Parliament and to make proposals for its Standing Orders and rules of procedure.[119] Its main report set out key principles and recommendations:

119 Ev w40

> designed to achieve 'an open, accessible and, above all, participative Parliament, which will take a proactive approach to engaging with the Scottish people—in particular those groups traditionally excluded from the democratic process'[120]

127. Scottish Parliament bills must be accompanied by various documents, only some of which are similar to those accompanying United Kingdom bills. This system has been praised by the Hansard Society.[121] In the case of Scottish Government bills, these documents are:

- a Financial Memorandum, setting out the best estimates of the costs to which the bill would give rise;
- Explanatory Notes, summarising the bill's provisions objectively;
- a Policy Memorandum;
- a statement that, in the view of the relevant Scottish Government Minister, the provisions of the bill are considered to be within the Parliament's legislative competence;
- a statement by the Presiding Officer as to whether or not, in her/his view, the provisions of the bill are considered to be within the Parliament's legislative competence. A bill can be introduced notwithstanding a negative statement by the Presiding Officer.

128. The Scottish Parliament explained that the contents of the Policy Memorandum were stipulated in the CSG Report. It must set out:

- the policy objectives of the bill;
- whether alternative approaches to meeting those objectives were considered and, if so, why the approach taken by the bill was adopted;
- any consultation that was undertaken and a summary of the outcomes;
- an assessment of any effects of the bill on equal opportunities, human rights, island communities, local government, sustainable development and any other matters which Ministers consider relevant.

129. As a bill goes through the Parliament and is amended at Stage 2 (consideration of amendments by committee), revised or supplementary versions of the Explanatory Notes, Financial Memorandum and Delegated Powers Memorandum will be produced, but there is no provision for a revised Policy Memorandum to be submitted, "as the matters it is intended to cover are not likely to have changed as a result of amendments."[122]

120 *Shaping Scotland's Parliament*, was published in January 1999 http://www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf

121 Ev w21

122 Ev w43

130. Another feature of the Scottish Parliament's legislative processes that is different from Westminster is the Committee Bill process, which is a formal mechanism for a committee to make a proposal for a bill on matters within its remit and hold an inquiry into the need for a bill. The Scottish Parliament commented:

> Where such a proposal is made it will be considered by the Parliament. If the Parliament agrees to the proposal and no indication has been given by the Scottish Government that either it or HM Government intends to initiate legislation within a set timescale to give effect to the final proposal, the Convener of the Committee obtains the right to introduce the bill. In recognition of the work that will have been undertaken to develop the proposal for the bill, a report by a committee on the general principles is not required for a Committee Bill. All other aspects of the process are as for other Public Bills. During the first three sessions, six Committee Bills were introduced all of which were passed.[123]

National Assembly for Wales

131. In Wales the legislative process has been adapted to fit the size of the Assembly and the absence of a second chamber. Claire Clancy, Chief Executive and Clerk explained that:

> The Government of Wales Act 2006 requires the Assembly's Standing Orders to include provision for general debate on a bill with an opportunity for Assembly Members to vote on its general principles. The Committee on Standing Orders agreed that prior to a debate open to all Assembly Members in Plenary there should be an opportunity for consideration of the general principles of a bill by a committee (Stage 1).
>
> [...] The decision whether or not to refer a bill to a committee is taken by the Assembly's Business Committee—a committee representing all parties in the Assembly. In the five years since the Assembly gained primary law-making powers there has only been one occasion where a bill (or proposed Measure) was not referred to a relevant committee for Stage 1 consideration.[124]

132. We were informed that, although the Standing Orders do not set out how the Stage 1 Committees should approach their work, since 2007 a reasonably consistent approach has been taken. The Committees consider:

- the need for the bill to deliver its stated objectives;
- whether the bill achieves those stated objectives;
- the key provisions set out in the bill and whether they are appropriate to deliver the objectives;
- potential barriers to the implementation of the key provisions and whether the bill takes account of them;

123 Ev w44

124 Ev w39

- whether there are any unintended consequences arising from the bill; and
- the views of stakeholders who will have to work with the new arrangements.

Claire Clancy, Chief Executive and Clerk stated:

> [The Committees] will approach this in a variety of ways, consulting widely, taking oral evidence from stakeholders, and the relevant minister. They will usually take evidence from the minister at the beginning of their consideration and again at the end, to test the evidence they have heard from stakeholders.
>
> The Assembly's Constitutional and Legislative Affairs Committee will usually also report on the provisions for the making [of] subordinate legislation contained in the bill and in the Third Assembly (2007-11) the Finance Committee also reported routinely on the financial information contained in the Explanatory Memorandum; often taking evidence from the relevant minister and occasionally from stakeholders involved in the delivery of the provisions in the bill.[125]

133. We were told by the National Assembly for Wales that this process enables the Assembly to consider the bill in an informed way, and the Committee Report may also make recommendations for later amendment, many of which are tabled by the Welsh Assembly Government.

Conclusions for Westminster

134. **We recommend that consideration is given to adopting some of the processes and procedures used by the devolved legislatures, in particular:**

a) **Northern Ireland: where emergency or fast-track legislation is introduced, we recommend that the Minister in charge give an explanation to the House of the reason for the accelerated process, the consequences of the bill not being accelerated, and any steps taken to minimise recourse to this procedure. Should the House adopt our suggested draft Code of Legislative Standards, this explanation could be provided within new expanded Explanatory Notes. This would be in addition to the inclusion of sunset or review clauses as discussed above.**

b) **Scotland: the provision of similar details within Explanatory Notes as provided within the Scottish Parliament's Policy Memorandum (although not consideration of the merits of policy), and as requested in our draft Code of Legislative Standards. Also the concept of a formal mechanism for Select Committees to introduce legislation.**

c) **Wales: that the effective scrutiny of the general principles of a bill (or on our suggested Committee model, an Act) can and should be adopted, preferably through our draft Code of Legislative Standards and/or our model Legislative Standards Committee.**

125 Ev w40

7 Different processes for different types of legislation

Constitutional legislation

135. As part of our inquiry, we considered whether different processes should apply to different types of legislation. The evidence that we received focused on one type of legislation: constitutional legislation. Nat le Roux, Director of the Constitution Society, set out three factors which, in his opinion, make constitutional legislation different from other legislation. First, he suggested that constitutional legislation is the architecture of the state and that "the elements of the constitution are unavoidably interconnected, so an alteration in one part of the building has unforeseen consequences in other parts." His second point was that constitutional legislation has an effective presumption of irreversibility. Finally, there is the use of "manner and form restrictions, where a piece of legislation passed by an ordinary majority imposes restrictions on future Parliaments about how that legislation is to be implemented or repealed".[126]

136. Witnesses who disagreed that constitutional legislation was different from other legislation, or should be treated differently, took the view that all legislation affects individuals and that constitutional legislation is not special in this respect. Daniel Greenberg told us:

> Law is law is law is law. A temporary order to close a road for six months during the course of the Olympics—local legislation, technical, minor, of no interest to anybody so it does not need to come to Parliament, does it? But what if I am the newsagent on the corner whose business is dependent on the footfall and I think they could have closed a different road and I am going to go bust if they don't? Law is law and very often the more important that it seems at the political coalface, so to speak, the less important it is to people out there.[127]

Defining what is constitutional legislation

137. One of the difficulties encountered by supporters of differentiating between constitutional and other legislation is how to define what is meant by "constitutional legislation". This problem was encountered by the House of Lords Constitution Committee in its inquiry into *The Process of Constitutional Change*,[128] and is being considered by the Constitution Society.[129] The Government's response to the Constitution Committee highlighted the Committee's decision not to offer a watertight definition of what is constitutional, but to continue to rely upon a working definition they had suggested

126 Q133

127 Q 22

128 House of Lords, *The Process of Constitutional Change*, 15th Report of the Select Committee on the Constitution, Session 2010-12, HL Paper 177

129 Ev w18

in 2001.[130] The Government suggested that the difficulty in finding an agreed, effective definition, was a "significant problem in introducing a special process for 'constitutional' legislation."[131]

138. Adam Pile told us that "It is difficult to say what a constitutional bill is. There is no one set idea".[132] However, he also noted that there was a different procedure for constitutional bills whereby they are generally taken on the Floor of the House of Commons in a Committee of the whole House. We pointed out that this must mean some form of selection takes place, but the only explanation we received was that "If it directly impacts on the relationship, for example, between the Crown and Parliament, and if it relates directly to things like the relationship between ourselves and the devolved Administrations, it tends to form a constitutional Bill."[133]

139. Lord Norton suggested that his "2Ps" test could assist: does it affect a *principal* part of the constitution, and does it raise an important issue of *principle*. This test has been used successfully by the House of Lords Constitution Committee.[134] Professor Sir John Baker has suggested the following list of what constitutes a constitutional bill:

- any alteration to the structure and composition of Parliament;
- any alteration to the powers of Parliament, or any transfer of power, as by devolution or international treaty, which would in practice be difficult to reverse;
- any alteration to the succession to the Crown or the functions of the monarch;
- any substantial alteration to the balance of power between Parliament and government, including the conferment of unduly broad or ill-defined powers to legislate by order;
- any substantial alteration to the balance of power between central government and local authorities;
- any substantial alteration to the establishment and jurisdiction of the courts of law, including any measure that would place the exercise of power beyond the purview of the courts, or which would affect the independence of the judiciary;
- any substantial alteration to the establishment of the Church of England;
- any substantial alteration to the liberties of the subject, including the right to *habeas corpus* and trial by jury. [135]

130 House of Lords, *The Process of Constitutional Change*, 15th Report of the Select Committee on the Constitution, Session 2010-12, HL Paper 177, paragraph 15

131 *The Government Response to the House of Lords Constitution Committee Report 'The Process of Constitutional Change'*, Cm 8181, September 2011

132 Q 309

133 Q 313

134 Q 229

135 House of Lords, *The Process of Constitutional Change*, 15th Report of the Select Committee on the Constitution, Session 2010-12, HL Paper 177

140. **Constitutional law is qualitatively different from other types of legislation. We agree with the House of Lords Constitution Committee that there is currently no acceptable watertight definition of what constitutes constitutional legislation. However, we consider that it can be identified through experience and commonsense, and that this is encapsulated in Lord Norton's "2Ps" test (does it affect a *principal* part of the constitution, and does it raise an important issue of *principle*), and the list of typical features of constitutional legislation suggested by Professor Sir John Baker.** We await the Constitution Society's work to formulate a definition.

141. **We have considered the Government's response to the House of Lords Constitution Committee Report, and disagree that a watertight definition is needed before making any changes to processes for preparing and legislating in the area of constitutional law.**

142. **The current ad hoc process of identifying which bills to take on the Floor of the House of Commons in a Committee of the whole House lacks transparency: it is clear that differentiation is taking place in order to decide which bills are to be considered by a Committee of the whole House, but the decision-making process is unclear. We recommend that the Government adopts our suggestion and applies Lord Norton's "2Ps" test, together with the list of typical features of constitutional legislation as suggested by Professor Sir John Baker, or at the very least sets out why it does not agree with this approach. We also recommend that the Government follows our draft Code of Legislative Standards and explains whether the test has been met for each piece of legislation.**

Should Parliament treat constitutional legislation differently?

143. The Constitution Society believe that the application of special standards to constitutional legislation by a parliamentary committee would be a positive influence and would have a beneficial effect "because it would, over time, help to establish the idea of a separate process for constitutional legislation as a political norm."[136]

144. They suggest that special standards should be applied to constitutional legislation with oversight undertaken by a separate parliamentary committee "either [our] Committee or the Lords Constitution Committee, or a new joint committee". They identify two types of special standards: "*enhanced* standards, where the same standards which are applied to ordinary legislation are applied to constitutional legislation but with greater rigour, and *additional* standards which are applied to constitutional bills only." Furthermore, they advocate "an enhanced requirement for consultation and pre-legislative scrutiny where legislation is of major constitutional significance" and support "the application of an additional standard to major constitutional legislation requiring a written ministerial statement setting out the impact of the proposed legislation upon existing constitutional arrangements."[137]

136 Ev w17

137 Ev w17

145. Mark Ryan, Senior Lecturer in Constitutional and Administrative Law at Coventry University, suggested that constitutional bills should be treated differently by always being submitted in draft and considered by a joint committee; in addition, he thought that "consideration of the constitution should not be programmed."[138]

146. **We do not recommend the creation of a new joint constitutional legislation standards scrutiny committee. We consider that the processes we recommend to improve the quality of legislation as a whole, together with the application of our suggested test, will assist with the identification and improvement of constitutional legislation, and will provide an enhanced level of scrutiny.**

147. **In particular, application of our draft Code of Legislative Standards would assist identification of constitutional legislation by ensuring the provision of relevant information. Thus, our Code would allow Parliament to determine whether it agrees with the Government's decision that a particular bill, or part of it, is or is not constitutional, and in doing so, scrutinise decisions as to whether particular bills should be considered by a Committee of the whole House on the Floor of the House of Commons.**

148. **Once the use of our draft Code, or a final agreed Code, has been established and evaluated, the question of whether there should be more significant changes so that constitutional legislation undergoes different procedures, or requires a constitutional legislation scrutiny committee, could be re-considered.**

138 Qq 173 - 175

8 Five key recommendations

149. **We consider that there is a need for the quality of legislation to be improved. We have made a number of recommendations, as well as suggesting areas for further consideration by Parliament, designed to achieve this end. The most significant of these are:**

a) **that there should be a set of standards for good quality legislation agreed between Parliament and the Government. We have provided our own draft Code of Legislative Standards to start this process;**

b) **that a Joint Legislative Standards Committee to oversee application and effectiveness of the Code of Legislative Standards should be created;**

c) **that a week should elapse between the conclusion of Public Bill Committee evidence sessions and the start of line by line scrutiny, to allow Members enough time to consider the evidence they have heard and read, and for amendments to be drafted and selected for debate;**

d) **that a test for identifying constitutional legislation should be agreed between Parliament and the Government;**

e) **that for each bill presented to Parliament which has not previously been published in draft, the Government should provide an accompanying statement setting out why the bill was not published in draft and therefore not available for pre-legislative scrutiny.**

Annex A: Draft Code of Legislative Standards

The purpose of this Code is twofold: first to set standards based upon existing evidence of good practice that ensures quality legislation, and second, to set out the information that Parliament expects to be provided for the purpose of scrutinising legislation.

[It is expected that the number of standards set out in the first category will increase as the work of the Legislative Standards Committee highlights and promotes areas of good practice.

The contents of the Code may include requests for information already supplied to existing Committees. It is not our intention that the Legislative Standards Committee should duplicate their work – such information is required to present a comprehensive picture of the legislation only.]

Responsibility for the bill

(a) When presenting a Bill to Parliament or publishing a draft Bill, the Government should also provide the following information: details of the sponsoring Department(s), Minister(s), and point of contact for inquiries about the bill

Purpose *(three or four lines)*

(b) A short description of the legislation, including its purpose.

(c) Does the bill in whole or in part affect a principal part of the constitution, and does it raise an important issue of constitutional principle?

Extent, application and devolution

(d) What is the territorial coverage of the bill? In which jurisdiction does it have effect?

(e) Are there any implications in relation to devolved powers to Scotland, Wales or Northern Ireland?

Legislative background[139]

(f) A short outline of how the bill relates to existing Acts and, if applicable, European Union law;

(g) A statement of how opportunities to consolidate legislation have been considered and exploited;

(h) An explanation of why legislation, rather than any other means, was necessary to fulfil the policy intention; and why it is being brought forward at this time;

139 These questions set out standards to be met (e.g. legislation should be necessary).

(i) Provision of an informal "Keeling-like" Schedule (not to form part of the bill) where substantial amendments will be made to an earlier Act;

(j) Has the Law Commission reported on this area of law? If so, please provide the date and title of report; and where the Government has made a decision contrary to the Law Commission's recommendations, reasons should be provided.

Policy background *(two or three lines each)*

(k) The policy objectives of the bill;

(l) Whether the change is politically or legally important;

(m) The desired outcome;

(n) Does the bill bring into effect a manifesto commitment?

Pre-legislative scrutiny[140]

(o) A summary of the Government's response to pre-legislative scrutiny on the bill, and, in cases where a bill was not published in draft, an explanation of why it was not.

Consultation[141]

(p) A summary of any internal consultation (or an explanation of why it was not undertaken/needed).

(q) A summary of any external consultation

(i) If no consultation was completed (on the whole or part of the bill), an explanation of why it was not

(ii) A list of clauses for which the consultation is relevant

(iii) Where the Government has made a decision contrary to the overall consultation responses, an explanation of why such a decision was made

(iv) Has the Government's response to the consultation been published? If not, when is publication expected?

Emergency legislation

(r) Is the bill considered by the Government to be a piece of emergency/fast-track legislation, and if so, why?

140 We expect pre-legislative scrutiny to have taken place; where it does not, an explanation is required. Where pre-legislative scrutiny has been undertaken it is more likely that a Legislative Standards Committee would report that a bill has met the standards.

141 We expect consultation to have taken place on the whole or at least the key provisions in the bill; where consultation does not take place, the Government must expect to explain how the legislation will meet quality standards.

(s) Does the bill contain sunset clauses or review clauses?

Public bodies

(t) Is the creation of a new public body proposed? Has an estimate of the costs of creating and running this body been included within the explanatory materials, and if not, why not?

Large multi-topic bills

(u) In relation to large multi-topic bills (aka. omnibus/portmanteau/Christmas tree bills), an explanation as to how the parts of the bill bring into effect the bill's central policy purpose and why it cannot be separated into individual bills.

Is the legislation understandable and accessible?[142]

(v) Does the bill include, and if yes, in what clauses:

(i) Purpose or overview clauses,

(ii) New definitions of existing legal concepts,

(iii) Index clauses for definitions,

(iv) Formulae,

(v) Any new drafting techniques or innovations?

Offences

(w) A list of any new criminal offences and/or civil penalties created by the bill, and a summary of how they relate to existing offences;

Costs

(x) An estimate of the costs of preparing and implementing the policy set out in the bill (including a regulatory impact assessment);

Scrutiny and secondary legislation

(y) A list of "marker clauses",[143] and a short explanation;

(z) A list of clauses with retrospective application;

(aa) A list of proposed areas for secondary legislation, with a note as to the relevant clauses;

(bb) A list of Henry VIII powers.[144]

142 We do not have set standards for drafting, but consider that the provision of the following information would assist in consideration of what makes for good quality legislation.

143 A clause which, although containing a plausible legal proposition in itself, for example, "The Minister may make provision for X...", is destined to be replaced by more detailed provision in due course.

Annex B: Sources of information used in drafting the draft Code of Legislative Standards

a) List of proposed standards in the Report of the Leader's Group on Working Practices;[145]

b) List of proposed standards produced by the Better Government Initiative;[146]

c) List of proposed standards produced by the Hansard Society;[147]

d) List of proposed standards produced by the Constitution Society;[148]

e) List of proposed standards produced by the Rt Hon Mr Nick Raynsford MP;[149]

f) Written evidence received from the Northern Ireland Assembly, Scottish Parliament, and the National Assembly for Wales on their processes and procedures;[150]

g) Scrutiny guide produced by the European Scrutiny Committee;[151]

h) Reports of the Joint Committee on Human Rights;[152]

i) Guidance for Departments produced by the Delegated Powers and Regulatory Reform Committee;[153]

j) Guidance for Departments produced by the Secondary Legislation Scrutiny Committee;[154]

k) Reports and Terms of Reference of the Joint Committee on Statutory Instruments, and Select Committee on Statutory Instruments;[155]

144 The House of Lords Select Committee on the Scrutiny of Delegated Powers in its first report of 1992-93 defined a Henry VIII clause as: a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny [HL 57 1992-93, para 10]. The clauses were so named from the Statute of Proclamations 1539, which gave King Henry VIII power to legislate by proclamation.

145 House of Lords, *Report of the Leader's Group on Working Practices*, Session 2010-12, HL Paper 136

146 Ev w13

147 Ev w21

148 Ev w16

149 Ev w1

150 Ev w39, Ev w40, and Ev 44

151 The European Scrutiny System in the House of Commons, A short guide for Members of Parliament, By the staff of the European Scrutiny Committee, April 2010

152 Available on the Committee's website via www.parliament.uk

153 Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee*, November 2009

154 Secondary Legislation Scrutiny Committee, *Guidance For Departments On Statutory Instruments*

155 Available on the Committees' websites via www.parliament.uk

l) Standards list suggested by Professor Dawn Oliver in her written evidence[156] and article "The Parliament Acts, the Constitution, the Rule of Law, and the Second Chamber";[157]

m) Queensland Legislative Standards Act 1992;

n) New Zealand Legislation Advisory Committee, Guidelines on Process & Content of Legislation.

156 Ev w52

157 Professor Dawn Oliver, "The Parliament Acts, the Constitution, the Rule of Law, and the Second Chamber", *Statute Law Review*, (2012) 33(1): 1-6

Conclusions and recommendations

Introduction

1. We think that new Members would benefit from briefing sessions by the Office of the Parliamentary Counsel, and that all Members would be assisted by presentations from the Law Commission about bills before the House which have been drafted on the basis of, or substantially influenced by, Law Commission reports. (Paragraph 7)

What are the problems?

2. We recognise that legislation is not made in a vacuum. The parliamentary legislative process reflects the inherent constraints and negotiations present in the process of turning policy into statute, and we accept that the introduction of large multi-topic bills is, on occasion, a legitimate and appropriate use of parliamentary time. We acknowledge that the greater breadth of such bills allows greater scope for amendments by backbench MPs, and that without such bills, some "worthy" but "unglamorous" statutory sections might not become law because of lack of parliamentary time. However, multi-topic bills risk becoming simply too big to be scrutinised effectively. (Paragraph 14)

3. We recommend that for large multi-topic bills, the Minister in charge of the bill explain to Parliament why this large scale format has been chosen. If there is a good reason for the legislation being brought forward then Parliament can be confident that the Government has given proper consideration to the importance of parliamentary scrutiny. (Paragraph 15)

4. We recommend that a week should elapse between the conclusion of Public Bill Committee evidence sessions and the start of line by line scrutiny, to allow Members enough time to consider the evidence they have heard, and for amendments to be drafted and selected for debate. (Paragraph 25)

5. Parliament must have a stronger role as a partner with the Government in setting and monitoring standards of legislation. This will require a change of attitude by parliamentarians in asserting their role and "caring more" about legislative standards, and in using existing processes and documents, such as Impact Assessments, more effectively. It may also require the creation of new mechanisms to assist them in the performance of their legislative duties. A change in attitude by Government is also required in its work with Parliament. (Paragraph 28)

6. Proper preparation of policy is crucial. Clear, coherent policy which has been subject to challenge and revision will aid Parliamentary Counsel in drafting comprehensive and comprehensible bills. To require a formal draft to be produced before the policy preparation process has finished is to put the cart before the horse, necessarily increasing the risk of error and need for parliamentary time to be taken up with amendments. (Paragraph 34)

7. Good quality preparation should begin at an early stage and include proper consultation, timetabled to conclude before a bill is introduced; such consultation may need to be targeted to avoid overloading individuals and organisations with Government consultations. Responses to consultations should be available for Parliament before first reading. (Paragraph 35)

8. We think that a legislative process that involves a Green Paper, followed by consideration of expert advice, a White Paper and pre-legislative scrutiny prior to introduction would produce high quality legislation. We do not think that this is achievable or desirable for every bill because of the time and resources required to complete all of the stages. However, we consider that, as stated in our Report on the Fixed-term Parliaments Bill, the Government should and can utilise the potential greater certainty provided by fixed terms for effective and efficient legislative planning. This would allow enough time for these preferred processes for legislation to be adopted for the majority of bills**.** (Paragraph 36)

9. We recommend that the Cabinet Office's *Guide to Making Legislation* should adopt and set out a Code of Legislative Standards as agreed with Parliament, and emphasise the need to work with Parliament to ensure those standards are met. (Paragraph 37)

10. We agree that there is a "good law championship role" for the Office of the Parliamentary Counsel and welcome the launch of their "Good law" Initiative. Their position as specialists in the drafting of legislation and knowledge of parliamentary procedures, as well as their connection to the Law Commission, means that they are ideally placed to undertake this championship role. We look forward to working with them to take forward the recommendations in this Report, and to build upon the preliminary work of the "Good law" Initiative. (Paragraph 46)

11. We conclude that the majority of poor quality legislation results from either inadequate policy preparation or insufficient time being allowed for the drafting process, or a combination of the two. This is not to point the finger at the Office of the Parliamentary Counsel, which neither produces policy nor determines the speed with which policy is to be transformed into legislative proposals. (Paragraph 53)

A draft Code of Legislative Standards

12. Overall there is a level of consensus amongst our witnesses that part of the solution to improve legislative standards is to formulate a set of standards which legislation should meet. We do not think that legislative quality will improve without an objective set of quality standards against which to compare and judge bills and Acts, agreed between Parliament and the Government. Without such a list the decision that a piece of legislation is or is not of bad quality remains highly subjective. As a first step in the process of reaching such agreement, we have drawn up a draft Code of Legislative Standards (see Annex A), which we urge the Government to consider. (Paragraph 55)

13. We consider that the exercise of distilling what a bill does, and why (or for large multi-topic bills each part of a bill), into a short paragraph would provide clarity and assist both the Executive and Parliament; the better quality Explanatory Notes

already do this. Paragraph B of our draft Code encapsulates this as a requirement. (Paragraph 63)

14. We present our draft Code of Legislative Standards as the basis for discussion and agreement between Parliament and the Government as to legislative standards. We recommend that the Government undertake work to refine the draft Code, and produce a new version for discussion and agreement with both Houses of Parliament. (Paragraph 69)

15. We recommend that information and answers required by a finalised Code of Legislative Standards are provided to Parliament in the Explanatory Notes to a bill. We think that this is the simplest and most logical place for details to be provided by the Government, rather than a further category of parliamentary document being created. It also has the advantage of firmly and clearly linking standards to the bill. We acknowledge that the best Explanatory Notes already include many of the details we suggest in our draft Code, but the quality is variable. We hope that compliance with the finalised Code of Legislative Standards will help to improve the overall quality of Explanatory Notes. (Paragraph 71)

Legislative Standards Committee

16. We are not convinced that the extra time needed to assess the quality of legislation can be built into the legislative timetable after first reading and before second reading. If bills were to be presented to the Committee before first reading, with the aim of suggesting amendments be made to the bill by the Government, then that bill would necessarily be a draft bill, and the process would be, in effect, a form of pre-legislative scrutiny. (Paragraph 92)

17. We agree with the Hansard Society that a standards committee on its model would require a committee staff similar in size and expertise to that of the Joint Committee on Statutory Instruments. We do not think that, in the present economic climate, funding would be available for a committee staff of this size and expertise. (Paragraph 94)

18. We conclude that the overall concept of a Legislative Standards Committee is a good idea. We consider that, whilst Parliament and the Executive could agree standards without such a Committee, the introduction of a Legislative Standards Committee would have the following benefits: (Paragraph 95)

It enables Parliament to be a full partner in ensuring standards; (Paragraph 95.a)

It provides parliamentary oversight of the standards process, thereby encouraging change; (Paragraph 95.b)

It allows for a continuing process of investigating and refining standards; (Paragraph 95.c)

It provides a public face for scrutiny of legislative standards, rather than relying upon the closed procedures of the Cabinet's Parliamentary Business and Legislation Committee. (Paragraph 95.d)

19. It is clear that the proposed Legislative Standards Committee should: (Paragraph 96)

Avoid consideration of the merits of policy; (Paragraph 96.a)

Use an agreed set of standards drafted and applied in a manner so as to prevent a tick-box approach; (Paragraph 96.b)

Be objective in its critique and recommendations; (Paragraph 96.c)

Meet the concerns raised by the Leader of the House as to delay and duplication. (Paragraph 96.d)

20. We recommend the creation of a Legislative Standards Committee to provide oversight of the Cabinet's Parliamentary Business and Legislation Committee's approach to and use of the finalised Code of Legislative Standards. The Committee would have the flexibility to look at individual bills before Parliament, where a failure to adhere to the Code of Legislative Standards was obvious from the Explanatory Notes, but would normally focus its work on a selection of Acts that had recently received Royal Assent, scrutinising those Acts for compliance with the Code. This oversight model would fit within the current parliamentary legislative timetable and would not be as resource-intensive as a committee scrutinising every bill. We think that this model answers the questions proposed by the Leader of the House. (Paragraph 98)

21. Our recommendations suggest the following process for ensuring legislative standards: (Paragraph 99)

A Code of Legislative Standards is agreed between Parliament and the Government (and we suggest our own draft Code as a basis for discussion, as set out in Annex A); (Paragraph 99.a)

The Cabinet Committee responsible for approving proposals for new legislation checks the information provided by the relevant Department and certifies (by internal process) that the standards are met. The Minister in charge of the bill is responsible for the quality of the bill at all stages of the legislative process, and for post-legislative review. The Leader of the House is responsible to Parliament for the decision to certify the bill as having met the agreed standards, and should expect to answer questions about the Government's approach to legislative standards in the Chamber; (Paragraph 99.b)

The information required by the Code of Legislative Standards is provided to Parliament within a new model of Explanatory Notes; (Paragraph 99.c)

The Legislative Standards Committee would principally provide oversight, analysing a selection of Acts that have recently received Royal Assent to ascertain whether the standards, as certified by the Cabinet's Parliamentary Business and Legislation Committee, are generally being met. The Legislative Standards Committee's findings can then be used by parliamentarians to ask questions of the Leader of the House or Minister in charge of the bill. (Paragraph 99.d)

The Committee should have discretion, in exceptional cases, to: (Paragraph 99.e)

Analyse compliance of individual bills and report before second reading depending upon the time available; (Paragraph 99.e)i)

In rare cases, analyse compliance of individual bills and report later in the legislative process when public and parliamentary scrutiny may have revealed quality issues. (Paragraph 99.e)ii)

The Committee should also be charged with regularly reviewing and recommending revisions to the Code of Legislative Standards. (Paragraph 99.f)

22. We recommend that, initially, the Legislative Standards Committee follow an established model in terms of its procedural rules, such as that of the Joint Committee on Statutory Instruments, producing short analytical reports, and not seeking to bind either House or force votes on its recommendations. We think that there are benefits to starting with a more collaborative approach with the Government. Once the Committee is established, Parliament can investigate and evaluate the effectiveness of the Committee and Code of Legislative Standards, and consider whether there is a need for new procedures, including voting on the Committee's recommendations where the Government has declined to amend a bill. (Paragraph 100)

23. The disadvantage with our model is that there is no immediate sanction normally available to improve the quality of individual bills. The advantages are that it fits within the current parliamentary timetable, is politically neutral, involves Ministers in the Parliamentary Business and Legislation Committee, and not simply Civil Servants, analyses themes and isolates general problems leading to continuous improvement of the Code of Legislative Standards. It is also less resource intensive in terms of Committee staffing than alternative models. (Paragraph 101)

24. We recommend that the Legislative Standards Committee should be established as a Joint Committee. (Paragraph 103)

25. We recommend that the Committee should not normally invite Ministers to give evidence, as the Committee should remain focused on standards and be non-party political. It is also important to make it clear that legislative standards are a matter for Parliament as a whole, and the appropriate place for questions to be asked, to hold the Government to account for legislative standards, is in the Chambers of both Houses. (Paragraph 104)

26. We recommend that the Legislative Standards Committee hold informal meetings with parliamentary officials, Ministers, departmental bill team officials and Parliamentary Counsel at least annually, to discuss the Committee's recent reports, and to identify and recommend amendments to the agreed Code of Legislative Standards. (Paragraph 106)

Pre- and Post-legislative scrutiny

27. We welcome the Leader of the House's commitment to pre-legislative scrutiny. Whilst we accept that not all bills are suitable for pre-legislative scrutiny, we note that it is still only a minority of bills that are published in draft. We consider pre-

legislative scrutiny to be one of the best ways of improving legislation and ensuring that it meets the quality standards that Parliament and the public are entitled to expect. Our draft Code of Legislative Standards would require the Government to publish the reason why a bill has not been published in draft. (Paragraph 115)

28. We consider post-legislative scrutiny to be an important process in improving existing legislation for both the Government and Parliament; indeed this is a point on which everyone would appear to be agreed. The difficulty seems to be in translating this support for the concept into actual examination or inquiries by Select Committees. We observe that post-legislative scrutiny memoranda have been used in general oral evidence sessions, followed up with written questions, discussed informally with Ministers, or taken up as elements in the course of other inquiries. (Paragraph 120)

29. The reasons for the seemingly low take-up of post-legislative scrutiny memoranda by Select Committees are not clear. We note that the Government intends to keep the use of post-legislative scrutiny memoranda under review. We urge the Government to continue to produce these useful memoranda. In return, we will undertake, and we take this opportunity to encourage other Select Committees to undertake, more visible post-legislative scrutiny work when opportunities arise. (Paragraph 121)

The approach of the devolved legislatures

30. We recommend that consideration is given to adopting some of the processes and procedures used by the devolved legislatures, in particular: (Paragraph 134)

Northern Ireland: where emergency or fast-track legislation is introduced, we recommend that the Minister in charge give an explanation to the House of the reason for the accelerated process, the consequences of the bill not being accelerated, and any steps taken to minimise recourse to this procedure. Should the House adopt our suggested draft Code of Legislative Standards, this explanation could be provided within new expanded Explanatory Notes. This would be in addition to the inclusion of sunset or review clauses as discussed above. (Paragraph 134.a)

Scotland: the provision of similar details within Explanatory Notes as provided within the Scottish Parliament's Policy Memorandum (although not consideration of the merits of policy), and as requested in our draft Code of Legislative Standards. Also the concept of a formal mechanism for Select Committees to introduce legislation. (Paragraph 134.b)

Wales: that the effective scrutiny of the general principles of a bill (or on our suggested Committee model, an Act) can and should be adopted, preferably through our draft Code of Legislative Standards and/or our model Legislative Standards Committee. (Paragraph 134.c)

Different processes for different types of legislation

31. Constitutional law is qualitatively different from other types of legislation. We agree with the House of Lords Constitution Committee that there is currently no

acceptable watertight definition of what constitutes constitutional legislation. However, we consider that it can be identified through experience and commonsense, and that this is encapsulated in Lord Norton's "2Ps" test (does it affect a principal part of the constitution, and does it raise an important issue of principle), and the list of typical features of constitutional legislation suggested by Professor Sir John Baker. (Paragraph 140)

32. We have considered the Government's response to the House of Lords Constitution Committee Report, and disagree that a watertight definition is needed before making any changes to processes for preparing and legislating in the area of constitutional law. (Paragraph 141)

33. The current ad hoc process of identifying which bills to take on the Floor of the House of Commons in a Committee of the whole House lacks transparency: it is clear that differentiation is taking place in order to decide which bills are to be considered by a Committee of the whole House, but the decision-making process is unclear. We recommend that the Government adopts our suggestion and applies Lord Norton's "2Ps" test, together with the list of typical features of constitutional legislation as suggested by Professor Sir John Baker, or at the very least sets out why it does not agree with this approach. We also recommend that the Government follows our draft Code of Legislative Standards and explains whether the test has been met for each piece of legislation. (Paragraph 142)

34. We do not recommend the creation of a new joint constitutional legislation standards scrutiny committee. We consider that the processes we recommend to improve the quality of legislation as a whole, together with the application of our suggested test, will assist with the identification and improvement of constitutional legislation, and will provide an enhanced level of scrutiny. (Paragraph 146)

35. In particular, application of our draft Code of Legislative Standards would assist identification of constitutional legislation by ensuring the provision of relevant information. Thus, our Code would allow Parliament to determine whether it agrees with the Government's decision that a particular bill, or part of it, is or is not constitutional, and in doing so, scrutinise decisions as to whether particular bills should be considered by a Committee of the whole House on the Floor of the House of Commons. (Paragraph 147)

36. Once the use of our draft Code, or a final agreed Code, has been established and evaluated, the question of whether there should be more significant changes so that constitutional legislation undergoes different procedures, or requires a constitutional legislation scrutiny committee, could be re-considered. (Paragraph 148)

Five key recommendations

37. We consider that there is a need for the quality of legislation to be improved. We have made a number of recommendations, as well as suggesting areas for further consideration by Parliament, designed to achieve this end. The most significant of these are: (Paragraph 149)

that there should be a set of standards for good quality legislation agreed between Parliament and the Government; we have provided our own draft Code of Legislative Standards to start this process; (Paragraph 149.a)

that a Joint Legislative Standards Committee to oversee application and effectiveness of the Code should be created; (Paragraph 149.b)

that a week should elapse between the conclusion of Public Bill Committee evidence sessions and the start of line by line scrutiny, to allow Members enough time to consider the evidence they have heard and read, and for amendments to be drafted and selected for debate; (Paragraph 149.c)

that a test for identifying constitutional legislation should be agreed between Parliament and the Government; (Paragraph 149.d)

that for each bill presented to Parliament which has not previously been published in draft, the Government should provide an accompanying statement setting out why the bill was not published in draft and therefore not available for pre-legislative scrutiny. (Paragraph 149.e)

Formal Minutes

Thursday 9 May 2013

Members present:

Mr Graham Allen, in the Chair

Paul Flynn	Mrs Eleanor Laing
Sheila Gilmore	Mr Andrew Turner

Draft Report (Ensuring standards in the quality of legislation), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 149 read and agreed to.

Annexes and Summary agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (Standing Order No. 134).

Written evidence was ordered to be reported to the House for printing with the Report (previously reported and ordered to be published on 13 September 2012 and 2 February 2013).

[Adjourned till Thursday 16 May at 12.15 pm

Witnesses

List of printed written evidence

List of additional written evidence

(published in Volume II on the Committee website www.parliament.uk/pcrc)

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436 (Cm 7951)
Third Report	Parliamentary Voting System and Constituencies Bill	HC 437 (Cm 7997)
Fourth Report	Lessons from the process of Government formation after the 2010 General Election	HC 528 (HC 866)
Fifth Report	Voting by convicted prisoners: Summary of evidence	HC 776
Sixth Report	Constitutional implications of the Cabinet Manual	HC 734 (Cm 8213)
Seventh Report	Seminar on the House of Lords: Outcomes	HC 961
Eighth Report	Parliament's role in conflict decisions	HC 923 (HC 1477)
Ninth Report	Parliament's role in conflict decisions: Government Response to the Committee's Eighth Report of Session 2010-12	HC 1477 (HC 1673)
Tenth Report	Individual Electoral Registration and Electoral Administration	HC 1463 (Cm 8177)
Eleventh Report	Rules of Royal Succession	HC 1615 (HC 586)
Twelfth Report	Parliament's role in conflict decisions—further Government Response: Government Response to the Committee's Ninth Report of Session 2010-12	HC 1673
Thirteenth Report	Political party finance	HC 1763

Session 2012–13

First Report	Recall of MPs	HC 373 (HC 646)
Second Report	Introducing a statutory register of lobbyists	HC 153
Third Report	Prospects for codifying the relationship between central and local government	HC 656(Cm 8623)
Fourth Report	Do we need a constitutional convention for the UK?	HC 371

Oral evidence

Taken before the Political and Constitutional Reform Committee

on Thursday 10 May 2012

Members present:

Mr Graham Allen (Chair)

Mr Christopher Chope
Sheila Gilmore
Simon Hart
Mr Andrew Turner
Stephen Williams

Examination of Witness

Witness: **Daniel Greenberg**, Parliamentary Lawyer, Berwin Leighton Paisner LLP, formerly of the Office of Parliamentary Counsel, gave evidence.

Q1 Chair: Hello, Daniel. How are you? Welcome. Nice to see you again. I think we last met at our seminar in here, didn't we?

Daniel Greenberg: Indeed.

Chair: Probably in the same room. Very good to see you again, Daniel. You know you are among friends and we are trying to initiate this inquiry. You are our first witness, so it is a good agenda-setting opportunity for you. Is there anything you would like to say to kick us off?

Daniel Greenberg: Well, Mr Allen, if one were looking for a case study that brings together quite a lot of the issues that were raised at the seminar and has the advantage of being recent, I would strongly invite the Committee's attention to the Legal Aid, Sentencing and Punishment of Offenders Act, which passed in the last few days. I think it involved almost everything that I suspect you will want to touch on.

It has the nature of a portmanteau Act. It includes a number of very key issues that are tucked away at the back—I don't say that in a pejorative sense, but they happen to be at the back—like the new criminal offence of squatting. As Lady Miller pointed out, it is not an accident that it has not been a criminal offence for a few centuries, and here we are putting it in at midnight in the House of Lords.

The Act has rafts of amendments that were described as technical amendments, and there were lots of exchanges in the House of Lords between front benchers saying, "These are technical; I will write to the House"—mystic words that make the public think, "Oh, I wonder what that means. Where do we find that?" It has 320 Lords amendments, covering 90 pages. I think it will prove a fertile source of investigation for the Committee.

Q2 Simon Hart: I want to go back to a very simple fundamental, which is just an observation, I suppose, followed by a question. In most institutions, other than Parliament, if a policy idea is introduced by an executive, chief executive or management board, it is then subject to quite a lot of stress testing and goes before boards and committees and what have you. It might even be voted on by a membership, who knows, or shareholders, and the finished product will probably be quite a long way from the original proposal.

What seems to be odd in Parliament is that the Government will come up with a policy proposal and then devote every ounce of energy at its disposal for the foreseeable future in attempting to prevent anybody from changing any aspect of it at all, unless it is a sanction of a Government amendment. You mentioned the Criminal Sentencing Bill; for Andrew Lansley's health reforms there were 1,000 Government amendments to a piece of legislation that had apparently been five years in the preparation. I think that strikes all of us as not only being odd; it also conjures up images of lack of forethought and expertise, perhaps.

But to get to the question, to what extent do you see a problem existing where the politics collide with the technical requirement for good quality legislation? I think there are quite a lot of examples where everybody in the room—everybody in the Chamber, everybody in the building—knows that something is wrong, but the politics prevent the Government from accepting that that thing is wrong and therefore from making some fundamental and basic changes that would improve the quality of the legislation under discussion. One, is that a problem, and two, how can it be resolved? That is a bit of an open-ended question. Is it purely a matter of time or is something else required as well?

Daniel Greenberg: To answer your last question first—in words similar to those I used on a previous occasion, Mr Allen—the solution will come when you all care enough. I discussed this with the National Assembly for Wales, who are a new legislature with the luxury of sitting around and thinking, "How shall we do this?"

I have had a number of really interesting sessions with committees, Members and staff there. I have said to them, "If something looks to you as though we just shouldn't be doing it, then the answer is not how do we do it or how do we make it better; it is don't do it". Interestingly, when I was in one of the committees there, somebody said, "Well, I would get into big trouble with the Whips if I just said this is too big an enabling power and I am not going to allow it". I said, "That's true, yes, you would. If one person said it, they would get into trouble, but if a whole committee turned around and said, as a Parliament, as an Assembly, 'We are not doing this; this is not right',

then you would be supported". My feeling is if as individual parliamentarians you all cared enough about not allowing things to happen that should not happen, you would find ways of doing it.

Moving back to the beginning of your question, I think you mentioned outside organisations and commercial organisations, and one of the things that I have noticed recently is that when commercial organisations test something, they don't just test it internally. They test it partly internally, but they bring in the people who are going to use it and they go to customers and involve them, not through this business of consultation. Consultation is a troublesome exercise because at the moment so many organisations outside Parliament are drowning in government consultations; there are so many that they just find it impossible to respond to them. Consultation is fundamentally a passive process. It is not an active process of involvement just as, again, if you were the CEO of a large organisation and the profits depended on it, you wouldn't just want to send letters back and forth—you would want to engage them and really get them tested.

When I was Parliamentary Counsel, I used to think that I was working away writing an Act and there were clever lawyers in the City waiting to tear it to pieces and cunningly find holes in it. One of the most eye-opening experiences I have had as part of the parliamentary team in Berwin Leighton Paisner has been seeing that lawyers are not there waiting to pick holes in it. They are mostly sitting there waiting to make it work, and the frustrating thing—and we had this with the Localism Bill, for example—is that sometimes you have expertise sitting there wanting to help, being able to see that this is not going to work, being able to watch it go wrong, and not being able to play a real part in controlling it and helping to make it work.

Being on a list of consultees, putting in a paper, is not the answer. The answer is to involve people at an earlier stage. Pre-legislative scrutiny should be an active process in much the same way as it would be if you were the CEO of a large company testing a product to destruction before you tried it on your customers.

Q3 Simon Hart: I take your point entirely about that. Just to follow it up, do you see the way that we do the business here—and I have only been here two years, unlike everybody else who has been here forever. It seems to me odd that there is clearly such a high degree of political pressure involved in the process and the fact is that everything has a consequence. It either has a professional consequence or a legislative consequence and it has, ultimately I suppose, an electoral consequence.

That affects and infects our decision making. It certainly does with my end of the food chain—and, probably wrongly, I should have more of the background, but there we are—and I think that permeates further. We know we are doing things, we know we are verging on things—because of political pressure essentially—that we know fundamentally are wrong. The reason why we hold our noses and do that, it seems to me, is that we are conscious that someone else down the line will pick it up—I promised the Chair I would not mention second chambers, but I can't really avoid it—and therefore there is a reasonable chance that the error that we might have made in the House of Commons will be corrected somewhere else. It might not be in the Commons, but it will be corrected somewhere else and hopefully some sort of sense of balance will be restored.

Going back to my original question, is it a matter of time? To what extent do you attach importance to time? Everything we seem to do appears to be done in a hell of a rush. I think I probably speak on behalf of quite a lot of colleagues here. When you are voting on chunks of amendments of a rather technical section of some rather technical bill, the chances that we are giving it proper analysis are pretty slim, to be honest. Some will—I am looking at Christopher Chope, who I know does—but some of us probably don't give it the scrutiny we should. If that is a problem, how can it be resolved?

Daniel Greenberg: You have identified a solution yourself. It is all about time, but it is also about at what stage in the process the time is allowed. Generally speaking, I think we are allowing it at much too late a stage. As you say, the assumption that the Lords have the time and ability to pick up everything is clearly not true. The other problem is that by the time it gets to you, you are dealing with a finished product—an animal that has been created. It is very difficult to turn a giraffe into a hippopotamus without breaking bones. The Whips have a limit on the number of bones they wish to have broken because each broken bone is a potential debate and a potential vote. So if you have the wrong animal, you are basically stuck with it.

I come back to the issue I mentioned before—turning squatting into a criminal offence. Clearly, in one sense it is urgent; as a matter of social policy, it is urgent. In another sense, it is very important. Is it so urgent that it could not have been preceded by a Law Commission report for two years, by some other kind of commission report for two years, looking at all the potential consequences, good and bad? I don't know; I am not a politician. Maybe it is so urgent, maybe it did have to be put through in that way. However, if it did have to be put through in that way—I doubt it, but if it did—let's at least do it knowing that because we are putting it through that fast we probably have it wrong. So let's have a planned system of post-legislative scrutiny that will pick up the errors and not just say, "Well, we got it through, the vote is done, it is all over. We got away with it again. The Lords did or didn't pick up some stuff later on. We got away with it," put it away and forget about it.

The issue is about time and it is about where you give the time. I think the time needs to be before you draft a bill, while you are drafting a bill engaging people from the outside, not so much necessarily during the parliamentary process; let's accept that Parliament is not a forum in which a lot of technical scrutiny can be given to difficult technical subjects. Then afterwards, proper scrutiny, proper checks that it has worked and an ability to come back if it has not.

Q4 Mr Chope: Thank you for your paper. I agree with almost everything in it. Do you know of any legislature that has a better way of doing things than we do?

Daniel Greenberg: Even if I had had notice of that question I might have found it difficult to give you really good examples, because most of the ones that I have had and have current experience of have the luxury of being very, very small, so they can do things in a relatively informal way. I think informality is the keynote here. I feel you may be able to give yourselves more ability to depart from the script than you sometimes do. No system you devise is going to be right for every bill. What worries me about the idea of inventing a new committee, for example—I know I am jumping around a bit, Mr Allen—is that that again will become a hurdle that you have to meet for every bill. For some it will work very well, for some it will not work very well, but it is a fixed system.

I would like to think that you would start with a bill and think, "Okay, what are the challenges? How difficult is it? What sort of a mechanism do we need for it?" long before it becomes a drafted bill. I do know of legislatures where they can do that. I am often consulted long before something is sent to the drafter. I am consulted on how a bill should be packaged and how they should begin to prepare it and how it should involve people with a view to facilitating its passage, and we are talking two years before.

So I would not give you a specific other legislature and say, "Do it like they do" but I would say that the ones that I have seen that work well work well because they have the luxury of informality and are able to devise a new system for each time.

Q5 Mr Chope: In paragraph 2.2 of your evidence, you say you are worried that setting up this Legislative Standards Committee could be seen as a substitute for addressing the problems directly and it could come to be used as an excuse for inaction rather than as part of the solution. You mentioned this Legal Aid Bill, and I think a number of us are concerned about the amount of legislating that was done in the very short space of time without anybody being able to get a handle on what was going through.

If I could ask you a general question, how do you think that process could have been improved? Do you think, for example, that there is a case for saying that a carry-over should have been permitted? In a sense, it was all concertinaed right at the end of a Session, and the excuse was that we had to deal with it by Monday otherwise Her Majesty was going to be inconvenienced and so on.

Daniel Greenberg: With apologies for slightly ducking both of your first two questions, carry-over always makes me nervous because, as Mr Hart said, it is such a political issue. If we were talking about a commercial product, I would agree with you absolutely. My answer to your second question would have been yes. I am nervous because I am conscious that the end of the Session is one of the few checks and balances that still remain within the system and for you as politicians to decide to give that up in the interests of taking a little more time over legislation is a very tricky call. I would be nervous about saying yes to that.

If you want me to stick my neck out a little bit more, I think the answer is, no, don't carry over but don't wash up either. Say, "Time's up. It clearly was too long, too difficult, too portmanteau for this session, therefore we look forward to seeing it again in a few weeks' time". But I acknowledge, as Mr Hart says, this is an entirely political process and I speak only as a technician.

When I started in government more than 20 years ago, it was more common than I think it was towards the end of my time to have proposals simply being sent back internally within government because of not being ready. You are confronted with things where the department say, "Basically, it is nearly ready. Here are 5,000 amendments to make it actually ready". But when you decide to say as a result of that, "We are just not letting it through" it becomes very difficult, particularly for a portmanteau bill where you are told, "We have this that you need, we have that that you need, people are waiting for this section, they are waiting for that section". Are you really going to pull the plug on the whole thing? I am telling you what you know much better than I do. These are political judgments that are very hard to make, but at the end of it someone is waiting for the legislation who is going to have to live with it.

Q6 Mr Chope: Going back to the example of the Legal Aid Bill, who do you think should be held responsible for that? Is it Parliament's responsibility that the bill came forward in a bad way, is it the Government's responsibility? Under our constitutional arrangements, who do you think should take the buck for that?

Daniel Greenberg: Within the context of this Committee, I have no difficulty at all in saying that you are responsible—indeed, I would say even this as a Select Committee of the House of Commons and the House of Commons is responsible because, as Mr Hart says, it may be tempting to say, "Down the passage they will also look at what we have to say", but once it leaves here you have signed off on it and when it comes back with 90 pages of amendments and you let them through, you have signed off on it. That question I do not need to duck. You are responsible.

Q7 Mr Chope: Do you think we as a legislature should be insisting on more sunset clauses, for example? You have referred to post-legislative scrutiny. That would not be much use unless you were going to control the legislative changes arising from that, which would still belong to the Executive to control.

Daniel Greenberg: I am strongly in favour of sunset clauses, partly for that reason, partly for the very closely related reason that ministers very often justify policy by reference to essentially temporary considerations—"We have a huge problem with people squatting in London. We have an issue that has to be tackled". Again, I am expressing no judgment about the politics of this at all: it may be true or it may not be true, but even if it is true it is an argument at best for rushing through legislation for dealing with

an immediately urgent problem. It is not any argument for rushing through legislation that will sit on a statute book for 20, 30, 40 years and deal with changed circumstances without ever being looked at again.

I think a sunset clause is a fantastic way of ensuring that people have to come back and look at whether the circumstances are the same. How has it worked in the meantime? You are not going to get your sunset clause debate if you have—as we used to with the Northern Ireland legislation, where you had to come back and debate it every single year or every period and you had to brief the minister on how it had worked in the interval, because if you didn't you wouldn't get your extension. I am very strongly in favour of them.

Q8 Mr Chope: Final question. How do you think MPs can be held to account for this? You say it is our responsibility, and I agree with you—the buck must stop with the legislators. But how can we be held to account? We were told, for example, by the Prime Minister before the general election that he was very much in favour of allowing MPs the freedom to move amendments to try and improve bills, but what has happened in practice is that everything is politicised—even the most modest amendment is regarded as an issue of confidence for the coalition Government. So that is very difficult. How do you see parliamentarians being able to break out of this yoke that is preventing them from doing what most of us think is our core business?

Daniel Greenberg: I agree about the politicisation of the process. Mr Hart impliedly asked whether it was more common in the old days for amendments to be accepted where they were not intended to be hostile amendments. Certainly that is my impression. It is a purely anecdotal impression, but yes. I don't think it was a point of dishonour to accept an Opposition amendment; indeed, I think it was the reverse. With good ministers it was a point of honour that you came out saying, "I really feel I have done my job as a parliamentarian today because I have facilitated a backbencher, from whichever part of the Chamber, in doing his or her job". I think some of them wore it as a badge of pride. I think there are political and institutional reasons why that has changed and it certainly is not my job to lecture you on those.

The second part of your question is: how do you get out of it? Well, possibly one way is by enhancing the constituency side of the pressure by engaging, as I said before, organisations and groups that have real expertise to offer. A tiny bee in my bonnet, a little mini-rant, is that backbenchers sometimes seem to be slightly nervous of saying who has briefed them. This has changed a little since we now have written submissions to the Public Bill Committee, so you can often see where an amendment has come from in effect, but there is no formal way of registering that your amendment is on behalf of an organisation.

Of course, backbenchers are your own people and you stand up for yourselves, but I think you could use more effectively than you do, if I may say so, the fact that you have backing from people who really know what they are talking about when you stand up and debate with ministers in the Public Bill Committee or in similar arenas. Ministers do listen to that.

As I said, I see my colleagues now preparing to have to deal with something about to fail and getting on the phone to MPs and peers, saying, "Do you realise how badly this is going to work?" When they stand up and perform in committee, when they have the time to do it, they don't tend to say, "So and so told me this is going to happen and so and so told me that is going to happen" in the way that you do, for example, at Question Time. You stand up and say, "This is a letter from my constituency post bag, Mrs So and So and Mr So and So are worried about this". You do not do that enough on technical issues. If I have any helpful answer to your last question it is, yes, engage support from outside the House in facing up to ministers. I think you could certainly be doing more of that.

Q9 Chair: Daniel, isn't the problem—the elephant in the room, as they say—the fact that Members of Parliament are members of the legislature and they are also members of the supporters' club for the Government, or the anti-Government club, and therefore there is a dual pressure on an individual? So it is not a matter of seeing what we know to be right and getting on with it; there is a permanent dichotomy while we do not have an effective separation of powers between the legislature and the Executive.

Daniel Greenberg: Well, you don't have a formal separation of powers but you do have an informal separation of powers and it is becoming, if I may say so, a little more formal as committees like this begin to be recognised more as—if I may put it this way—career options for politicians. This is being talked about openly in the House. You have always had politicians who regard themselves first and foremost as parliamentarians. They are not always beloved of governments, but on the whole those who have built up a reputation as really believing in Parliament get a lot of respect from their front bench, and one sees this in the time they are given and the way they are approached.

I wonder whether you really need to give up quite so readily and say, "Because we are all part of the club" because different members of the club behave very differently, and I think if it is going in any direction it is going more towards that. I think you have younger Members of Parliament who are at an earlier stage in their career deciding that they possibly are more parliamentarian than party political, and I think that is only to be welcomed.

The second part of my answer is, fine, at the end of the day, like I said, do you care or don't you? If you care enough as parliamentarians to say, "Our loyalty to the Government is secondary to our loyalty to Parliament when we are passing legislation and we simply must not pass legislation that we cannot warrant to our constituents as being good or bad because we haven't got the foggiest what it is about", then do it. I don't believe membership of a political party stops you from doing that.

Q10 Chair: No, but there are two cultures and you are trying to serve two cultures as a Member of Parliament. That is undoubtedly true. If I may just

give you one personal example. As a backbencher, in amending the Criminal Justice Bill—I think it was around 2002 or 2003—I proposed various amendments on the back of my experience as a constituency Member of Parliament and made significant changes with the then minister's consent and with all-party consent. It did not require votes to extend the Sentencing Guidelines Council to non-judicial members or to allow the testing of 16-year-olds for class A drugs if they were arrested on an acquisitive offence. These are sensible things that were driven by a lot of interest outside that I was a conduit for. There were a number of other questions. I was not then put on a Bill Committee for three years, having achieved those things that I thought were absolutely what a backbench Member of Parliament should do.

So in a sense, as well as the divided loyalties because of two cultures coming together, there are also penalties that are exacted on people who stand out as individual parliamentarians. Yes, sometimes your colleagues give you respect, but I can say—we had a little discussion before you came in about writing in the Whip's book when you are sitting on the front bench—as someone who has been in that seat as well, often the view is, "These people are a complete pain, we wish they would go away. How do we discipline them?"

It is not quite a matter of giving up or not seeing the possibilities. It is a matter of the fact that the institution that we are meant to be holding to account dominates us as a force, and that makes it rather difficult.

Daniel Greenberg: Okay, but take your example and turn it on its head. You mentioned the Sentencing Council. Let's say that, as a result of the changes you made, a policy of rehabilitation has worked its way more effectively into sentencing policy than it would without it. When you retired from politics, you would probably be able to be prouder of that one achievement, if that was the only legislative achievement you had made, than most ministers would be able to be of the 50 bills that they had shoved through without really knowing what was in them. So I don't take your example as a story of despondency; I take it as an example to your colleagues. If the result is that you all have a shot and the Whips do not like it, they have to put someone on Committees so other people will come on, and if you all do the same thing then you will find that everybody ends up doing it. It is about culture.

All right, maybe, Mr Allen, you were a little bit ahead of your time and maybe your colleagues did not back you up so maybe some of the ones who were put on committees after you were a bit quieter and less inclined to make improvements. But hopefully this is now where you send the message to everybody that that is the way it should be and the Whips shouldn't have people to choose from who are going to sit there and do nothing. Again, having worked with a range of Whips over the years, I know that many good Whips genuinely welcome people who get involved in things that they know about, have briefed themselves about or are representing people about. So I think even if that is all you achieved, it shows how it can be done.

Q11 Chair: I would like it not to be a one-off but to be a way of life and a culture of making legislation better, that 650 or 600 MPs felt that was their primary duty. Nonetheless, I take your point.

I have one other question before I ask Andrew to come in. One of the things that I think the Prime Minister deserves most congratulations for is a fixed-term Parliament because that allows some degree of certainty, not least for Parliamentary Counsel but also those who plan the timetable. It allows a greater degree of certainty than the old "there could be a snap election at any time" culture that we have come from. We have not had the first full fixed-term Parliament yet, but do you agree with that sentiment? Do you think we should be exploiting the fact that we do have a known beginning and known end in a way that we have never had before and that should facilitate better planning of legislation?

Daniel Greenberg: Again, as I said before, I don't think those are the beginnings and the ends. The beginning for legislation should not be an introduction of the bill—it should not even be the introduction of a draft bill, the presentation of a draft bill, because that is still a draft elephant and its basic bone structure is settled. It should be the policy commission, the policy process, something more than pure consultation, which, as I say, can be very passive. That should be the beginning and that should be part of the planning.

The departmental Select Committees should be asking, in my opinion, not what bills are you bringing forward next Session or what draft bills are we seeing next Session but what proposals are you working on now that you are thinking might become bills in three or four years' time. That is the beginning of the process and then we will think about the start of when the thing is introduced. I see the time for the bill in here as actually not the most important period. It comes in, it is here for a few weeks and it is out, and then people have to live with it for decades. Too much focus, in lots of different ways, is placed on what goes on in here rather than all the stuff that goes on beforehand and all the stuff that ought to go on afterwards.

So five years fixed-term, five years not fixed-term, you know more about this than I do, all of you, but am I expecting it to make a lot of difference? No, frankly. How many big important bills have been lost in a surprise wash-up in my time that I saw? Very, very few. How many have pushed through in a planned wash-up? Lots, and that is something that again I don't think should happen at all. To me it is not a big issue, but you may be right.

Q12 Chair: Excuse me, Andrew, I will just do one more.

I do not think that we are disagreeing. You are saying the process itself is much more important than the time limit, and I take for granted that is true. But once you have settled on a new process, to know when you can start the process inside and when it finishes allows you—I mean, Roy Stone, permanent secretary to the Whips Office—he has a more grandiose title than that—sits down and I am sure he plans much more than the next parliamentary year. I am sure that he has

a view about some of the big things that are going to come in, and that is a moveable feast.

The closer you get to today, the tighter and less flexible that becomes. So if you can plan for a five-year Parliament, you are giving yourself a little bit more leeway and that allows some of those process things that you are talking about, which I tend to have a lot of sympathy with, to come into play more effectively. We could, for example, have had a very serious discussion about parliamentary boundaries and alternative votes in the way that we were not able to do because we have to do this quickly, we have to get it going, this is a big priority. If we had said, "Stop the music for a second; we have five years to do this. We must deliver the Government its bill but what shape is it going to be in? Let us take the first six months to really look at this very carefully"—I am leading you terribly, but I am trying to get your opinion.

Daniel Greenberg: I hear all that, and of course I agree with all of it; I even, like you, Mr Allen, believe that the Whips plan further ahead than next week. I have always, like you, believed that they have a 10-year plan and I am sure it always gets stuck to. However, I am worried that, again, you over-formalise things and "legislation should not happen because we have been planning to have a bill about X in the fourth Session of the coming Parliament".

It should happen because there has been a growing social issue, a growing problem and it has been addressed by the appropriate kinds of policy development organisation. They have come up with the view that it cannot be dealt with without a certain amount of legislation, and it should be a process where you are sometimes taken by surprise. Sometimes the reason why bills get full of nonsense is that we have announced a big bill, we are going to have a big bill about this, and then you go to the department and say, "What are we going to do?" They say, "There isn't very much that needs to be done" and it gets full of stuff that does not need to be done at all.

So yes and no. Yes, I think some things need planning in advance. Will the five-year fixed term give you a greater ability to plan in advance? Yes, it will. Some things do not benefit from planning in advance and are harmed by being planned too far in advance. Is there a danger that things will become too rigid and therefore be harmed? Yes, there is.

Q13 Mr Turner: The answer to the question appears to be some things go down one route and some things go down another and we may know beforehand which things we are planning to take fast and which ones we are planning to take more slowly. I can't quite work out which proposals are passed through and which are taken rather more slowly and gently.

Daniel Greenberg: Are you asking me in terms of classes of legislation?

Mr Turner: Yes, I think I am.

Daniel Greenberg: Perhaps this is the time for brief rant number three on the subject of there being no such thing as technical legislation. Will you allow me a brief rant about that, Mr Allen? At the end of the day, as I say in my submission to you, political importance and practical importance do not always coincide; in fact, they very often don't. I think the difference is this. Some legislation needs to be prepared very, very slowly because it is complicated and difficult and needs to be got right at a practical level. All the things that I have been talking about until now would apply to that kind of legislation.

Other legislation is not complicated or difficult to prepare but it is politically incredibly sensitive and it is, as you were saying, Mr Allen, something where you know you are going to have to have a long and careful political debate about it, as with voting systems. That does not need to be prepared very carefully because it can be sometimes very easy to draft but it needs a lot more handling at your end.

So the question is: how do you get effective guidance as to what kind of legislation needs to be prepared laboriously before it comes to you and what kind of legislation needs to be handled laboriously once it gets to you? I would say, back to your departmental select committees—I think they are the places where you can probe. I say this deliberately because, as Mr Chope rightly said, if you can avoid creating another six committees I think that would be a good thing. You have an effective committee for every single policy area that has the ability to discuss with departments, decades in advance if you want to, what their plans are. I would say that is the point at which you can begin to decide into which class the legislation falls.

Q14 Mr Turner: Are you suggesting—I think you are—that there is stuff that these committees are doing that gets in the way of their making decisions about legislation?

Daniel Greenberg: No, I don't think that. I am suggesting in addition to their agenda.

Q15 Mr Turner: What I am really saying is, is there time? All these committees are full of things we want to do with a very small amount of time to do them and something would have to go if you are putting something else in. That is my fear.

Daniel Greenberg: Okay, if that is the case, do I think that it is worth dropping an inquiry or two in order to be sure that legislation, coming from a department on a particular issue, has had the scrutiny from you at the policy stage? Yes, I think it is worth it.

Q16 Mr Turner: Another issue is this one of stuff brought in at the last minute, usually in the House of Lords. Could that not be made less dangerous if it had a limit of, say, two or three years—not the whole bill, but certainly the bits that are brought in at the last stage? Then they would have to bring it through again in the form they wish to make permanent.

Daniel Greenberg: If the question is building on Mr Chope's question about sunset clauses and saying should you be imposing more and shorter sunset clauses on legislation that you know was passed particularly fast with a particularly large number of amendments, I would say yes. I think that builds on my answer to Mr Chope earlier.

Mr Turner: Thank you very much.

Q17 Sheila Gilmore: One of your suggestions was that bill teams might be kept together after the bill becomes an Act. How do you see that working, given it is just the political Executive that is responsible for legislation, not civil servants?

Daniel Greenberg: Can I address the "how" in a minute? Can I just do a little bit on the "why", because I think they do feed into each other? My answer earlier to the Committee about what do I think is the key to this was when you all care enough it will be resolved.

That feeds back into the Civil Service as well. I have a fear that sometimes the individual civil servants who are working on a bill don't care enough about how it is going to operate because they know it is going to be someone else's problem. That is only human. It is in no way meant to be a criticism of them as civil servants; it is an observation about human nature. If it is going to be my problem, I care about it more than if it is going to be someone else's problem.

Yes, of course, there is a distinction between the Executive and Parliament and you are not directly responsible, you can't give instructions to departments about how they are to structure these things. But you could indicate that, for example, when you are doing your post-legislative scrutiny of a particular Act, you would like to meet again civil servant X by name, who you discussed the policy with before the bill was introduced, even if they have moved on in their responsibilities, to discuss how they think that particular thing has developed under the Act as it was passed.

That is one little example directly to your question of how you might achieve something like that, because then clearly the briefing within the Executive would have to follow the questioning by the committee, and civil servants would know, "I'm going to be called back in a year's time. They're going to ask me how this thing has worked". I think that would focus minds a great deal.

Q18 Simon Hart: That goes back to an earlier comment I made; it is connected to it, but not identical. It has been suggested by some that perhaps one way of improving the overall standard is a statement of compliance. You have to meet a certain pre-agreed standard. Is that something that has any realistic chances of succeeding, given the system that we have at the moment?

Daniel Greenberg: I think people would love it and I think it would be a very bad thing, because anything that is just tick-box—"Right, we have to get through this committee, we have to get our certificate of compliance, we have to get this"—is a way of forgetting the first golden rule of legislative drafting, which is that there are no rules of legislative drafting. There is no such thing as precedent, there is no such thing as manuals, there is no such thing as, "Does this match this standard? Tick off this box". It is, "Is it fit for purpose?"

If there is a theme in what I am saying today, Mr Allen, I think it is about reconnecting the technicalities with the policy, going back to your policy discussions in select committees and not saying, "Right, that one is all over, that was the policy development stage. Now we have a new angle called a bill". A bill is just policy on the paper. Anything that looks at technical compliance and says, "Now that bill is fit for purpose", and divorces it from the policy, is not the real world. That is not the way legislation works.

Q19 Simon Hart: You mentioned earlier on that you were very keen on sunset clauses. It seems to me as a result of all these conversations that the only real way of ironing out some of the difficulties that we have highlighted, or that you have highlighted, is by having some sort of sunset clause written into pretty well every piece of legislation. If we look even at the last two or three years, most of the embarrassing problems that confronted the previous Government towards the end of its tenure, and this one in its early stages, have been the unforeseen consequence. Is a sunset clause the only way we can get round that?

Daniel Greenberg: It may not be the only way but, as I said before, I strongly support them. One should never imagine there is a real distinction between primary and secondary legislation. It is all law. I still go to prison if I break it, so it is entitled to the same consideration.

The Government have increasingly introduced review clauses into secondary legislation that implements European Union legislation. They are not sunset clauses because they don't carry a cut-off, but they do require formal review of the legislation at particular intervals and a report to Parliament, so that is another way of doing it. You could have reviews. I was advising people on a recent bill and pressing them to put statutory reports and reviews into the bill, and they got a few of them in. I think that is great because it means that you come back and you have a formal look at it after the event.

Q20 Simon Hart: It is all very well just having a formal look at it, but what are the criteria, what assessment is going to be made? Once that assessment is made, does it compel anybody to do anything about it other than shrug their shoulders and say, "Well, it didn't work quite as we anticipated"?

Daniel Greenberg: Yes, it does, for the reason that all of you have mentioned this morning—practical politics. You get your provision about making it an offence to squat because the minister says you have to do it. You vote, whipped vote—you have to do it. Fine. Then there is a year. During that year you get constituency correspondence. You get a pile of letters from people saying this has gone wrong—exactly what you were saying, Mr Hart, unintended consequence number one, unintended consequence two.

Going back to what I said to Mr Chope, you get a reputable organisation coming to you and saying, "We can build up more anecdotal evidence for you and turn it into a paper". Come the debate in a year's time, and it is just a formal review, that is true, and the minister says, "What am I facing? I am facing a barrage of my colleagues and parliamentarians from all sides of the House with solid political reasons why this does not play well politically because it is flawed, because it is wrong. Therefore we have to do something about it".

It turns technical issues into genuine political pressure and helps you to bridge the gap that Mr Allen was talking about between the political process and the Executive.

Q21 Simon Hart: But my point is this, and you have absolutely put your finger on it. The problem is it is political pressure rather than technical pressure. If I put a different example to you—the legislation on handguns. By everyone's recognition, that did not turn out the way people wanted. The people who mainly suffered as a consequence of the legislation were legitimate handgun owners, and criminals carried on getting access to handguns in much the same form they always have done.
Politically, that was very difficult. There wasn't a clamour of people saying, "Relax the laws on handguns"—in fact, quite the opposite. So we sat there with our arms folded basically, watching a piece of legislation not work because of political pressure. My question is if you are putting in a sunset clause, surely it should compel people to correct it, even if in correcting it there is an unpopular political decision to make.
Daniel Greenberg: I totally agree with that. But, again, let's imagine the minister's briefing before the debate a year later on the formal review. The Minister comes in and he or she has a pile of backbench correspondence. That is the backdrop against which the meeting with the Executive then takes place and that is serious political pressure.
I hear what you say; that is not always going to be enough and it is not always going to be in the right direction, but it is going to work, I would say, more often than not and at least it gives you something. Before the event the minster says, "This is our policy". You say, "I'm worried about it". The minister says, "Tough, I know more about it than you. We are going to do it". What do you have? You have no ammunition. A year later the minister says, "This was our policy" and you say, "We have all had 600 letters from constituent organisations. It is not working". The minister does not want to be presiding over legislation that is shown not to work and the minister will be saying within that briefing, "We have to give an undertaking to change it because I can't turn to my backbenchers and say, 'I agree it is not working and I don't care'". It comes back to caring.

Q22 Simon Hart: Yes. One last question, a slightly different one. Do you think we should approach constitutional matters differently? Do you think, in terms of the scrutiny and time devoted to constitutional measures, that we should look at them in the same way as we do other measures, or should there be an enhanced or upgraded form of scrutiny that we can apply?
Daniel Greenberg: Law is law is law is law. A temporary order to close a road for six months during the course of the Olympics—local legislation, technical, minor, of no interest to anybody so it does not need to come to Parliament, does it? But what if I am the newsagent on the corner whose business is dependent on the footfall and I think they could have closed a different road and I am going to go bust if they don't? Law is law and very often the more important that it seems at the political coalface, so to speak, the less important it is to people out there. I believe your responsibility as legislators is to the citizen who is going to abide by your legislation and you have to be able, in one way or another, to warrant every piece of legislation that you are responsible for to your constituents and others as being fit for purpose.
Simon Hart: Thank you.

Q23 Chair: When we were at school, we were told that there would be the presentation of a bill, second reading, committee stage, House of Lords and then Royal Assent. Daniel, what is your O-level syllabus? How does the line run in the ideal way of having proper scrutiny of legislation? What are your stages?
Daniel Greenberg: I could have done with notice of that one as well—indeed, so much so that I might write to you with some thoughts on that. When I do so, however, Mr Allen, I fear I will be boring and repeat myself. It would not start at First Reading, but years before.
Chair: Excellent.
Daniel Greenberg: I think, joking aside, the most sensible thing I can do by way of answering that question is to agree to write to you.
Chair: Please feel free to do it graphically with some visual aids, which I think actually might help.

Q24 Mr Turner: The legislation that we passed within six months or whatever it was—the AV boundaries legislation—was done so quickly, we were told, because it would not go through before the next election. It was impossible. I think we could probably have given it, as we now know, an extra six months to get that through and maybe that is enough for what you, Mr Chairman, are suggesting, although I rather suspect it is not. You could not do the work before because someone else was in government. There really was a race to get the legislation through and still they managed to change some bits of it for my benefit, among others. I come back to ask the same question, really. How are you going to ensure that it gets through under a Conservative-Liberal Government?
Daniel Greenberg: Okay, two things. First, you can do the work before; there is no reason why policy work should not begin before a government comes to power—indeed, the civil service resources are often made available to some significant extent, not entirely, in relation to policy development before a general election. Obviously, that is at the discretion of the Cabinet Secretary at the time, but it certainly has been used, I think fairly importantly.
But there is no reason why any political party should not be engaging with people. There are plenty of people out there who are happy to help. As I say, I genuinely get frustrated by seeing how many people are desperate to help at policy formation stages, who would be perfectly happy to come and talk to any political party about the formation of their policy, whether or not they have a bill in the programme. I don't believe that you couldn't start—I don't mean

you personally, or indeed your party specifically—much earlier.

My second comment in relation to your question is, yes, it is true that sometimes there are going to be things that are going to have to go through fast, and maybe not even as considered as you would like, because they are urgent. But, if I may say so, just keep a rather closer eye than I think you do at the moment on how many legislative provisions are sneaking in through with them as the door shuts. Every time you are told a bill is needed, how many provisions in the bill are actually needed now? If the answer is that there is a real-world need to have clause 63, fine, then let's have a bill with clause 63 in it. Every time that shutter comes down, how many other provisions are sneaking through? I would encourage you to look at that.

Q25 Mr Chope: In paragraph 6.3 of your paper, you talk about this issue of the use of purpose clauses. You say that, in the light of developing judicial approaches and other changes, you think this should be evaluated. Obviously, this is quite a technical subject in its own right, but can you tell us where these developing judicial approaches are to be found and whether you think that it would be for Parliament to try and introduce these things or whether it is a matter for interpretation? Exactly what did you have in mind?

Daniel Greenberg: Yes. There was once a very strong presumption that legislation was passed in pretty much perfect form. It did not include mistakes, presumptions of meaning, presumptions of correct law, but they are changing. They are changing quite fast, and one of the issues for an inquiry into the quality of legislation is how much more use is being made of what is called "the Inco rule".

I will give the correct citation in due course or include it in my letter, but in the Inco case the conditions were laid down for the courts to correct an error in primary or secondary legislation, and that rule appears to have been invoked increasingly. The courts are showing less deference to the form of legislation, and I think rightly so. The courts are partly influenced by the fact that they have to be increasingly teleological as a result of the amount of legislation that is transposed in the European legislation, so there is no point applying a hard letter approach to our law if the underlying legislation requires, under European law, a purposive construction. But that is only part of the influence. They are generally applying a more purposive construction and you have to meet that by exerting influence over the purpose that they identify. The way that you meet that is by ensuring you set out the purpose in a clear statement of purpose on the face of the Act.

So it is about matching the increasing judicial willingness to apply the law in a purposive way, in a contextual way, by increasing the ways in which you show the context and the purpose in an authoritative way on the face of the bill itself. I think that is one way in which you ensure that some of the technical imperfections that you suspect may lie underneath the surface can at least be construed, should it come to it, in the light of your avowed clear social policy purposes.

Q26 Mr Chope: In that way, there are two ways. The legislature would get more control, because we would be able to stop the judges going off and interpreting for us, and we would be setting out more clearly what our intentions were and hoping that would be followed through.

Daniel Greenberg: One can put it even more positively than that. One of the problems with skeleton legislation is that not only does Parliament not know what is going to be done with it when you pass the enabling powers, but sometimes you are not giving the courts any guidance as to how you want those enabling powers to be exercised. Again, in working with interested groups in relation to bills, as well as putting in review clauses, one of the things that I encourage them to try and get in, sometimes successfully, is statements of purpose.

So if the minister says, "This may look a wide power, but don't worry I need it because of X", let's say, "Good, the Secretary of State can do this if he or she is satisfied that having regard to X it is necessary to do A, B and C". Yes, it is about exerting control in relation to the legislation that you pass, and I think it is just another technique that we have touched on today. There are other ways in which you can exercise control and make sure that the legislation is construed in accordance with the policy intention that you have when you pass it.

Q27 Chair: One last question from myself, Daniel, and then I think we are just about done. Over the next 18 months or so, we have the advent of a House Business Committee. That will build on the Wright report on the improvements necessary in Parliament. All parties are committed to bringing this forward, but at the moment they are discussing how that can be done, and clearly the battle that I referred to about executive and legislative authority will play out. Looking at this as a technician, do you see that as an opportunity to do some of these things that you have raised with us this morning?

For example, could a House Business Committee decide the direction, as Andrew pointed out, in which a bill goes: should it go to a select committee, a special committee, a standing committee? Do you see the advent of the House Business Committee as being an aid to all of us in getting better legislation?

Daniel Greenberg: Responding as a technician and not passing a political judgment, absolutely, yes. As I said earlier, anything that means you have fewer rigid structures that have to apply, not inventing new classes—"This is constitutional law, this is not constitutional law"—but having more ability, as you would in a commercial situation, to match the process to the product on an individual situation, is only going to be good.

Q28 Chair: In the Wright Committee, we were very keen not to offend government, because government could stop any proposal, of course, and we came up with the cliché of "the Government must get its business, but let it be good business". I guess, in a way, we are going to "the Government should always get its bill, but let it be a good bill".

Daniel Greenberg: The Government is entitled to pass the legislation that it wants to pass. You are obliged to the citizens but also to government to make sure that, when it passes, it is going to work. That is not an obstruction of government, but part of your responsibility to government.

Chair: Excellent—a very good point at which to conclude. Thank you so much for your time today. You have been illuminating, as always. Thank you very much for coming and being our first witness.

Daniel Greenberg: Thank you.

Thursday 14 June 2012

Members present:

Mr Graham Allen (Chair)

Paul Flynn	Simon Hart
Sheila Gilmore	Tristram Hunt
Andrew Griffiths	Mr Andrew Turner

Examination of Witnesses

Witnesses: **Richard Heaton CB**, First Parliamentary Counsel, and **David Cook**, Second Parliamentary Counsel, gave evidence.

Q29 Chair: Thank you for coming in to help us with our inquiry into better legislation. We think you are in a good spot to give us some advice on that. Is there anything you would like to say by way of opening statement or shall we dive straight in?

Richard Heaton: First of all, it is nice to be here. Thank you very much for the opportunity to come and contribute to this inquiry. As First Parliamentary Counsel and as the Office of the Parliamentary Counsel, this is a subject that really matters to us. We care passionately, if that is an okay word to use. We care passionately about the quality of the law that we help to produce, not just the drafting but the quality of the law, and we might touch on what we mean by good law, quality of law. We also recognise that modern statute law is complicated and technical and there is lots of it, and again we might touch on the reasons for that. It follows that in a parliamentary democracy it is important to us that parliamentarians understand the law that we are helping them to pass. Scrutiny, for us, captures part of what Parliament does. More fundamentally, Parliament owns the law that passes here, so it is important to us that parliamentary scrutiny works so that you parliamentarians can understand and own the law that we help you to pass. So we share your quest for any ways that are available to make law better and to make the process of law-making better. It is an endeavour that is close to our hearts so we hope we can help you in this inquiry.

Chair: Excellent. Anything to add, David?

David Cook: No.

Q30 Chair: I am a recovering Whip, taking one day at a time, but from those days and through that haze I seem to remember when we were trying to get legislation as a new government through the House, Murdo Maclean and then Roy Stone, as the Parliamentary Secretaries, would always suck their teeth and tut about parliamentary time and how difficult it was to get legislation through and the logjam that could happen in Parliament. If pressed, their default position of blame was that Parliamentary Counsel was very understaffed and they could not get all this stuff forward fast enough. That is a terrible shorthand review of their explanation. Do you feel that things have changed since those days, which is 1997? We hear that it has been a problem for decades that Parliamentary Counsel as a section or department is understaffed to meet the demands, particularly when there are very high-level demands early on in a Parliament.

Richard Heaton: No, I don't, Chair. I don't think I can say, hand on heart, that Parliamentary Counsel is understaffed. I think that undoubtedly was true at an earlier stage, and if you look as far back as Renton in the 1970s it is a criticism that was made then. The office increased in strength. We have come down a bit, so in terms of full-time equivalents we have come down from something like 60 to the low 50s in terms of full-time drafters drafting legislation. That is much higher than it was 20 years ago. I do not think there is a bottleneck at Parliamentary Counsel in terms of drafting resource, so if there is a problem in the field, I do not think it is that.

David Cook: That is right. There was a significant expansion programme in the early 2000s where we recruited quite heavily. Our complement is fairly full now, and we certainly have capacity to do what we need to do.

Q31 Chair: Of course you work for the Government, quite rightly, but there is the conundrum of an incoming government presenting you with their ideas on day one and saying, "Get on with it," and you are then doing that from a standing start. Is there any way around that potential paradox where you could involve parties other than the governing party in producing workable, thought-out proposals ahead of the logjam that does take place when a new party or coalition comes to power?

Richard Heaton: A couple of things to say there. First of all, some legislation brought forward early in a Parliament is legislation that is not terribly political, and that is quite often the legislation that is introduced in the first week. That stuff can be prepared because the chances are the Government of whatever colour is going to take it up. So that is some of the first wave in a new Parliament.

Q32 Chair: You can put some time aside before an election to—

Richard Heaton: To do sort of housekeeping legislation.

Chair:—read the mind of the political party that may or may not come in?

Richard Heaton: There is reading the mind of, reading the manifestos—and I will come to this in a moment—but I was just talking about the class of legislation that a government of whatever colour is likely to pick up. If there is something that desperately

needs fixing the chances are you are going to be saying to new ministers, "You are going to want to do this." To take a minute example, when I was working in the Law Officers, back in 1997, one of the first Acts of Parliament that that Parliament passed was the Law Officers Act to give power to the Solicitor General. Fantastically technical, not controversial, not political, but it was prepared knowing that that was something that needed fixing.

Then you get the political class of legislation and, as I am sure you know, at a period before a general election the Prime Minister of the day gives an instruction to the Cabinet Secretary that work can be done with the opposition party, that contact can be made. So there is a kind of window before the election when the Civil Service, on authority of the Prime Minister, can engage with the opposition party. That contact does not usually get to the stage of drafting the ideas in the opposition party's minds; it is usually the civil servants just teasing out the policy and working out what the priorities are likely to be. On day one, an incoming government, if there is a change of colour, is presented by the civil servants with a sort of critique of what is in the manifesto, the sorts of things we think you will be wanting to do. There is then a gap when the drafting and the policy iteration takes place, and you tend to get the first wave of political legislation following an election a few months after that.

I think your question was whether anything could be done to bring the drafting process forward, and I suspect not. I am trying to think of an example from the first session of this Parliament. On the Fixed-term Parliaments Act, for example, I think we moved about as quickly as we could have done. Could anything be done? That was a key part of the coalition agreement, so I am not sure what more advance work could have been done. For the Human Rights Act from 1997, the Whitehall machine thought a lot about how that might be done. I do not think it would have been quicker if the drafters had engaged earlier. I think the answer to your question is no.

Q33 Chair: Is the drive from Parliament for pre-legislative scrutiny something that bumps up against the drive of government to get legislation started quickly and get the processes going? Is that a contradiction that is quite difficult to reconcile?

Richard Heaton: I think it is a tension. Government has taken up the idea of pre-legislative scrutiny. We are putting a number of bills out to PLS and on the whole it is a good process and it helps to improve the quality of legislation that hits the statute book. There are political situations where government wants to move quickly, and an example is the one I have just given on fixed-term Parliaments. You can imagine a world where a piece of legislation like that would have been subject to PLS. It was not on this occasion because politically the Government wanted to move quickly. So yes, there is a tension from time to time, no question.

Q34 Mr Turner: Do you agree that we need better legislation?

Richard Heaton: It is a very good question. I think the legislation that we produce covers an enormous area, and the area occupied by the statute book gets bigger and bigger year after year. That is for all sorts of reasons—partly European law, human rights law, the desire for society to solve mischief and to get things regulated and to remove sources of injustice and so on. So the body of statute law grows year after year. The drafting style and the way in which we legislate needs to respond to the growth, otherwise the statute book becomes incomprehensible. Has the increase in quality kept up with the increase in the size of the statute book? It is a good question. I think we do pretty well. There are certainly areas where we could understand more about why we are legislating in such a complicated way, why there is so much detail in the statute book. I think we could ask ourselves whether detail is always necessary to the degree to which we legislate, so there is an aspect of quality that is about detail where I think we could probably do more and do better. There is probably an aspect of length of legislation that we could look at where possibly we could do better.

In terms of the drafting style, I was looking at the legislation that attracted the criticism of the Renton Committee in the 1970s. If we legislated now in the style that we did then, the statute book would be incomprehensible. It would just be utterly impossible to follow. We have massively improved the technical plain English quality of the legislation we produce. There is undoubtedly room to improve but I think we do pretty well there. We are always looking for ways to improve the style in which we legislate. David, anything to add?

David Cook: From a purely technical perspective as a drafter, we always want to improve the quality of legislation. Our goal is to produce the best possible legislation and so from the technical drafting perspective we are very much open to ideas about how to make legislation better, more accessible to the user. Over the last 20 years or so, which is the period I have been in the Parliamentary Counsel Office, there have been enormous developments in terms of the use of plain language drafting techniques to try to make legislation more accessible from the drafting perspective, and we remain very open to new ways of trying to achieve that.

Q35 Mr Turner: But if you were writing for *The Sun* you would have a different standard. Not standard and not quality; there is a difference compared with what you are doing writing legislation. Are you saying you are moving towards people, in a very small amount, with a simpler way of reading it?

Richard Heaton: Undoubtedly. The trend has been moving away from language that looks like it has been written by a lawyer to language that might be understood by the end user. The end user is the key person in this, the person who has to use the legislation. So you will find the statute book of 30 years ago riddled with "heretofore" and "whereby" and brilliantly clever compressed phrases that require enormous mental agility to understand. That was the drafting style. That was the pride of the drafter in the 1970s, to caricature slightly.

The move has been towards breaking ideas down, using more, as it were, editorial white space, so a sentence is broken down into paragraphs so the reader can have a clue about what is going on. There is an argument that that has gone too far and that the drawn-out nature of the statute book makes it harder to follow the story. I suppose you could say we are constantly looking for ways to present material in a way that the user can understand. But on a plain English front, just looking at the statute book from 40 years ago, we have moved a long way towards plain, simple English. We will never complete that journey.

David Cook: I think we also have to be conscious of some of the constraints that we operate under in terms of producing plain language because, of course, the reality is we are not writing for *The Sun*; we are drafting legislation. Legislation is there to change the law and any extraneous material that does not change the law is likely to cause confusion in the courts and litigation and unnecessary expense. We are restricted in what we can do in terms of including explanatory material, for example, in legislation and there are also limits to some extent on the type of language that we can use, although we have tried very much to move away from legalese. I spent two years at the Tax Law Rewrite Project, which was rewriting tax legislation in as modern a style as possible. We still sometimes came across words or language that, because of the weight of case law behind it, we have to reuse because that is the legal context within which we are operating.

So there are a number of constraints within which we operate, but within those constraints it is undoubtedly true that our direction of travel is to move as much as possible towards making the legislation as user friendly as we can.

Q36 Mr Turner: I am going to use the phrase "lowering the target audience". Who are the target audience? Are they people who read *The Sun*, are they people who could not read a decent newspaper with a reading age of about 14? Can they do something better than that, bearing in mind that it said it is much more difficult now for children to learn to read? They have far less ability to understand what is in front of them than 100 years ago.

David Cook: What the target audience is is something that we wrestle with quite a lot. The reality is there are a number of different target audiences, one of which, of course, is you as parliamentarians, because the bill has to get through Parliament in the first instance. Beyond that the target audience includes the judiciary, who are going to be reviewing the legislation and need to understand it; that includes the academics and legal commentators. A particularly important target audience in some ways is the person without legal advice who needs to access the legislation. That might, for example, be a member of the general public in relation to legislation that would directly affect members of the public, or it might be people who are working for local authorities or other bodies, who do not always have the benefit of legal advice or the time to take it but who nevertheless want to be able to look at a piece of legislation and understand it immediately for their particular purpose. I think the truth is there is a whole number of target audiences, and we have to draft in a way that does the best it can for all of them.

Richard Heaton: I am not a career drafter, but I am guessing some bits of legislation will have a clearly different core audience than others. If I am drafting something very technical about the employer covenant for a pension fund, I may mean intermediaries in the pensions industry who need to know their stuff clearly, I don't want to leave any ambiguity, but I am not too worried about *The Sun* reader in that case. If I am doing something bold and declaratory that sends a signal—this was picked up at the end of the last Parliament—that slavery is something we abhor, I am going to want to write it in plain language that almost anyone can read, because it is a signal for the public and we want the public to be able to understand it. So it is kind of horses for courses, in fact.

Q37 Mr Turner: That is quite interesting. We have things like computers now that are supposed to make the job easier. Do they really make it easier?

David Cook: I think they do, absolutely they do. When I joined the office it was still the case that some people were handwriting legislation and then handing it to the secretaries to type up. That is an incredibly cumbersome process and then, of course, it would be sent off to the printer who would set it in hard copy and there was always the risk of them dropping it and the bits going on the floor and them putting it back in the wrong place. The technology got in the way of the product because it did not enable flexibility. Now if I am drafting a piece of legislation on the computer screen I can try three or four different drafts on the screen in a matter of seconds, whereas if you are writing it out and it is coming back there is something in that process that inherently restricts your desire to change it because of the additional difficulty of producing that change. With computers you can be a lot more flexible.

The other thing about the computer technology that again is very different from when I joined the office is the availability electronically of the statute book, the ability for us to search electronically the statute book for precedents, for consequential amendments, for the way in which the new legislation we are drafting fits into the existing legislation, and also having up-to-date versions of the statute book. Again, when I started we literally had to cut and paste. It was not that long ago we were cutting and pasting to get an Act that we were operating on. From the Royal Assent copy of the Act, we were then cutting and pasting amendments that have been made by subsequent legislation and producing a composite copy. This is all electronic now and it is incredibly quicker, so from my purely technical drafting perspective it has made an enormous difference for the good. I think it has enabled us to produce a much better product than we could have produced when that was not available.

Richard Heaton: Just another thought on that. As I said earlier, we have the user in mind, the notional user of the statute book all the time, and the user's experience is almost always going to be via a screen. We need to bear that in mind when we are

constructing an Act because the user is likely to go page by page with links rather than reading the thing as a narrative or as a book. So sometimes that would influence the drafting style, would encourage you to be more self-contained page by page, so we need to be clear about the user experience and try to help that user use online material.

Q38 Tristram Hunt: Do you view it on paper finally before it is submitted, as it were?
Richard Heaton: Yes, we do. Parliament deals with paper and we print it out. We have prints of the bill. David can explain that.
David Cook: Yes, the bill is introduced in paper form as well as electronic form, and I think in terms of drafting work in practice people now vary as to the extent to which they print out the drafts and look at them on paper. I certainly still do. Sometimes, particularly with a big bill, it is an awful lot quicker when you are looking at the bill as a totality to thumb through it in paper, because you can access bits of it quicker than if it is in the electronic form. I think some people who perhaps grew up more with the electronic technology are more comfortable using the electronic technology a lot more in terms of rarely printing out drafts for their own use.

Q39 Tristram Hunt: I think there is a neurological point, having marked essays for a very long time, of students who do it straight on computer and students who read it out on paper, and your ability to discover errors on the page relative to the screen is a factor, I think.
David Cook: My experience is that you always spot things in the hard copy that you have not spotted on the screen.
Richard Heaton: By and large we have a system of two pairs of eyes in the office, so there are always two drafters looking at a draft and—correct me if I am wrong, David—generally speaking the second pair of eyes will look at a printed copy for that and other reasons.

Q40 Mr Turner: The things we are looking at particularly are amendments; either here in the House of Commons or more likely in the House of Lords there are amendments. I take it you are involved in this. Is it true—it certainly seems to be true—that, first, amendments are more acceptable in the House of Lords and, secondly, are they good, worse, or better than in the House of Commons?
Richard Heaton: I think there is probably a difference between First House and Second House, so Second House, whether that is Commons or Lords, amendments are quite often correcting or responding to developments in the First House, putting things right, tidying up, so there is a Second House difference in terms of quality assurance. In terms of acceptability to the House, I don't think I know. David, do you have any thoughts on that?
David Cook: I am not sure I quite understand what you mean by acceptability to the House.
Richard Heaton: There is a slightly different approach to scope in the two Houses.

Q41 Mr Turner: My feeling is that things that are not acceptable in the Commons for various reasons—we are whipped and so on—are more likely to find a home in the House of Lords.
Richard Heaton: The difference I can think of is I perceive a slightly more relaxed attitude to scope in the House of Lords. I do not think they call it scope. In other words, in the House of Commons the House authorities would rule out of order an amendment that was outside the subject matter of the bill. In the House of Lords they have the same rules but I detect they are slightly more relaxed and self-governing, so I observe that difference. Whipping happens in both Houses but the whipping experience is undoubtedly different in the Lords than in the Commons, but I do not think I could put my finger on any differences beyond that, if I am honest. It may have been the scope one that you had in mind.

Q42 Mr Turner: I just wondered if a House of Lords elected in its current way would be different from one that is full of elected people.
Richard Heaton: It is a very interesting area for speculation.
David Cook: One of the areas where amendments are more likely to be made in the Commons is if you have amendments that affect financial procedure, for example, because the Commons has a particular interest in financial procedure, so that is one of the differences. That is not to say that you do not get amendments on financial procedure in the Lords, depending on the extent to which that infringes Commons privilege and that the infringement can be waived, but inevitably one tries to deal with that sort of thing in the Commons where one can.
Richard Heaton: But from a government perspective, in each House it is true that the Government can expect assertive parliamentarians moving amendments that are unwelcome to the Government, or are welcome as the case may be, because they are creative or add new material—material to which the Government responds. That is the experience in both Houses. Both Houses can be assertive. Sometimes it is said that parliamentary scrutiny is inadequate. From a government's point of view, parliamentary scrutiny feels active and operative, and matters, and it is not just stuff to which government responds. It influences the shape of the final bill by way of new material being added, by way of new ideas, by way of challenge. So I certainly would not concede that parliamentary scrutiny does not work in some fundamental way. It certainly feels pretty real from the government perspective in each House.

Q43 Chair: You write bills for government and yet they are processed by Parliament. Do you feel that you work for government or for Parliament?
Richard Heaton: The straight answer is that we are civil servants like any other civil servants who might appear before you, so we have ministers and we are subject to the Civil Service Code and all the rest of it. The black-and-white answer is we are civil servants. We recognise that, for the reason I gave right at the beginning: what we write is words that we offer to you to enact—Parliament to enact, not government;

that is absolutely lesson one in constitutional law. We have a particularly important relationship with Parliament. We have a particular obligation to help you understand and own the words that we write. We are an important bridge within the system between the Civil Service and the House and House authorities, so we have good relationships with the Public Bill Office in each House. We talk to them all the time about the handling of a bill, scope and all sorts of matters like that.

I frankly wish that the relationship between the Civil Service and the administration in each House was better. It sometimes feels a bit uncomfortable that we are one of the main bridges, along with the business managers. The straight answer to your question, Chair, is that we are civil servants but I think with a particular responsibility to Parliament, is how I would put it.

Q44 Chair: Whenever I have written any report I am torn between wanting people to accept it, because it is obviously my words of wisdom that can't be improved upon, and taking expert advice so that my report is better than I could have originally drafted it. In your circumstances, when Members of Parliament bring newspapers and correspondence to sign into Select Committees do you find that something that you relish or do you find it quite insulting that back-benchers of all parties are not making the serious contribution that representatives could make?

Richard Heaton: In my first experience as a civil servant in 1991, going into what was then a Standing Committee, I was interested and surprised that that was going on. But Members have all sorts of demands on their time. I was surprised then, it struck me as a bit odd, but I do not think I would want to comment beyond that; in the same way that if I chair a meeting and people are using their BlackBerry or their iPhone, it strikes me as odd.

Q45 Chair: I am going to press you on that, Richard, if I may. One of my last experiences on a Standing Committee, which colleagues have heard about before, probably too many times, was to amend one of the Criminal Justice Bills with the consent of all parties to improve it in a number of respects. It never caused a vote and I was not selected for any other Standing Committee for a period of four years after that. That would seem to me to be doing the things that people have elected us to do, particularly if you are trying to do it in a consensual and constructive way. Don't you think you are missing something from your potential partner when you are not getting the best out of Members of Parliament in a Standing Committee and getting their expert contribution from their constituency experience? Perhaps more constructively—it is a very leading question—how might that process be improved, because we are looking at better governance?

Richard Heaton: Just moving slightly into the abstract, it strikes me as odd that we do not get much feedback from parliamentarians on what you find easy or difficult with bills or drafting. A thought that occurred to me the other day is we could run seminars or workshops. We could come in and talk to you—not in the context of a bill, because that is clearly subject to stages and procedures, but we could come and talk to you and say, "What is it about drafting that you find difficult? Is there something about the committee process that causes you to switch off because you simply can't follow it because it is too complicated? Is there anything we can do to improve the explanatory notes" (although that is a government function not a Parliamentary Counsel function) "Could they be better? Could the way we arrange material be better? Could the grouping be better?" We could talk about those matters with you in abstract, and it goes back to my point about a better relationship between the two administrations and the two bureaucracies. I wish sometimes we were not always at such loggerheads and one of us being defensive and the other not, and the other on the attack. I wish there was more of a partnership, and it may be that joint workshops or seminars to make the process work better is something I would be keen to look at, certainly.

Q46 Chair: But the people who run the House of Commons, for example, do not want there to be lots of educated Members sitting on a committee. They want them to put their hands up at the appropriate moment. Aren't you wrestling fundamentally with this problem of executive sovereignty where Parliament can't make a contribution when it is eminently qualified to do so? Are we not passing legislation, effectively, with one hand tied behind our back by not having the benefit of Members' experience from all parties?

Richard Heaton: I do not think I want to be drawn on party management issues, if I am honest, if that is all right.

Q47 Chair: I can understand why you say that, but we are here to try to improve the quality of legislation and half the legislative process is not being enabled to make a serious contribution, and I think it is something that should be of concern to you.

Richard Heaton: When we were reflecting on one of the ideas that is on the table at the moment about whether there should be a standards committee, I do sometimes think that Parliament has lots of opportunity and lots of tools and lots of processes and committees; pre-legislative is a new one and evidence stage in a Public Bill Committee is another. There are lots of opportunities for Parliament to do a tough scrutiny job and sometimes there is a reflection that Parliament is not using the opportunities available to it, and maybe that touches on the matter that you touched on, Chair. The previous chap you took evidence from, Daniel Greenberg, previously of this office, put it in provocative terms. He took the challenge to you and said, "Parliament needs to do more," and I can kind of see where he is coming from. But Parliament is a political place and there are political parties and there is government going on. I can understand the dynamics where the executive has to get its business through and has whipping and so on. I do not think I can go much further than that.

David Cook: I think perhaps you should not be quite so almost negative, if you like, about the level of

contribution that you make in Parliament. My experience as a drafter of the legislation and seeing the legislation go through Parliament is that the scrutiny process that is undertaken in Parliament is in many ways a very effective one and the points that are made in debate are wide-ranging. I think we often find ourselves in a position where once a bill has been introduced and is being debated, from a technical perspective there is an awful lot that we can learn about the drafting from the way in which Members have understood or not understood particular provisions, the points that are made in debate. It regularly occurs that things occur to us as a result or prompted by the debate, not just points that are specifically made on the drafting or on the policy in debate itself but arising out of the debate. There are often government amendments that flow on the technical side as a result of the fact, if you like, that the legislation has been tested with an audience.

The parliamentary scrutiny process feels very real to us. It is a very meaningful process, and it is quite a long process as well. It does have the advantage that the legislation is out there and able to be commented on, not just within Parliament but with groups outside Parliament, for a significant period of time before it becomes its final form. That ultimately does produce better legislation.

Q48 Paul Flynn: The Regulatory Reform Act 2001 was so incomprehensible that the Legislative and Regulatory Reform Act 2006 had to be introduced to explain what the 2001 Act meant. Is the 2001 Act regarded by you as an atrocity in the world of drafting bills?

David Cook: I am not particularly familiar with the 2001 Act. I am familiar with the difficulties that arise in trying to characterise the grant of fairly wide powers to achieve particular policy results. Certainly in connection with deregulation—I think there was a Deregulation Act back in the early 1990s as well—there is a long history of difficulty that arises in trying to take powers in a way that are not too wide but on the other hand achieve the result that is sought.

Q49 Paul Flynn: I dug out the preamble this morning to the Act and, while it is clearly written in a language that is derived from English, I read it three or four times and I have no idea what it means. Is it seen this way? It is not a low point, it is not something when you train you say, "Look at the 2001 Act, this is how we messed things up"? The evidence that it was messed up was the need for another Act five years later because professionals in the field tell me they didn't know what the 2001 Act said, as crude as that.

Richard Heaton: It is not notorious to me as a low point but that is not to say—

Paul Flynn: There are low points? This is worrying.

Richard Heaton: The point I was going to make was similar to David's. That procedure is difficult within government—people find LROs difficult, partly because they are such broad powers that to persuade Parliament they are proper powers to pass they have to be hedged around in such a way. You add procedure and you add length of time and you add consultation periods and quite often it is easier to introduce a bill than to introduce an LRO. That is not particularly a comment on the drafting but it may be that that sort of complexity is reflected in the draft. I will be fascinated to see the draft because I am not familiar with it.

Q50 Paul Flynn: I would be grateful in fact if you would like to write about it. To go back to what was raised earlier on, which seems to be a fundamental question, I can remember Dame Irene White in about 1974 addressing a meeting in North Wales where she complained about the problems with parliamentary draftsmen and that it was a worry going on. Her memory and her distinguished father's memory go back to the 1930s. She was claiming that logjams, because of the problems with parliamentary drafting, because of shortages, because of the way that they worked, were as much part of parliamentary life and as permanent as Big Ben is and it was something that was endemic and would go on forever. From your first answer, that has gone. We no longer have a problem. There is not a holdup, logjam, because of the activities of your department.

Richard Heaton: I really don't think that is the case and indeed part of the evidence that the Committee is generating is something about the quantity of legislation. If it were the case that if only we were better staffed we would produce yet more legislation to provide to you is a horrifying thought. I don't think it is the case that because of the staffing in 36 Whitehall we can't get the work done. There are all sorts of things going on here, but I don't think that is one of them.

Q51 Paul Flynn: Yes. I think we would all tend to agree with that, along with what the Chairman said about his exile from committees not having his talents, but he knows the reason why. There are many of us that could add a great deal to the four years that he claims in which he would never have been invited, but he obviously did not submit to the Whip's lobotomy that is necessary to go on to these committees. I am fascinated with your replies on this. Are you suggesting that there is no room for improvement in the way that MPs and Lords scrutinise bills now? Are they better examined somewhere else where MPs do even better than we do?

Richard Heaton: I am sure there is room for improvement. You have not asked us—and perhaps you are going to—about the idea of a legislative standards committee. There is an idea out that perhaps some better parliamentary process would help.

Q52 Paul Flynn: Would you like to answer the question, even though I have not asked it?

Richard Heaton: Okay, because my answer to that might help on your question as well. We were thinking about that and there seem to be two ideas in play. The first idea is that there ought to be some sort of agreed list or agreed standards that good legislation ought to meet. That is the first idea, and it is something about clarity; it has been thought about for long enough, the policy has settled down, it has been consulted on. There is that sort of list and that is the gold standard.

Then stage two is, is there some sort of room for a new parliamentary process or a committee to scrutinise bills as they come in?
On the first of those I think there might be something in that, some sort of agreed understanding of what it is that contributes to good law and what gets in the way. I am not sure it is a list of criteria that would lend itself to a checklist—is it there or is it not?—but: has a bill been consulted on; has a bill been thought about; are the provisions necessary and they don't exist by other means, and you can't use powers to do what you are trying to achieve; does it have the quality of durability so it is unlikely to be amended in successive times; is there something about the quality of the thinking that has gone on that makes it robust against the passage of time? That sort of thinking and codifying that sort of thinking I think is quite an interesting idea.

Q53 Paul Flynn: What would you say would be the gold standard in a parliamentary Act? Which one are you most proud of in its clarity and durability?
Richard Heaton: I am going to slightly tempt fate by mentioning one that has only just been introduced, so who knows, it might receive a mauling. I think the Defamation Bill, second reading on Tuesday this week, is quite an interesting example. I mention that for a number of reasons. It started as a Private Peer's Bill, I think. The ideas, the need for change, were out there and the ideas had been well tested, well articulated, well moderated. Then the Government, I think, agreed to pick up the ideas, and so my office got involved and talked to the Peer involved and iterated the drafting. Then it was subject to pre-legislative scrutiny. There is no extraneous material. It is nice and clear. It seems to do a job that everyone agrees is necessary. So I am hugely tempting fate, because it may fall on its face during its parliamentary passage, but that seems to be quite a good example.

Q54 Paul Flynn: How is it helped by the checklist for drafting instructions? At which stage did that come in? Was that a key role?
Richard Heaton: I wasn't involved in the drafting but I do know that the drafter adopted the draft that the Private Peer had commissioned, interestingly from a former member of this office, and spoke to the Private Peer. So there was quite a lot of iteration, which is another good sign. If a drafter is involved with the person whose policy it is, talking and engaging with them, that is a good sign. That suggests that the communication—

Q55 Paul Flynn: How does the process work for bog standard bills—the checklist itself? Is this an effective tool?
Richard Heaton: The checklist that I was trying to articulate just then?
Paul Flynn: Yes.
Richard Heaton: It doesn't exist yet. It is just an idea. I think there is something my office can do in terms of promoting quality of legislation and good law principles within government, talking to parliamentarians, talking to users, talking to judiciary. I think there is a role for Parliamentary Counsel in saying, "This is what good legislation looks like and these are the upstream things that will help make better legislation." There is an area there that I would like my office to be a bit more visible and to have a greater leadership role in. It is early days and we are treading quite cautiously, but I do think there is a good law championship role that this office can help to lead.

Q56 Paul Flynn: There is a suggestion that teams are set up with specialist interests, with lawyers dealing with criminal legislation and so on. Is this a good idea?
Richard Heaton: In my office?
Paul Flynn: Yes
Richard Heaton: Yes, undoubtedly. It is.

Q57 Paul Flynn: Progress to be made there?
Richard Heaton: Well, it is a new idea. The office has been divided into teams that face off against particular departments doing particular work and that has been going for, what, 18 months or so. So it is a novelty. It is not how the office used to work. It means that you get continuity. It means that you get a degree of subject expertise. It means that you are not always starting from scratch when you are doing a criminal justice bill; you know the previous one. So it is a positive development, I think.

Q58 Paul Flynn: What does "face off" mean?
Richard Heaton: Simply you have a particular responsibility for a department. You face a department. David's team principally deals with Home Office legislation, for example.

Q59 Paul Flynn: It is very educational, hearing your presentation. To what extent does the Office of the Parliamentary Counsel rely on draft bills prepared by the Law Commission? Would you like to tell us about that?
Richard Heaton: Prepared by the Law Commission?
Paul Flynn: Yes.
Richard Heaton: The Law Commission have members of this office, Parliamentary Counsel, seconded to them on detached duty. The bills that emerge from the Law Commission have been drafted by Parliamentary Counsel, just not by people who are physically in my office. It is the same team of people.
David Cook: There are different ways in which bills will emerge from the Law Commission. The straight consolidation bills will go through the parliamentary process with drafters from our office who are on secondment to the Law Commission taking them through. There will also be law reform bills that the Government decides to take up in those circumstances. I think the Bribery Act was an example of a bill that was originally drafted at the Law Commission and then became a bill that our office took up when the Government adopted it, and it went through Parliament in that way.

Q60 Paul Flynn: Your general message this morning seems to be that there were problems in the past but generally you are optimistic that the quality of drafting and the quality of legislation is improving. Is that right? If it is, what further improvements do you

think are necessary from all sides, including the contribution of Members of Parliament and Peers?

Richard Heaton: The technique of plain drafting I think is established and done. More to do in that area but I think that is reasonably okay. We have things that we want to get better on within my office that are within our control, so greater use of peer review within the office, slightly more directive standards so we are clear what "good" looks like and we have a clear standard within the office about how things should be drafted. So I think slightly more directive is an interesting area. We would like to build capability in government legal teams, because let's not forget the user. Regulations, rules and orders are legislation as well, and so we are interested in standards of that type of legislation.

I think we could do more to understand why legislation is complex, the causes of complexity, and work out whether they are all necessary causes of complexity or whether there are some unnecessary causes. Are there some areas of law that we legislate to too fine a degree of detail that we can relax a bit? I don't know the answer to that. I would love to know something more about the causes of complexity. I think explanatory notes could be better. I think our relationship with the people who publish bills online could be better, for the reasons I mentioned earlier, so we have a better understanding of what the user experience is like. I think we could be probably better at lessons learned between us, the government machine and Parliament. If a bill has gone well, if it seems to achieve its objectives, what are the things that really made it successful? So I think we are quite good at office wisdom. I am not sure we are very rigorous and methodical about learning lessons from the process, so there is something there.

Then just going back to the drafting, I don't think we ask users enough about what really works. We tend to say, "I am writing in this style because this is clear to the reader," and I am not sure that we ask ourselves enough what the reader does find useful but we are beginning to do that. We are beginning to use an agency that has user groups, intermediaries, lay readers, lawyers, and we are beginning to work out what it is that readers find useful rather than just guessing. So there is a huge amount that we would like to do within the office in the area of improving what we do.

Paul Flynn: Thank you very much.

Q61 Chair: Do you interact with your colleagues in the USA?

Richard Heaton: A member of the office was seconded to the drafting office in Washington DC so we have a degree of relationship. We have stronger relationships with the Commonwealth drafting offices, but we know a bit about the Washington scene because we have had that secondment.

Q62 Chair: Is your equivalent Presidential Counsel or Congressional Counsel?

Richard Heaton: I don't know.

David Cook: I think the drafting offices are Congressional rather than controlled by the executive, in other words controlled by the equivalent of our Parliament.

Richard Heaton: The drafting office drafts all sorts of things. They draft things that clearly are destined for the American statute book. They also draft bits of legislation for Members of Congress that are designed to achieve a short-term, rhetorical, political effect and are not drafted with law in mind. So they have a kind of curious role. They are drafting resolutions, as it were, as well as legislation. It is a different set-up.

Q63 Chair: Do you think that in the UK there is room for a parliamentary counsel as opposed to a governmental counsel, not least on things like Private Member's Bills but also to advise the legislature on how it might best amend government-designed bills?

Richard Heaton: I think that is an interesting idea and I know that some countries—I think South Africa is one—have something similar. At the moment the way it works is that Private Members wanting to amend or do bills will take advice from the Public Bill Office, and they know us well and there is a relationship there. If the bill is picked up by the Government or supported by the Government, we will offer technical drafting assistance. Whether we could have people in Parliament working to parliamentarians is an interesting idea and it is one that we are beginning to kick around.

David Cook: Sharing knowledge and experience with Parliament is something we are very interested in. I did some seminars a while ago with the Commons Public Bill Office people in relation to Private Members' Bills just to try to spread a bit of expertise in that area, and generally sharing expertise is something we are very interested in.

Chair: Perhaps you could take that thought away and come back to us at a later point or talk to us again. Having some specific and exclusive parliamentary capability, as well as responding or reacting to the executive capability, might be something that would help our inquiry as we go.

Q64 Tristram Hunt: As a new MP—and maybe I just was not there or missed it—I think a seminar from yourselves to new MPs at the beginning of the session would be very useful. The interaction we had, as I recall, was with the clerks. There was a Labour Party "meet the clerks, see how it works" kind of event rather than as part of the initial stage of being an MP in the first three or four months, which I think would be very useful. That said, I agree that as a non-lawyer reading the legislation put before us, for example the Fixed-term Parliaments Bill, I found very understandable and clear, and that was the first bill I really looked at.

Returning to the volume issue, we have had some interesting figures that came from the House of Lords, and maybe this is simply to return to the earlier question of style. It seems that while the number of Acts has decreased since the 1980s, the average number of pages per Act had increased significantly. Is this because of the style reforms vis-à-vis the 1970s, so that those brilliant one-paragraph compositions that if you were a clever lawyer could

encompass a great deal now have to be explained so the size has increased?

Richard Heaton: I think I saw the same figures that you are looking at. You need to treat page numbers with a bit of caution, partly for the reason that you give but also the way Acts have been laid out by the typographer—I don't think we use that word any more—means that you get 20% fewer words on the page. There is more white space, bigger margins and so on, so treat page count with a bit of care.

But have bills got longer? I think that is your question. It is hard to say what is going on from a very narrow statistic like the average number of pages because you don't know what the spread is, do you? There are multi-subject bills, but then that is nothing new. Are there more multi-subject, compendious bills than there used to be? I don't know. It feels like there are one or two a session. Multi-purpose criminal justice bills have always been around, certainly as long as I can remember. The 1994 Act was enormous. It may be that we see more compendious bills in other areas. Unfortunately, just reflecting when preparing for this session, we do not really have the analytical capability or evidence base to know much about the quantity of the legislation we put through. There are all sorts of numbers and figures that are tantalising and interesting. I suspect that the phenomenon of the multi-subject bill has been around for probably 30 years or so. I suspect we are talking about one or two a session. It may be that we see them in areas other than criminal justice more than we used to, but beyond that I don't have the evidence.

Q65 Tristram Hunt: Are those the ones that are usually criticised in the press if there are going to be mistakes and errors? Are those the ones that are usually drawn out?

David Cook: I don't think there is a necessary correlation there at all. It may be because they are multi-subject, they are bigger bills, that they may be more controversial, they may attract more attention. The sad truth is that you can make mistakes in any bill whatever size it is.

Richard Heaton: The other feature of a multi-purpose bill is that the scope is very broad, which means that amendments can come in on any subject. It is an interesting paradox. Government on the whole does not like big bills because the scope is broad and amendments can come in on any subject. Parliamentarians, back-benchers, find wide scope useful because you can introduce amendments on any subject. So the parliamentary interest in scrutiny and the back-bench interest in putting things in sometimes diverge. Amendments can come in on new subjects late in a bill's passage and that is quite often an area where mistakes creep in, so you might see more of that in a multi-purpose bill than in a small confined bill like the Defamation Bill.

Q66 Tristram Hunt: As civil servants you have no view on that; you deal with what is placed in front of you? Would you have suggestions for reform of that process?

Richard Heaton: Of the process for amending or for putting—

Tristram Hunt: For the size, technically, for the sheer size of some of these bills.

Richard Heaton: It is a government function to take views from departments on what needs to be legislated on, so there are the bids for slots. Then it is a government function—and we are part of it with our Cabinet Office colleagues—to decide which subjects can properly be graded with which subjects. So we play a part in that. In an average session there are lots of single-purpose bills, which we like because the scope is narrow, and there are usually one or two multi-subject bills. If we don't get the balance right, then the chances are the Government will pay the price in Parliament. I don't think I have a view on whether we do get the balance right. Generally speaking, as I say, we have a balance of small bills and large bills, because that is the best way to handle a session and generally subjects tend to marry up with each other.

David Cook: I am not sure we fully understood what you saw as the difficulties with multi-purpose Bills.

Q67 Tristram Hunt: I am just seeing if there are, if you are finding any difficulties. I think the other question at the moment is we were all struck by the Queen's interesting comment about the number of bills she had signed off during her reign. In terms of the institutional memory of your office, is there a sense now of legislation as evidence of action so that, as it were, politics has to be legislatively focused? Is that a problem for you?

Richard Heaton: It is something I recognise. It is sometimes described as "initiative-itis" or ministers wanting to be seen to be doing something, so it is something I recognise. I think it is quite easy to overstate that. Most legislation, if you look at it, is pretty solid, worthy stuff that is not there to send a political signal and does not score many political points. It is there because we have a complicated statute book and it needs maintaining and you need to amend the law here because it has got out of step with developments and so on. Most of the legislation we produce is pretty uninteresting politically. The areas where ministers use the statute book to send a signal, yes, that is a phenomenon, but it is not a huge one in terms of the statute book, I think.

Q68 Tristram Hunt: Finally, in terms of the media commentators and the public, the Dangerous Dogs Act is the one that is the shorthand for where things did not go right in terms of speedy drafting and we have had all the reform change. Is there a seminar for your new graduate entrants entering your business on the Dangerous Dogs Act, or do we just not mention it within the department?

David Cook: Interestingly, I think the received wisdom is that it was well drafted in the sense that it did what it set out to do.

Tristram Hunt: Technically well drafted?

David Cook: Technically well drafted.

Richard Heaton: I think it is still on the statute. It is a very interesting example. Yes, there were some politics going on and there is always a need politically to respond to anything from metal theft and squatting to dangerous dogs. Fraudulent Mediums was an Act

passed in the 1950s because that was a big problem of the day so there is a Fraudulent Mediums Act still on the statute book. The Dangerous Dogs Act had to be introduced in a hurry and it was a difficult thing to pull off because you had to ban or require to be muzzled things called pitbull terriers and there is no such thing in the Kennel Club, no one knows what it means, so counsel managed to say that this Act extends to the dog commonly known as a pitbull terrier. So it was an interesting bit of drafting; it was cleverly drafted. It seems to have worked. It is notorious for being a rapid use of legislation to meet a political difficulty. I am not sure, I don't know for certain, whether it is an example of a bill that simply does not work. I don't think it is.

Simon Hart: I can think of one.

Q69 Chair: To an extent do you feel you get some of the earache, not least from parliamentarians, because we no longer normally do a Green Paper, White Paper, pre-consultation where Members of Parliament could speak up and could make their points very early in the process? Now we seem to run straight into drafting legislation and so perversely this puts a lot more pressure on colleagues to be loyal to government and to break with government or, indeed, the Opposition. Wasn't it done better in the old days when the process seemed to have other stages where parliamentary colleagues of all parties could make their views known before it came to you and therefore before you got the blame for the way the legislation was drafted? I am searching again for how do we make the process better? Have we lost something?

Richard Heaton: I think pre-legislative scrutiny feels to me like an idea that has not been properly exploited yet, and I think that there is more that we could do there. It may be simply that we do more of it, although I think we did quite a lot in this session and the last session, but somehow that is a process that has not met its potential, I think. It may be that pre-legislative scrutiny is a return to the days where the ideas were put into the public domain, subject to scrutiny, subject to challenge, created a challenge from parliamentarians and others by way of a White Paper and a Green Paper. Maybe pre-legislative scrutiny is a return to that sort of system.

Sometimes my worry about putting a draft out early is that immediately it invites people to dive into the drafting rather than to see the broad principles. A White Paper ideally in my books should not have a draft bill attached, or very often should not have a draft bill attached, because it encourages the pedants to come in and make drafting comments, where the focus at that stage ought to be on the ideas. There are two bits of a drafter's job. There is the easy bit, which is writing it down, and there is the bit that comes before, which is testing and analysing the ideas and saying, "What do you mean here? Do you really mean that? Do you need that level of detail?" That is the stage that is worth its weight in gold and that is the stage that the White Paper ought to help on. So if you put a draft you tend to force people into the words of the draft and they put in amendments, which tends to add to complexity and all the rest of it. Focusing at the pre-legislation scrutiny on the ideas as well as how to put it together is useful, I think.

Q70 Chair: Parliamentarians used to have that option at the ideas stage. Now the Civil Service consult with named groups, interest groups. I cannot remember receiving from the Civil Service any time in my political career an idea that, "We are putting this thing out to consultation. What do you think as a local Member of Parliament?" In that sense, that part of where we could actively get engaged is no longer there and therefore we are engaged only when we do see the bill and we do see the detail and, therefore, we have no alternative but to plunge in and make points on the back of the drafting.

Richard Heaton: That surprises me. As a civil servant I find that a bit concerning. If it feels to parliamentarians that a public consultation does not include parliamentarians that does not feel right, and it may be that something needs to be fixed either in how consultation is put out or how it is received by parliamentary authorities and given to Members of Parliament. I don't know, but public consultation certainly ought to include parliamentarians, who ought to feel like it is encompassing parliamentarians as well.

Q71 Simon Hart: Can I start by continuing the theme that we were discussing a few minutes ago on the back of the dangerous dogs example. It is how you square the problem of attempting to make good legislation out of a ridiculous idea—where the drafting collides with the politics and how that is overcome. I suspect there are more examples than simply dangerous dogs where there were some very strong political requirements for presentational and probably electoral purposes, which if translated into legislation would, if nothing else, cause significant problems with enforceability. I am interested to know how you address that when you think, "This is ridiculous. How on earth are we going to turn this into something that a policeman in a south London street, or in the case of other legislation maybe on a windy hillside, would be able to interpret and enforce in a way that is fair and proportionate?" I would be interested to know what you think about that.

Imminently, I think, we are about to be on the receiving end of a bill to reform the House of Lords, which is going to be a massive muscle test between the Liberal Democrats and the Conservatives and your poor old draftsmen are going to be forced to come up with something that is seriously pressured by coalition politics and party management. Do you close off all of that and just follow orders? How do you square that problem?

Richard Heaton: Taking the second one, when push comes to shove we take instructions and we draft what we are asked to draft. In the case of that bill there is a clear line of authority from ministers, mediated by Cabinet and committees and all the rest of it, and we will draft the emerging settled policy of the Government. So there is not a technical or philosophical problem there. What we would avoid doing would be to produce words that are understood by two different people to mean two different things

and thus achieve a compromise. That is a bad drafting solution. But as long as we have clear instructions emerging from the process that ask us to do that or that, we will do that or that, as the case may be. We will avoid drafting deliberate ambiguity because that is classically bad law.

Q72 Simon Hart: Do you go back to the department and say, "We can't do this"? You mentioned the pitbull example and how it works, but the truth is that it does not work. You may have convinced yourself that it does but I think on the outside it really does not, otherwise they would not be revisiting it now. We are constantly having debates here about how it could be improved. There are some provisions already now in place or coming down the line about how—it doesn't particularly work. Is there a way where you can go back to Parliament and say, "Nice idea, but we cannot do this in the way that you want us to do it so can you please come back with something better"?'

Richard Heaton: Yes. Sorry, David, do you want to answer this?

David Cook: Yes. That is the sort of challenge function that is an important part of our role in the drafting process. In relation to any instructions that we receive, a core part of our job is to read them through and try to understand what is being attempted to be achieved and how that will work and how that can be converted into law. There is an element of a challenge function in that, because if we come across ideas or instructions that simply do not stack up in one way or another, we can't translate those into effective law, perhaps because they are illogical or they don't make sense, they are inconsistent, and they have not taken account of fringe cases, for example. It is perfectly natural when you are devising policy to concentrate on the main cases you are trying to deal with, but when you are legislating you have to be aware of all the implications for the fringe cases as well, and it is an important part of our function within the drafting process to test the idea at a technical level in order to see how it can be translated into law. We will find around the edges of ideas that things need to be adjusted in order to be able to be translated effectively into law. We may prompt a rethink in particular areas and so on.

That is a part of our function and that is a continuing part of the process, both within the drafting process when we are drafting—leading up to introduction and, of course, one of things that happens in Parliament, as well as part of the parliamentary process, is that the ideas are continually tested. In a way it is one of the strengths of legislation that that happens over quite a significant period of time and there is quite a lot of testing that goes on.

Q73 Simon Hart: It has been suggested—and I don't know if this is true, you might tell me—or it has been claimed by quite a lot of pressure groups on the outside that they were responsible for drafting a bill. I have had a certain amount of dealings with the RSPCA, for example, and they will claim to have drafted a bill for government, this one or the last one. Is that true? Do outside campaigning charities draft legislation and, if they do, where do you come into the process?

David Cook: No. By and large they do not draft the words of the legislation. There is always a bit of ambiguity when people talk about drafting. We touched on it earlier. Where people complain about bad drafting often that is a complaint about the idea rather than the way in which we have given effect to it through the draft. The policy and the drafting tend to blur and I think in the example you have given that is perhaps where the RSPCA or whoever it is will have contributed ideas, they will have played a very important part in the process, but they will not have chosen the words that go into the bill at the end of the day.

Q74 Simon Hart: I think there might be an initiative entitled "lessons-learned" where when the process has been completed there is a certain amount of review—"How did that go? Could we have done it differently? What would we do next time to come up with a better product?" Is that happening? Does it work? Are there bits of legislation that you think we, the parliamentarians, could and ought to revisit as a consequence of the lessons-learned process?

David Cook: There are different levels where we apply lessons-learned. Just within OPC we have our own process with government departments and bills that we have worked on where we have feedback, a lessons-learned exercise effectively, in relation to the process. That is not the process you are talking about, which I think is post-legislative scrutiny, but it is at a very detailed level a process that informs us about what has happened and enables us to change or improve our practices and procedures in a way that will hopefully produce better legislation next time.

Richard Heaton: The Chair was looking for areas for procedural improvement. I think the post-legislative scrutiny idea is one of those ideas, a bit like pre-legislative scrutiny, that has not found its potential. There is much more that we can do collectively to look back at an Act, maybe an Act that had a difficult passage or maybe an Act that was controversial, and just say, "Did it change behaviour on the ground?" The point of passing law is to change behaviour on the ground not to just send a political signal. "Did it change behaviour on the ground? Is it enforceable? Is it not being complied with?" Another one of my indicators of a bad law is widespread non-compliance because it means something has gone badly wrong. On the whole people obey the law and if they are not complying with the law, is there some behavioural reason why they are not doing that? There is something there about not just analysing the drafting after the event but analysing what has happened. I think the post-legislative scrutiny idea is a powerful one that has not been picked up.

Q75 Simon Hart: It is a slightly cheeky question in a way, but if you were to live your lives again and you were asked to draft a Dangerous Dogs Bill and a Hunting Bill, would you come up with exactly the same product as you came up with last time?

Richard Heaton: I don't know. As I said earlier, I have never professionally looked at the Dangerous

Dogs Bill or been involved in it, and I simply don't know if it works. There are certainly bits of legislation that I have been involved with that I look back on and wish we had done better. There are some bits of legislation that we introduced in a terrible mess, in a terrible hurry, and they had to be amended a million times and the end result is a messy bit of legislation. I am thinking of one in particular, the Pensions Act 2004, for which I don't apologise because it was put there in a hurry because pension funds were collapsing and something needed to be done quickly. A lesson I observed there—and again this might be an area that you want to look at—is sometimes a bill is put through in such a hurry for operational reasons, because it is necessary, and you are dying for a stage right at the end of the process where we get a chance to tidy it up before it gets Royal Assent, and that would have been useful in that case. That is an idea that possibly you might want to play with.

Just going back to an earlier question about our challenge to instructions that ask us to write bad law, quite often what is missing there is the policymaker having a clue about non-legal means of achieving a policy objective. Quite often the most useful challenge is, "We could produce a bit of law here but the chances are it is not going to hit the target, it is going to be easily evaded, it is going to be a laughing stock, it is not going to get through Parliament for whatever reason. If you really want to change the behaviour of that group of people there is a different way of doing it." Quite often exploring non-legal means of achieving policy outcomes is quite fruitful.

Q76 Simon Hart: One more question. Are those exchanges with departments a matter of public record, the instructions that you receive and the correspondence that you have with departments about the conversion of policy and so on? Are we able to access that?

Richard Heaton: I am afraid they are legally privileged.

Q77 Simon Hart: Fair enough. My last question is on pre-legislative scrutiny. You said earlier on that sometimes for operational reasons, particularly at the beginning of Parliament—you mentioned the Fixed-term Parliaments Bill—there is a need to get on with things and therefore there is no pre-legislative scrutiny to speak of. Is that, in your view, a sensible way to go about this, because we are only talking about maybe a 12-week period? We have talked in this Committee about the fact that by not having pre-legislative scrutiny what you end up with is probably an elongated period anyway because things might get held up in the House of Lords or the whole thing just runs into the long grass because insufficient thought has been given in advance. So, is that operational? Does that operational argument, "We've got to get on with it, so forget the PLS" carry any clout at all?

Richard Heaton: The reason I am going to slightly duck the question is that it was not just an operational argument, it was a political one as well, and it was to do with cementing the coalition. There were serious politics at work. I don't think I want to get drawn into second-guessing the decision on rapidly introducing fixed-term Parliaments. It was necessary for coalition purposes.

Q78 Simon Hart: That was a specific example. It is just whether in the end hurrying things up and constricting the amount of time we have to discuss things in advance has the opposite effect because down the line you have 1,000 amendments in the House of Lords and everything comes to a grinding halt. If you had done the proper PLS you would have been able to get the bill on the statute book in around the same time or even sooner than if you had not. That was my point.

Richard Heaton: I can see that that might be the case in some cases.

Q79 Chair: We often quote the way in which this Committee interacted on electoral registration and virtual registration issues as an exemplar of good practice and there were a number of significant changes. Arguably there should be more and they are still in the process, but on the AV referendum and Parliamentary Boundary Commissions there was virtually no consultation with the Committee and I don't think there is anyone out there from either point of view that would argue that it has been a roaring success. We are not a guarantee of success but I come back to this concept of using the House of Commons to its fullest extent. We are a bit shy about saying or MPs are not allowed to say that they are hardworking and good at their jobs, but most of them are and they have a serious contribution to make and they can improve legislation, and ultimately that is what we are here for. I think where that has not taken place, we have perhaps in our own way demonstrated that Parliament should be used more effectively. Do you feel that is accurate?

Richard Heaton: In the abstract I would agree with the proposition that certainly the partnership thing is not always evident and, secondly, that there is a capability thing. Sometimes you sense a frustration in Parliament that parliamentarians can't contribute to their fullest capability, but I would not want to get drawn beyond that.

Q80 Chair: I do think you need to be drawn on it because we are having an inquiry into better governance and you may want to contemplate some of the things we have said and come back to us, Richard, because we are here to try to improve the process. We are not here to put you on trial but to try to see if there is a way that the executive and the legislature can work together in a more productive way.

I will pick up one question from Simon's contribution, and you touched upon it in part, about keeping your teams together post-legislatively. Do you think that is a good idea? Secondly, do you think that there is also a lead into parliamentarians being kept together, either because the Standing Committee revisits the bill that it passed or to develop the expertise in a forum like the Select Committee so that there is a permanent, hopefully slightly educated bunch of Members of Parliament looking at legislation that passes through the House and having some responsibility to keep an

eye on that and to keep an eye on whether it has been effective or not?

Richard Heaton: On the team question, within this office it is massively helpful having counsel with knowledge of the bill who, even if they have moved on to another bill, are still in the office and offer a sort of aftercare service to the department. They understand why the bill was put together in that way and what the powers are supposed to mean. That continuity is massively valuable.

The ideal circumstance so far as a department is concerned, the department instructing us, is to have a similar sort of longevity and continuity between the departmental solicitor and the bill team. The best cases are where you do get some degree of continuity, either through personnel or through knowledge being captured somehow. Sometimes there is an issue when that knowledge is dissipated because people move on and the knowledge is not captured. So there is certainly a gold standard there about some degree of continuity, and I can see the same would apply to parliamentarians. Parliamentarians having some degree of continuous knowledge or familiarity with the subject matter would be useful.

Q81 Chair: We are also looking at the concept of ministerial continuity. We are going to have an inquiry into the shuffle and the reshuffle where ministers themselves, with an average life of, was it, 23 months in the last administration, learn their trade and then are moved on, which is very bad, I would argue, for parliamentary accountability. Ministers do not keep an eye on the legislation that they were responsible for and are often moved on very quickly. It is part of a broader theme—I am not asking you to comment on that but just from the Committee's point of view—about stability and how this is not stagnation, this is how we maintain expertise and accountability, which we feel is a serious point in a number of areas.

Q82 Andrew Griffiths: This may be something that you are not going to be drawn on, but following on from both Simon and Graham's question in relation to Parliament and how Parliament can be more involved and help to improve legislation, we see often in the Chamber debates taking places, bills coming through, at committee stage in particular, lots of amendments being put down by colleagues with good intentions to improve the legislation that are never debated. They are not debated because of timetabling, because of guillotines, because of the way the party management operates and the management of the House operates. To what extent do you think that impacts on the quality of legislation that comes out?

Richard Heaton: As David said, an awful lot of amendments are selected and are debated. From a government point of view it feels like proper scrutiny and it feels like ideas are being put to the Government in debate and the Government is responding to them and accepting some and rejecting others. It is interesting you characterise it by those amendments that are not debated. We certainly see and feel the ones that are.

David Cook: Yes, and even the ones that aren't debated, the Government will be considering, will be preparing speaking notes for ministers and giving consideration to. Although there may not have been a debate, the Government will have been made aware of the point and will have taken account of it.

Q83 Andrew Griffiths: So there is a process then if I table an amendment that is never debated, that is not discussed in committee, where you will be going to the minister and saying to the minister, "Have you seen this?"

Richard Heaton: Yes, that list is very important. The marshalled list of amendments is an important document, and it goes around the bill team, the ministerial team and the Parliamentary Counsel. So, yes, absolutely it is a key stage.

Q84 Andrew Griffiths: To what extent do you feel, or do you ever feel, frustrated that because of the timetabling there has not been the parliamentary debate and the parliamentary scrutiny that the bill should have, or is it, to a certain extent, a bit of an inconvenience? You have seen the amendments, "Let's consider those and move on"?

Richard Heaton: Well, probably we are one stage removed from the action in the House so I am not sure I would be able to answer it very fully.

David Cook: The amendment process for us is a very important part of the overall process. There is obviously always discussion about, for example, the number of amendments that bills attract and so on but from a technical perspective, amendments that are coming forward are being put forward to improve the bill and as drafters we are obviously always interested in improving the bill. We always think a bill can be improved. I don't know of any bill or Act that I have been involved in that I haven't thought in one way or another I would like to test it further and try to improve. That is part of our culture almost. We have a culture where we are never really satisfied with things because, in a way, that is the way to learn, that is the way to develop. So this whole parliamentary scrutiny process is a process that I think adds a lot to the consideration of the bill.

Richard Heaton: It is true that timetabling happens but it is also observable that bills tend to emerge from committee early. I slightly question the idea that somehow debating time is not made available, because if that were the case you would be running right up against the timetable and that is usually not the case. Most bills tend to emerge early from committee.

Q85 Andrew Griffiths: I think we can all point to bills that have come before the House where there have been points of order and complaints about timetabling and complaints that amendments have not been debated, that colleagues have put work in on amendments that never see the light of day in terms of discussion. So I think I would disagree with you there. It is interesting that you have that perspective.

What sort of monitoring do you do of the debate in the House? What scrutiny do you have of what is going on in the Chamber and the view of the House rather than just what comes out at the end as voted and on the statute and through?

David Cook: Just on an ordinary bill that we are taking through Parliament, we will get the amendment sheet every day that comes around with amendments that are tabled. Part of our function is providing advice to the Government on the parliamentary process. So we inevitably are going to keep up to date with what is happening in Parliament. We are looking at the amendment sheets. The department will be the ones who are—

Q86 Andrew Griffiths: Would a member of your team be in the committee listening to the debate?

David Cook: Actually listening to the debate? No. That has happened in the past but now it would not be the norm to do that. But there are two ways in which what happens in the committee proceedings are fed back to us. One is through the departments themselves in terms of points that have been picked out from committee but also, of course, we get the Hansard debates from committee and try where we can to keep up with what has happened in the debates. So we are seeing the amendment sheet, we are advising on amendments, we are advising particularly where technical amendments have been proposed as to whether to accept them or not, and we are trying to keep up to date with what is happening in the debate and in the parliamentary proceedings.

Richard Heaton: If that sounds like we are slightly removed from committee, we are not the totality of the Civil Service looking after the bill in question. In the Committee you will have officials sitting on the table and in the corner you will have the bill manager, the policy lead, the departmental lawyer who is quite an important character. The fact that we are not present does not mean that the Civil Service and the ministerial team are not responding regularly to the committee.

Q87 Chair: Andrew, if I can just pick up your line of thought there. I think we are all missing a trick in the sense that we are probably looking at you guys as the whole bill team and you are the technical people who are drafting and doing the words. I think what we need to do is to bring before us some civil servants who have the experience of running the drafting teams, which would be particularly helpful. Part of the reason I say that is because I think the trick we are all missing is not that oppositions and governments do not get on their hind legs and argue over the bill; they do. It is invariably the front-benchers who have that debate and the back-benchers then vote one way or the other. I think what we are missing is the expertise of constituency Members of Parliament, parliamentarians who have something to offer.

I will give one brief example and it goes back to my Criminal Justice Bill experience. At that time I had an email circuit of people in my constituency who were interested in certain parts of that bill, because it is a difficult area where there is a lot of antisocial behaviour. I would consult with those people, including police officers, lawyers, community group leaders, and I would run parts of the bill by them that I knew were coming up next week and a local serving police officer would say, "Rather than making this 28 days, if you made it 36 it would have the following consequences and be workable for us." I fed that into the machine and I was able on their behalf, effectively, to amend the minutiae so that the law meant something significant and practical on the ground. There are many other examples that I will not bore the Committee with.

I think if we don't have a way of tapping into that then we are producing law in a formulaic way, which is loved by the Government and hated by the Opposition nominally, and not getting to grips with the job that I think sometimes we should be doing, which is getting the detail right. Do you think there could be a way in which that could be better facilitated so that you are getting a broader view from Members of Parliament?

Richard Heaton: As we have said a couple of times, I have no doubt at all that legislation is improved by parliamentary scrutiny, even if it doesn't feel like that in Parliament. That is not just because people are taking political shots at legislation, it is because of the amazing plurality you get in Parliament. You get a range of views and you get a range of views serviced by a range of constituents or interest groups or whatever. So it is like a very noisy arena with lots of important voices. That is an incredibly important part of the process. For us, although we are just the technicians, we are passionate about producing law that does real things and makes a difference and it does what it is supposed to do and doesn't get in the way and doesn't clutter up society. For that to happen, parliamentary scrutiny is really important because Parliament comprises the people who bring to bear this amazing plurality. If, for whatever reason, Parliament feels shut out or frustrated that means the system isn't working properly, so my general principle is emotionally I am completely with you, Chair.

Q88 Andrew Griffiths: You said you were a technician. Let's go for a technical question then about purpose clauses, slightly controversial purpose clauses. Do you think that they have a role to play in making sure that legislation is fit for purpose? Do you think we should be making more use of them?

Richard Heaton: I'll have a go and then David. We might have slightly different perspectives on this. Broadly speaking the office view historically has been fairly dogmatically against purpose clauses, fairly doctrinally against purpose clauses for a number of reasons, partly because of the mischief it is thought that the courts would do in spotting the difference between the words of the purpose clause and the words in the statute and they would play one off against the other and find the gap between the two. So we have historically been pretty nervous about it. I would say that we are less doctrinally opposed to purpose clauses. We are certainly keen on the overview material, possibly forming an overview clause but possibly forming bits of the statute that are deliberately put there and designed to help the reader navigate the statute. I think we are much more open to overview material.

Purpose clauses themselves—"The purpose of this Act is to such and such"—you don't often see in the work we produce, partly for the reasons I have given that we are worried that a difference could be drawn

between that clause and the text of the Act itself and partly because an ideal Act ought to be very clear what it is about. A Fixed-Term Parliament Act should not need a clause saying, "The purpose of this Act is to—" it ought to be very clear. So if you need extraneous material to say, "This is what this Act is about" it is just that somehow the drafting has fallen down. That is one idea.

The other idea is the explanatory notes idea is in my list of things whose potential has not been met. The explanatory notes ought to be a powerful, useful document to help the parliamentarian and the user understand what is going on. There is certainly a proper place for purpose material in explanatory notes. There is certainly room for the drafter to think hard about whether they are telling the correct story complete with purpose in the Act. We are still slightly sceptical about whether that should be placed in a separate purpose clause, although I don't think we are as doctrinally against it as we were. David, is that your view?

David Cook: Yes, as far as purpose clauses are concerned we are certainly willing to consider them in particular contexts. There are contexts where they may be appropriate, but I think the objections that there have been in the past to purpose clauses still remain to some extent. From our perspective, I think we are asking what the legal purpose of a purpose clause is, effectively, and is there a risk that by having a purpose clause you are getting a conflict between the specific provision and the purpose as expressed and therefore creating some sort of legal doubt? I think if you ask a drafter they would often say they are jolly hard to draft because you either come up with something very general, in which case they have relatively little meaning, or you come up with something more specific and more detailed that risks conflict with specific provisions. I think there are issues around purpose clauses.

I have to say I have not seen it as a particular problem that the purpose of an Act is not obvious from the Act itself or the explanatory material. The Government does not tend to conceal the purpose of an Act. In other words, there is material available to show what the purpose of an Act is without resorting to a purpose clause. So a purpose clause is something to be considered. I think in previous evidence there was a suggestion that because the courts had started to adopt a more purposive construction to legislation there is a reason to revisit purpose clauses because they will assist the courts in that construction. I have not seen a great need of that from the courts. The courts are, it is quite right, adopting a more purposive construction of legislation, but they seem to be able to derive the purpose of an Act reasonably clearly without the need for a specific purpose clause.

One other point I would make is that the purpose of an Act can be derived from the other provisions in the Act. For example, when you set up a public body and the public body has objectives, in a sense that is spelling out what the purpose is but not in a formal purpose clause. In other words, there is a variety of ways in which the purpose can be obvious without a specific clause.

Q89 Andrew Griffiths: Just one final question, Chair, if I may. The European Court of Human Rights exercises a lot of us—it certainly exercises the *Daily Mail* a great deal—about UK legislation being compliant with European human rights legislation. To what extent do you consider that when you are drafting?

Richard Heaton: We used to consider it way before the Human Rights Act. Under the Human Rights Act we consider it following a pretty tight procedure. This is really checklist material. One of the things the minister has to do on introduction is to sign a certificate saying he or she thinks the bill on the whole is compatible and that requires the lawyers to make a judgement call on whether it is more likely than not to survive challenge. The human rights compatibility of everything you write is something that both the counsel drafting and the lawyer instructing them will apply their mind to. You would always be conscious of whether you were up against the ECHR and if you thought you were drafting something that was incompatible, which is more likely than not to be challenged successfully, you would have to advise the minister to sign a section 19(1)(b) statement. It is something you always have in your mind now.

Q90 Andrew Griffiths: To what extent do you revisit that if something is found not to be compliant, if there is a case and it is found not to be compliant? To what extent do you look back and think, "Actually, that wasn't right"?

Richard Heaton: That can happen in one of two ways. Either one of the domestic courts, the Supreme Court or the Court of Appeal, can declare them incompatible—they can't, as you know, strike down Acts of Parliament—in which case the Government has to either politically decide not to respond or has to correct the legislation, or the Strasbourg court finds that our legislation is incompatible and then you have a legal, political something to be resolved, as we have with prisoners voting. Sometimes losing a human rights case from the Government's point of view does not mean that the initial action was wrong because government wants to test the boundaries of human rights law. So there are international principles of law that we sign up to. We take a call on whether we think we are acting within them. If the courts find that we have it wrong we have to revisit, but it does not necessarily mean that we are apologetic about the stance we originally took, if you see what I mean.

Q91 Andrew Griffiths: What is the consequence of the minister signing it off? You said you lay it before the minister and he has to sign it off. What is the consequence to the minister of that if something is then found to be wrong with it?

Richard Heaton: It is parliamentary only. The Human Rights Act requires him or her to sign that certificate. If they have it wrong that itself does not give rise to a legal liability. The UK could be liable in damages and so on, but the minister does not carry any.

Q92 Andrew Griffiths: Yes, but for the minister who signs it off there is no consequence to it? In which case, why do it?

Richard Heaton: It is quite a solemn thing to do to give an undertaking to Parliament that you, on advice, consider that something is compatible. I don't think it is something ministers do lightly.

Q93 Sheila Gilmore: Very briefly, having not all that long ago served on the Financial Services Bill Committee, that bill seemed to have been drafted substantially as an amendment of a previous piece of legislation and I have to say that many of us on the Bill Committee found it impenetrable when it came to we were inserting subclauses 5(a) to (g) and not necessarily having the background in the other. Would there be a decision to do it in that way? Would that be a decision of the department?
David Cook: No. It might in a rare case be a decision of the department but effectively that is a drafting decision, proceeding by way of textual amendment. It is interesting rereading the Renton report in 1975 when the thrust of the report was to move away from non-textual amendment because of the difficulties of understanding the statute book with layer upon layer of non-textual amendment. I think there is no doubt that textual amendment, when you get to the end product of a bill—in other words, when it is enacted and part of the statute book—and given that you have electronic databases and so on that show the updated statute book, provides a lot more certainty than a non-textual amendment does in relation to the end product. I can quite see there are difficulties in Parliament for parliamentarians in looking at bills where there is textual amendment, and my understanding is that it is only sometimes the case that the department is able to make available a marked-up text of the Act that is being amended by the bill to assist in the scrutiny of the bill. Where that is possible, that does seem a good idea.

Q94 Sheila Gilmore: Maybe we need some of the technology as well. Just a thought.
Richard Heaton: I agree with David, it sounds like in that case you could have been served better by the explanatory material from the department. Sometimes it is just inescapable that we have to put stuff into that Act because that Act is where the law is contained and we want to keep that sort of integrity, but it is pretty difficult for you to know what is going on without some material saying, "What we are doing is amending this Act and as amended it will look like that." If you were missing that, it sounds like you could have been better served.

Q95 Sheila Gilmore: There was a question I wanted to ask about whether you thought the Office of the Parliamentary Counsel would benefit from being enshrined in statute?
Richard Heaton: Interesting one. I think one or two of our counterparts are; I think possibly New Zealand is. The question would be what would you seek to achieve by that? If you were trying to change the fundamental status, constitutional status of the office then that is a bigger question—should we be answerable to people other than ministers? But if you are simply brigading a unit of civil servants, you don't generally need a statute to do that. I had notice of that question and I was trying to think what the benefit would be. As I say, unless you were fundamentally changing the status of the office and giving it some sort of independence from government I couldn't quite see the point of putting it on a statutory footing.
David Cook: I did have a look last night at the Parliamentary Counsel Act 1970 in Australia just to see what that was about. I think that was about appointing senior officials of the office there and about their terms and conditions and providing for them to provide a report to ministers. As Richard said, as we are civil servants this is all stuff that can be dealt with in the normal way through the Civil Service.
Richard Heaton: I think the statute book with yet another Act, on Parliamentary Counsel would be—
Sheila Gilmore: Good point.

Q96 Chair: Just feeling my way beyond the immediate question to the situation of, say, the National Audit Office, which does not feel inhibited by the fact that it is a creature of statute. In fact, it feels strengthened by that. It does not stop it fulfilling various functions in relation to government. If we go back to the point about whether Parliament should have its own capability on drafting, perhaps that would be a very good reason to be clear about the role of Parliamentary Counsel in the legislative process by putting it in the statute.
Richard Heaton: It is possible, but just supposing, on reflection, we all decided that was a good idea, I don't suppose you would need a statute for me to second some people into Parliament. I don't think I would need a statutory authority to do that.

Q97 Chair: No, but you are working into a very big principle, which is the dominance of the executive over Parliament and inadvertently, while administratively you could second people to the House quite easily, you will nonetheless be marching into the jaws of one of the biggest paradoxes in our democracy. There would be some feedback, I would imagine, from the executive if you were to try to do that. In a very genuine and open way you would stumble into one of the biggest controversies in British politics, I suspect.
Richard Heaton: I think I would observe that the statutory nature or not of the office is not particularly material. The fundamental question, the wider question about the relationship between Parliament and the executive and the relationship between this office and Parliament are much bigger questions, I agree. But I think one gets there by asking ourselves the big questions rather than the narrow procedural point about whether we are on a statutory footing or not.

Q98 Sheila Gilmore: The final question is about whether it would be sensible to distinguish in terms of the process or the effects of drafting for constitutional bills and other legislation. It has been suggested by some witnesses that it would be appropriate to have a different process. The sorts of things suggested are there should be a ministerial statement to show the impact of legislation on existing

constitutional arrangements, but there have been other things suggesting that constitutional legislation is different.

Richard Heaton: I am a bit circumscribed here because there is a clear government line on that. The House of Lords Select Committee on the Constitution asked the same question and government's response is, "No, no particular procedure needed for constitutional matters." So I am a bit circumscribed; that is the Government line, and that is the ministerial line. But to comment on the analysis, I suppose there are a number of observations; first of all, the definitional one, of what is constitutional or not. That is easy to identify in the obvious cases. The House of Lords Bill is clearly constitutional. It is a bit more difficult in the marginal cases. Marginal changes to jury trial is in some people's minds constitutional; in other people's minds it is not. So there is a definitional thing.

Then there is a point that the Government's response made that goes, "Is it right that all constitutional change is necessarily of a higher order than, for example, changes to the welfare state"? That is an interesting question. Then I think the third point is that, like many things in our constitution, matters are dealt with by convention and so on. As it happens, constitutional bills of the first order are always dealt with solemnly and specially in the House. It tends to be a committee of the whole House and so on, and time for scrutiny. So, in practice big constitutional change is treated specially. There are no rules to entrench that and the Government position is that rules aren't justified. As we observed earlier, there is some big constitutional change that is not, for example, PLS'd because of political imperatives, like the Fixed-term Parliaments Act.

Chair: If there are no more questions from colleagues, thank you, Richard and David. It has been a very informative session. There are a number of thoughts that we have left with you. If you care to consider those at leisure, it would be good to hear from you again, either verbally or in writing. Thank you very much for helping our inquiry this morning.

Thursday 21 June 2012

Members present:

Mr Graham Allen (Chair)

Paul Flynn
Mrs Eleanor Laing
Mr Andrew Turner

Examination of Witnesses

Witnesses: **Rt Hon Lord Butler of Brockwell KG, GCB, CVO**, Better Government Initiative, **Sir Nicholas Monck KCB**, Better Government Initiative, and **Nat le Roux**, The Constitution Society, gave evidence.

Q99 Chair: Thank you, gentlemen, for coming in today and helping us on our inquiry on ensuring standards in the quality of legislation. It is a very wide-ranging topic, one of great interest to the Committee. We are charged by the Liaison Committee, on behalf of all the select committees in the House, to come up with something practical and workable, and we look forward to your help in doing that. Would you care to kick off and make some sort of opening statement about your position before we get into questions?

Lord Butler: I think not, Chairman. If it would be agreeable to you, we would like to answer your questions. If at the end there is a point we have not managed to get across, if you would give us a chance then, we would be glad to do it. Just to say that Nick Monck and I are both former Permanent Secretaries, so we have seen this process from the inside. We think that is where the solution to the problem must start, so that is the particular angle from which we have looked at it.

Q100 Chair: Just to kick us off, I had this debate with friends from Parliamentary Counsel last week. It was how you get to a point of view when you are inside the machine—which you have clearly got to now you are outside the machine—how do we penetrate the culture so that people will open up a little bit and be responsive to what we are trying to do here, which is essentially to make Parliament an effective partner, when the drive from government is, "We have our bill, how quickly can we get it through?", which is obviously a countervailing culture.

Lord Butler: Yes. I read the evidence of both your previous witnesses, which I thought was excellent, if I may say so. I was particularly struck by Daniel Greenberg saying, in answer to question 11, "The beginning for legislation should not be an introduction of the bill—it should not even be the introduction of a draft bill, the presentation of a draft bill, because that is still a draft elephant and its basic bone structure is settled. It should be the policy commission, the policy process, something more than pure consultation, which, as I say, can be very passive. That should be the beginning and that should be part of the planning". We agree with that very strongly.

I think the basic trouble is that passing legislation is too easy for the Executive because of the built-in majority, and they start on the process too late. We have seen from inside that the departments bid for a place on the legislative programme. They do not get that place until quite late in the day. It is highly competitive. That is the point at which they can go public that there is going to be a bill, and they get pressed then to introduce it at the start of the session and to get it ready as quickly as possible. That does not leave enough time for proper consultation, proper explanation of why the legislation is necessary and cannot be done in some other way, or for proper costing and proper exploration of its practicability. I think it is all done too hastily.

You say, "How can Parliament help with that?" It is a question of changing the behaviour of the executive. But if the executive knows that it has to answer to Parliament for having gone through proper processes in preparing legislation, we believe that that will change the behaviour inside government—change the behaviour of the executive—because no minister likes being criticised by Parliament for having introduced ill-prepared legislation. On the fact that it is ill-prepared, I do not think we need to make the case; the number of amendments, the number of changes, the number of repeat bills—70 Home Office bills under the last Government.

In our evidence, you will see that I put down a question in the House of Lords about how many bills in the last session of Parliament—2005 to 2010—have not even been implemented in whole or in part. The answer was that 77 bills were not ever implemented in whole or in part. Why? Because they were overtaken or because they were found to be impracticable and had to be amended because they were defective in one way or another, which does suggest that there is something basically wrong with the process at the moment. If Parliament did something to hold the Government to better standards of preparation we believe that could be amended. I am sorry, that was rather a long answer.

Sir Nicholas Monck: If one got these changes, I think the way it would work is that having made the preparations that we talk about would be a way of increasing a department's and a minister's chance of getting a slot. Because if they reacted in the way Robin has described, you just would not get a slot if you could not answer those questions about standards. We hope that is how it would work.

Q101 Chair: Nat, I am very sorry I got straight into questioning there. You are not with the party, so to speak. You are a separate entity.

Nat le Roux: No, semi-detached.

Chair: Would you care to make some opening remarks?

Nat le Roux: Yes. Thank you very much for the opportunity to contribute to this inquiry. I should start by saying that we strongly support the work of the Better Government Initiative in this area, and on many of the detailed matters that we have started to talk about, we would very much defer to their expertise. As you know, our own particular interest is in improving the process of constitutional change, which is sometimes normally treated as a separate subject from improving legislative standards generally, but we would argue that, at the very least, there is a significant overlap. As I think we have tried to suggest in our written evidence, we believe that a parliamentary initiative on legislative standards generally could assist in establishing a more coherent treatment of constitutional legislation specifically. Much of what we have to say here, Chairman, is in response to question 4 in the call for evidence—the case for distinguishing constitutional and ordinary legislation, which to that extent is perhaps bolted on to the main subject matter here.

Q102 Chair: All right. We certainly have some questions on that. Just a last one from me. I think people realise that there is a weight of history and precedent in some of the things that we all do in this place and in Whitehall and elsewhere, and if we were starting afresh we would not start from here, or whatever the expression is. In a way, haven't we seen, particularly in Wales, Northern Ireland and, above all, Scotland, institutions who pretty much started with a blank sheet of paper? It is a bit of a tangent, but do you feel there are things that we can learn from those institutions and the way that they have set about their new role as devolved institutions?

Lord Butler: I only know this from hearsay. I have no direct experience of it, but what I read and what I hear is, yes, I think they have had the advantage of starting with a new system and they do not find it so easy to produce legislation. They are forced to take more care in producing it and they do produce a better quality of product. As I say, that is only hearsay.

Sir Nicholas Monck: I gather one thing that happens in Scotland is they do have more access to official policy advice before the election than has happened here. It would be perfectly possible here with the fixed Parliament.

Chair: From personal experience, it seems to me there is a lot more communication between the various institutions and organisations, even informally, than we have here, and I think they tend to move a little quicker because of that—not necessarily superficially speedily, but actually able to resolve problems and do the necessary consultation in a shorter time span. Maybe some friends from Scotland, Wales and Northern Ireland will be coming to talk to us about how they have started afresh, and get some inspiration from them.

Q103 Paul Flynn: Even those of us who take a cynical view of the value of legislation would be surprised by the fact that there are 77 Acts that were either not put fully into force or not put into force at all. I know that represents to all of us many, many hours of sitting in the Chamber in activities that are absolutely futile. Taking the great canards in politics: dogs bark, children cry and politicians legislate. It is our answer to every problem on earth and in heaven. That is the religious view of politicians, the great myth that keeps this place going. I do not know if you have gone further into this but, of the 77 Acts, which are the most egregious examples of futile legislation? We talked last week of a Legislative Reform Act, which was put through in 2001, and it was so incomprehensible that there needed to be a new Act in 2006 to explain what the first Act was all about. Can you think of any others from 2005 to 2010 that were examples of utter futility?

Lord Butler: I chose the Home Office as the example because there were so many Acts that followed on from each other and, incredible though it may seem, 4,000 new criminal offences were created. Your witness Mr Greenberg was talking about the squatting offence—there was much too quick a reflex action. It does matter. The public feel afflicted by it. The people who have to implement it lose heart. When you ask for particular examples, I think, no; I talk in general terms, just about the mass of legislation, and that is what I think is a bad part of British governance.

Q104 Paul Flynn: To what extent does the complexity of legislation undermine clarity? We see a tendency to react to whatever is the scare of the day. The media scandal is often one that is perceived to be a problem and possibly is found not to be a problem. But given the fact that the Acts themselves have grown in length, possibly because of the ease of using computers and so on, is complexity a major problem?

Lord Butler: As your last witnesses said, I would take the view that drafting has actually improved and the language is easier to understand. The world has become more complex, but there is a process by which, when a department has a slot, they add things to it like Christmas trees, so you get much longer bills. There is also a complexity that comes in through constant correction. What I would say about that is if there was more exploration of policy, of its practicability, of its necessity, you would not have to have legislation tumbling over itself as we do at the moment.

Q105 Paul Flynn: Politicians rightly see themselves as the guardians of the manifesto on which they were elected, and they feel they have to carry out the wishes of the electorate. I believe your plea is to make sure the legislation goes through in a way that can be smooth and efficient, rather than getting involved in the legislation itself or the aims behind it. Are there examples you could quote us of other governments, where they have a far more effective system of legislating than we have that we could borrow from?

Lord Butler: I am afraid I am not sufficiently expert to answer that question, but it is so obvious there is something wrong with our legislation process that I cannot believe there are no other countries that are not better.

Q106 Paul Flynn: You were talking about adding things on like a Christmas tree; they certainly do this in America, where you have a piece of legislation so

you can add on a leisure centre in your own department or a new dam in your own state in order to get it through. It can be completely irrelevant to the actual bill that is going through and deals are done to ensure support for it. I presume there are places that are even worse than ours. How do you see Parliament working in partnership with the executive to produce better legislation? Are we on the back benches not performing our role as we should?

Lord Butler: I do not think that that is the main problem, although I think the House of Commons is given too little time to scrutinise legislation properly and a lot of it has to be done at the Lords end of Parliament, but there is nothing wrong with that. No, what is needed is for the Government to have to go through processes that filter the legislation and improve its quality before it first comes to Parliament. That is what we are after. If that happened, we think it would help the Government, because not only would legislation go through more easily but it would be more implementable, it would be more practical and it would not have to keep being revised. That is what we think is necessary.

I am told my old department, the Cabinet Office, produces 300 pages of guidance to departments on the preparation of legislation. But it is all procedural and it is not about what we think are the important points, about explaining the policy to Parliament and the public, why legislation is the solution to it, why it is necessary and it cannot be done in some other way and what its objective is, which can then be tested later by post-legislative scrutiny. If the Government inside the executive concentrated on going through those processes, we would have less and better legislation. What we are after is that the Government should commit itself to some standards for the preparation of legislation, which Parliament could then monitor.

I recall that when I was Head of the Civil Service, Giles Radice and the Treasury Select Committee, which looked after the Civil Service, drafted a Code of Practice for civil servants. They produced it; the Government would not have produced it itself. Then the Government adopted it, because it was so obviously sensible, and it has become the code for civil servants. It would be wonderful if this Committee—if it is persuaded that there are improvements that can be made in the preparatory process—were to suggest a code that the Government would have great difficulty in not adopting. Then, when bills were introduced, Parliament could monitor whether the preparation had been adequate.

Q107 Paul Flynn: That is very useful. I am sure the Government would be very grateful for our work on this.

Lord Butler: We have done something to help you because we have suggested some of the standards that should be set, as indeed the Hansard Society did, as indeed has the Leader's Group on House of Lords Procedure, which I sat on. At the back of our evidence there are some suggestions about what such a code might include.

Q108 Paul Flynn: Just a final point, because I think others will want to follow that up. I mentioned Dame Irene White's view last week. She has a very long memory of Parliament as an MP many years ago, and her father was a civil servant going back to the time of Lloyd George. Her view is that a permanent and endemic part of parliamentary life was the shortage and quality of the parliamentary draftsman. There was always a logjam, and the politicians perceived that as such. We were told last week that that is not true anymore. I think what you said in your answer there suggests that it possibly has, so the quality of drafting and the speed of drafting has improved.

Lord Butler: Yes, absolutely. As I say, the mischief lies further back in the policy-making in the department.

Sir Nicholas Monck: I could just add one thing. Robin spoke about the perfect solution of government accepting a draft of standards provided by this Committee, if you decide to do that. But it would be successful even if they proposed something that is different. What is needed is that there should be some standards—preferably agreed between Parliament and the executive—against which what is presented to Parliament for you to spend your time on can be judged.

Chair: I think that is a very helpful suggestion and it goes with the grain of the way we try to do things on this Committee; for example, producing a code on independence for local government, being fairly clear about the changes required in the electoral registration legislation, and even the Cabinet manual. I think you are going with the flow, and I am sure colleagues will think carefully about your suggestion.

Q109 Mr Turner: Before I worked for the Civil Service, even before then—which is goodness knows how long ago—there was something called HSSSSA, which is the Health and Social Security and Social Services Act, which was passed by Norman Fowler and his colleagues. I have not looked at it, but I am told that it was quite a detailed piece of legislation, whereas now it seems to me that the detail is left to beyond the bill becoming law, and is subsequent. Do you recognise that, or do you disagree with me?

Lord Butler: I do not disagree with you. One of the jobs I do in the House of Lords is to sit on the Delegated Powers Committee. At the moment we are very busy because there are all the bills at the start of the new Parliament. We are wading through those to see what Henry VIII powers there are to change legislation by statutory instrument, and advising the House where it ought to consider whether these are appropriate. There are an awful lot of them. No, you are quite right, that is a feature that has grown.

Q110 Mr Turner: Presumably you would think that is not satisfactory, compared with the more detailed law that was passed in 1980 or whenever it was. Am I correct in that assumption?

Lord Butler: Certainly as far as the Delegated Powers Committee are concerned, we think some of it is appropriate and some of it is not. When we think it is not appropriate, we say that to the House. We say, "This is something that ought not to be changed by

statutory instrument, and if the Government subsequently wants to change it, it ought to do it by primary legislation".

Q111 Mr Turner: What we have done is to have more staff drawing up and drafting bills, but what on earth are they producing? Are they spending their time on bills or are they spending their time on subordinate legislation? As Members, we seem to have two ways of not dealing with them, because that is what we do generally: we either put our hands up or we do not put our hands up. It is only the Government that directs something. Is it a good thing that we have more people producing more legislation, half of which we probably think should be in more detail, but that is why people are not complaining now as they did 10 years ago?
Lord Butler: People are complaining actually, and I think parliamentarians are complaining.

Q112 Mr Turner: But what are we complaining about?
Lord Butler: You are complaining about the volume and the complexity of the legislation and that certainly you, in the Commons, do not have as much time as you would like to scrutinise the legislation. But, even more importantly, the public are complaining. As I say, it cannot be right, surely, that in the last Government—I am not making a political point—there were 4,000 new criminal offences.

Q113 Mr Turner: I agree with you about that. The problem is we are not in a position to oppose our Government, either here or two and a half years ago. We have to find a way of persuading the Government, of whatever colour, that they are doing things that are a waste of time. How do you advise us to take up the baton and, well, throw it at them?
Lord Butler: That is precisely our point. If Parliament set standards of preparation, which the Government would have to say whether they had complied with or not, then that would affect upstream behaviour.

Q114 Mr Turner: It would if it were implemented. The problem is that we, who mostly support one side or the other and want the stuff to go through, can produce all sorts of guidance but when they are in a hurry they will rush to push stuff through.
Lord Butler: Absolutely. There will be cases when that is necessary. But what we say is that they ought to have to account for that, to say, "Well, we haven't had a *White Paper* in this case. We haven't had public consultation. We haven't had pre-legislative scrutiny because this is very urgent". In many cases they will be able to make a case for that. After an election the Government wants to get going. It wants to hit the ground running. Some of the legislation that was introduced it the last session they could have taken a bit more time consulting on and preparing, but it is understandable that a government should want to get on with that. But they ought to explain. They ought to be obliged by Parliament to explain, "We haven't gone through as rigorous a preparatory a process as the standard suggests we should have done, for this reason". Parliament will normally accept that. I think the very fact of having to explain and account will change behaviour.

Q115 Mr Turner: What do you think?
Sir Nicholas Monck: I agree with that. Of course the standards are not only for the bill and the preparation, but also for the documents accompanying the bill available to inform MPs about what the purpose is. For example, to have a clear statement of the purpose of a bill—not necessarily in the bill but in the documents somewhere—would be useful, and also evidence about whether people in the frontline of services have been consulted. Both those things would help you to see if there was something in the bill where either there was no evidence that the thing was workable, or that it did not seem to be related to the purpose and the intended benefits. I think that would help MPs.

Q116 Mr Turner: I am afraid I take the view that people would tick the boxes. They would not do the work, and that is the problem. What we need to have is some power where, for instance, when amendments are thrown in at the last step in the House of Lords, the Lords are prepared to say, or for that matter we can say, although we are less likely to do so, "Well, this will only be there for two years, and you have to put proper legislation in and the temporary amendments will be dropped automatically". It has to be something much more energetic that makes it much more demanding on the Government because otherwise it will not have an effect. Do you not agree with that, Mr le Roux?
Nat le Roux: I do agree with that. I agree with the points from my colleagues about early stage preparation being crucial to this. Another angle, which rather ties into your point, is whether there are common structural features of legislation that are both intrinsically undesirable and capable of objective assessment by Parliament. Brainstorming this in preparation for this evidence, we came up with three such characteristics, two of which have been mentioned already. One is whether the intended effect of the draft legislation could be achieved using existing powers, either in parallel or in part. In other words, is this legislation purely demonstrative and playing to the gallery rather than legislating in the proper sense?
The second is whether the legislation is being used as a vehicle for extraneous matters, and this is the point about Christmas tree bills that Robin was making. I can quite see why a department or a minister, who only gets one slot, might want to heap as much into it as possible. The third is whether the legislation grants ministers, or public bodies, powers that are wider than necessary. I think the point is not that Henry VIII powers are, in themselves, undesirable—in a limited context, they have become necessary; it is whether the Henry VIII powers are wider than necessary. A very useful role for Parliament, particularly for the Legislative Standards Committee, would be to explicitly identify Henry VIII powers in draft legislation, which are not always obvious, and provide a commentary on their extent.

Lord Butler: I do not think we are claiming that what we are suggesting would change the Government's behaviour overnight or completely, but it would be a useful thing that Parliament could do to press government in the right direction, because ministers do not like being criticised by a committee for not having maintained the standards that they themselves have set. As we have seen within the department, civil servants will say, "Minister, if you produce the legislation in this form, I think you are going to have quite a rough ride with the Legislative Standards Committee". That influences the way that things happen inside government.

Q117 Chair: Andrew, can I just take your point a little bit further? The elephant in the room really is that we do not have an effective separation of powers, so that, as Andrew points out, at the end of the day the majority party will want to vote through its legislation. When we came across this difficulty on the Wright Committee, a number of us made it very clear that it had to be explicit that government should get its business and, therefore, "Do not be afraid of some of the things we are proposing. We are trying to make the business better and make the House function better, but at the end of the day you will get your business through the House", which I think, at the heart, is what governments of all political persuasions are interested in. I am thinking on my feet here, as you have provoked this thought and Andrew's question has provoked this thought. Do we say something similar? In effect the Legislative Committee is doing this, but do we need almost a concordat between government and Parliament that says, "Look, we're not trying to change that fundamental. Government will always get its business, but these are some of the things that we feel could make that partnership work better"?

Lord Butler: I think that is absolutely right. We suggested that the Legislative Standards Committee, if there is a Legislative Standards Committee to help put pressure on the Government, would report to Parliament whether the necessary processes had been done. It would be the nuclear deterrent for the Committee to recommend to Parliament that a bill was so awful that they should not give it a second reading. I cannot imagine that happening. But, like the nuclear deterrent, the possibility of it has an effect on the way people behave.

Chair: Until we have Members of Parliament who feel they can square the circle and ultimately vote for their party—if it is in government—but also hold government to account on its legislation as part of their job, and unless we can create that framework of reassurance for Andrew, for me and for other colleagues who think about these issues in the House, we are not going to get anywhere. That is why I welcome the contributions that you have made.

Sorry, Andrew, I thought that point was worth pursuing. Please continue.

Q118 Mr Turner: The question is what do you mean when you say "get their legislation"? Do you mean as it goes in or what it comes out looking like? What does that expression mean?

Lord Butler: We hope that something better would go in as a result of this.

Q119 Mr Turner: Sorry. What I meant was, from our point of view, is it us saying, "They've got the right to get their legislation"? Does getting their legislation mean rather poor legislation going in, approved by the majority party, or is it going to be the legislation coming out? Because it is not just because they have drawn it up badly, it is because things are dropped in at the last minute.

Lord Butler: Yes, that is absolutely right—I mustn't talk too much—but what we believe, from having worked in government, is that this is in the Government's interests, as well as in Parliament's interests. If they have taken more time and trouble to explain and to prepare, or not to have legislation if it can be done by other means, it is in the Government's interests as well as Parliament's interests. I believe there are a lot of people in government who agree with that; for instance, I think Sir George Young agrees with that. Of course, one has to help him because he is under tremendous pressure from his colleagues who say, "Come on. We, the department of such-and-such, want this bill. Do not put difficulties in the way". The business managers are often saying, "No, we've got too big a legislative programme", or, "This bill is too big" but they need some help.

Q120 Chair: Making that idea explicit—that it is a partnership and that we are here to help, and getting government to accept that—is going to be one of our interesting jobs as we come to draft the report.

Sir Nicholas Monck: Chair, is it conceivable that the Government would say, "No, it is not a partnership. It is just for us to send you a lot of rubbish and you stamp it"? I do not think they would ever say that, and I think the Prime Minister—

Chair: No, but they do it, even though they do not say it.

Sir Nicholas Monck: They do it, but I think reminding them that they cannot say it in public would be quite useful.

Chair: Yes. But it will be a culture change for government to say, "You are an effective partner". In order for that to happen we go back to Andrew's earlier point, which is that for us to be an effective partner we also have to say, "Ultimately, when the vote comes forward, we are partisan political animals and we will support our parties". That is a difficult contradiction sometimes, even for Members of Parliament who want reform, to come to terms with because they feel, "If I help make legislation better I am somehow opposing it". We need to change that mindset and, "If I vote for the legislation ultimately, I am accepting every dot and comma, even though I disagree with certain parts of it". It is the nuance there that we have been robbed of over the years because we have become a rubber stamp in many ways.

Mr Turner: Can I—

Chair: Andrew, please do, yes. I think this is an interesting debate.

Q121 Mr Turner: No government has got its majority before the election. So it is a question of

persuasion, but a lot of that persuading is going to a minority rather than the large minority.

Lord Butler: Yes, and if I may say so I think the Chairman gets the paradox very well. On the one hand, the Government ought to welcome Parliament improving its legislation. On the other hand, whenever it does it in practice they think Parliament is a terrible nuisance and they want to give as little opportunity to do it as possible. I have seen this in the House of Lords. If we amend a bill they want the House of Lords abolished.

Chair: Let's not go there, particularly since we have a very expert member of the Joint Committee on my immediate right, who is just about to ask some questions. Eleanor, over to you.

Q122 Mrs Laing: Thank you. I was hoping to slip in that reference without even referring to it, but we will come to that in a moment. This is a fascinating exploration of the relationship between government and Parliament. I find it difficult to imagine that any government, of any colour or persuasion, could see the House of Commons as a partner in getting legislation through when a large proportion of Parliament—both Houses—is there because it is opposed to that government. We have a system that is based on conflict in democratic engagement. How could we expect a government ever to see Parliament as a partner in that way?

Lord Butler: But it is based on conflict. As the Chairman said, there is a convention accepted by the Opposition, as well as by the Government, that in the end the Government gets its business. The Opposition obviously want to make the case against the Government for public purposes, but they also sincerely believe there are improvements they can make to the legislation as well as just opposing it. In the final stage, they won't oppose it. They accept the Government has to get its legislation through. It is the same in the House of Lords.

Q123 Mrs Laing: Yes. I accept that, but even being optimistic about the way in which this reform could help—I believe it could; it is a well worthwhile route to go down—have you observed any significant differences we have had? Pre-legislative scrutiny, for example, is fairly new.

Lord Butler: Yes. I think there are great improvements through that. I think the Government does believe in it. I think the present Leader of the House of Commons believes in it and much more is being done, and that is all to the good, which should encourage us not to give up hope. Things do improve, and that is one of the ways in which it has improved.

Q124 Mrs Laing: Mr Chairman, I was going use an example of a bill that is before the House. We won't say which bill it is. There is a bill before the House that has been subject to pre-legislative scrutiny, and a particular clause of that bill has been significantly criticised by the Committee that did the pre-legislative scrutiny. That clause is not just an add-on; it is fundamental to this particular bill. A revised version of the bill is due to be put before the House in the near future. What path should be taken if the Government ignores the pre-legislative scrutiny and the criticism of that particular fundamental clause of the bill? I am sorry if that sounds opaque, but I am being deliberately opaque because we are not discussing politics here. We are discussing procedure.

Lord Butler: I can speculate about which bill you are thinking of and what the provision is. It is the Government's right and, if the Government does not agree with what the pre-legislative Committee has said, it will maintain its position. But the fact that the pre-legislative Committee has criticised it is not undamaging—it may be damaging to the Government; it means that a case can be made against it—but it does sharpen the Government's act in explaining why it is going to insist on its original provision and not accept the advice of the pre-legislative Committee. But the pre-legislative Committee has done a good and necessary job, in my view.

Q125 Mrs Laing: Exploring further the possibility of a Legislative Standards Committee. In an example such as the one I have given, would a Legislative Standards Committee then come in post the pre-legislative scrutiny stage or before the pre-legislative scrutiny stage? I can see great advantage in having a Legislative Standards Committee. As Lord Butler said, the fact of ministers having to explain to a Legislative Standards Committee exactly why they have certain wording in a certain clause and, therefore, that they would have to account for the way in which they have done it, would change behaviour because nobody would want to look as if they were trying to pull the wool over the eyes of the legislature, would they?

Lord Butler: Can I just say a word about how I envisage a Legislative Standards Committee would work? It would follow any pre-legislative scrutiny. It would follow publication of the bill. It would not get into the policy. It would not get into the drafting. What it would do is report to the House, between the publication and the second reading, whether the Government had gone through the sort of processes that are likely to make a good piece of legislation. That is what it would do. The fact that the Government had put the bill through pre-legislative scrutiny would be a thing that would be very likely to make the Committee say, "Well, this bill has been well prepared".

Mrs Laing: I can see that. I think that takes us quite a lot further forward.

Q126 Chair: Do any of the other witnesses want to comment on that?

Nat le Roux: There is an obvious potential difficulty in all of this, which is that the line between the content of policy and the quality of the draft legislation is not always going to be an entirely crisp and clear one. Take the question, "Is the policy evidence-based?" Well, different statistics can be produced to justify different results. A conclusion I draw from that point is that if a Legislative Standards Committee is to be effective, what it is doing has to be as objective as possible in terms of standards. If there is a grey area that is somewhere between policy content and

standards of legislation, that has to be conceded to government.

Mrs Laing: Yes, I—

Q127 Chair: Can I just add something, Eleanor? Members of Parliament need to be convinced that government is serious when they do this because—as a great advocate of pre-legislative scrutiny—I could not tell you what the provisions are, whether it is built into most timetables now. That is because a lot of the time when we hear about these steps forward Members do not believe that government actually want this to work. They still believe governments of all political parties want their bill, and push it through. Again, this is really a comment for my colleagues on the Committee; there probably has to be some sort of very clear political declaration: "We are going to do business in a slightly different way in future and you can have faith that government does want to hear your voice as a legislature". That has to be managed very effectively.

I can imagine Chief Whips of all parties having hysterics if the Prime Minister of the day said, "There's now going to be a new relationship between Parliament and government and we are going to listen a lot more, although we still want our bill". I think the Chief Whip would probably run up the road to No. 10 Downing Street in order to make representations—let me put it that way. If you are going to say to individual Members, "We want your views. We want you to approve this legislation," you need to be pretty clear about where that stops. Otherwise people may well say, "I have put a lot of work into this bill. It has not done what I wanted. They have not listened to me and I am going to vote against it". Then, of course, the Chief Whips of all parties start to have problems. The point I am making for my colleagues is that we do need to have something, not just an aspiration for parliamentarians to get involved. We need a clear political signal from the Executive that there needs to be a new relationship so that Members understand their new responsibilities.

Lord Butler: I think that the present Leader of the House has said this loud and clear. I could produce speeches, and I am sure you will, where he said that, and I think he means it because there is more pre-legislative scrutiny. What I hope is that we are strengthening his arm. I agree that there may be a difference between the Leader of the House and the Whips in this respect but, from our point of view, the Leader of the House is a good guy. There is worry in government—again, we have discussed this with the present Leader—that a Legislative Standards Committee would be scope for the Opposition to create political difficulty. I would like to reassure the Government that I do not think that that is so. It is really a factual thing: "Has the Government explained what the purpose of this bill is? Has it consulted?" These are factual things. There is not much room for political argument about it. I think it would cause the Government to go through the necessary processes and, if it doesn't get into policy, I do not see much scope for there being political difficulty. I may be naïve but I think that is the case.

Chair: Of course, what we are looking for is a structural answer here because good Leaders of the House come and go. Shuffles happen, personalities change and the Leader of the House, I have to say, traditionally has been a reward or a demotion rather than because someone has a real insight into the House. We are very fortunate at the moment, and I am on record as congratulating the current Leader and Deputy Leader for what they have done in allowing Members of Parliament to elect their colleagues to this Select Committee, and indeed to elect the Chair, and a number of other reforms. It is a good regime at the moment for those of us who think the House can do better, but it could change at any moment so I think we need to look for structural changes. Colleagues in the Committee need to ask for reinforcement at the highest political level to whatever structural changes we come back to.

Paul, I am just going to call Eleanor on her question, which I rather rudely interrupted, and then I shall come back to you to finish that point.

Q128 Mrs Laing: Sadly, it is not making for a lively Committee this morning because I agree with the Chairman entirely on what he has just said.

Chair: You always do.

Mrs Laing: I usually do, Chair. I suppose what we are all trying to do is see the current Leader of the House replicated in perpetuity because having an enlightened Leader of the House, who really is a parliamentarian and believes in Parliament, does give us the opportunity for progress of exactly the kind that you have all been working on—as, indeed, we have in this Committee. Of course, we are all aware that—I was going to say "at any moment", I hope not at any moment—at some point in the future we could have a different government, a different Prime Minister and a different Leader of the House who would have a completely different attitude. I suppose what we are trying to do is to put in a mechanism whereby Parliament becomes more effective. Personally, I think the idea for a Legislative Standards Committee is the right way forward.

Just thinking about how it would work and what it would do, I do not know if it is obvious to observers, although it is certainly obvious to anyone who has worked in government, that one of the ways Members of Parliament can scrutinise the detail of legislation, and the purpose of legislation, is during the Committee stage of a bill when we put down what we refer to as probing amendments. I have done that many times and I am sure other Members of the Committee have too. You put down an amendment, something like, "In clause 8.1(b) delete 'should' and insert 'must'." That gives the opportunity for about an hour's debate, not about "should" and "must" but about the way in which that particular clause would work. I would argue that system actually works quite well.

That takes us on to the issue of time for scrutiny by Members of Parliament. Have you taken into consideration the effect of always having timetable motions on bills now? Not so long ago, we did not have timetable motions. I found myself explaining this to some new Members of Parliament only yesterday.

They had no idea that just a very short time ago we did not have automatic timetabling and that we were able to look further at bills.

Lord Butler: In the good old days when we grew up, the Opposition had some leverage over the Government because it had the weapon of time. Timetable motions are a great shame actually. We nearly got to them in the House of Lords over the Voting System and Constituencies Bill and, mercifully, we just drew back from the brink, so there are no timetable motions in the House of Lords. The House of Lords can make up for some of the things that are squeezed out of consideration in the House of Commons, and that is Parliament acting jointly.

We do not believe that having a Legislative Standards Committee would add to the time because all it would be is a committee that looks at the facts, reports to the House and does not take any parliamentary time. Its report would be available at second reading and the Government would be criticised if it had not properly prepared the bill, but that is all it is. One of the points that I wanted to bring out is that we have no less than three committees on statutory instruments—certainly we do in the Lords. We have the Merits Committee on Statutory Instruments, the Delegated Powers Committee and a Joint Committee on Statutory Instruments. It is very odd that we have all these committees looking at statutory instruments and nothing looking at the real business of Parliament, which is main legislation.

Q129 Paul Flynn: The issue has been raised. Even Chief Whips are not what they once were. We heard an anecdote last night about one of our past Chief Whips—Mr Michael Cocks, of happy memory. It was a comment that would not be acceptable now. They are very different creatures now and they cannot impose the kind of discipline in the crude way that they did in the past. We do have an ardent reformer, not only in the Leader of the House but in the Speaker of the House as well. We have a number of other coincidences that have come together that makes this a good time for reform. We are not enslaved to the traditions of the past in the same way as we were, because part of the recent past is a shameful one and we want to escape from it. We want to rebuild trust in politics.

I do not think there has never been a better opportunity. With the coalition, we have the effects of the two parties coming together with a civilising effect on one another—possibly on both—so there is a chance to have not doctrinaire policies but consensus policy. There has never been an opportunity like this to put in real reforms. Think of the setting up of the International Criminal Court. It happened that there was a tiny slot of about five years. It could not be done 10 years earlier and it could not have been done 10 years later, but I think this moment is now the best time to get a code that will be acceptable to government because of all those who were keen on reform in this Committee and outside or in high office.

Lord Butler: I am hugely encouraged to hear you say that.

Q130 Paul Flynn: This is an interesting point. Last week, I asked for an example of fine legislation, a shining example of the best legislation, and what they suggested was a bill drafted by a peer, which is the Defamation Act. That is extraordinary, isn't it? But there we are.

Lord Butler: We should not be too dispirited. Parliament does make advances. They have done so through the Wright Committee, as you said. We did when we got select committees established in 1979. We also get some reversals with the growth of timetable motions, but I do not think we should be dispirited, in the slightest, about trying to make Parliament work better.

Paul Flynn: Sure.

Chair: Those of us who stayed up until 4.00 am and had to listen to Mr Eric Forth probably would not share your view, Robin, about timetable motions. I think bad timetable motions are like bad anything, really. Enabling all the items of concern in a bill to be addressed may well require timetable motions, but you are tempting me to break my own rules of order. So I will get back to Eleanor, who will put us on the straight and narrow again.

Q131 Mrs Laing: How can I frame a question to our witnesses that is really a follow-up of what the Chairman has just said? Have you discovered in your deliberations that it might often be the case that a timetable motion prevents large chunks of a bill ever being mentioned in the House of Commons? Not in the House of Lords but in the House of Commons, large chunks of a bill are completely ignored and passed on a nod. Have you ever discovered that that might be the case?

Lord Butler: Very, very frequently.

Mrs Laing: Thank you.

Sir Nicholas Monck: I like the suggestion that when a bill goes to the Lords and there are large chunks of it that have not been discussed—I think a peer suggested it—it should be indicated on the bill: "This has not been discussed at all in the Commons". That seems a very sensible notion.

Mrs Laing: Yes.

Lord Butler: Again, it was part of our recommendation in the Leader's Group report on House of Lords processes.

Q132 Mrs Laing: It is very difficult. We all know the meaning of the unparliamentary word that is never mentioned, "Filibuster". It is not difficult for parliamentarians to speak for a long time about absolutely nothing. If one does it in order, it can be quite an art. But of course it is a clever way of using time in order to oppose the Government. When we say "The Government should always get its business", which everybody accepts, on what grounds should the Government always get its business? Is it because that particular government was elected on a particular manifesto? What if the business before Parliament is not manifesto business? Should the Government still get its business?

Lord Butler: It is part of our constitutional convention that you elect a government for five years, it becomes the Government because it has a parliamentary

majority, and during that period it has a very strong presumption that—unless it loses the support of some of its own side—it is going to get its legislation through. It should not do it without difficulty, and sometimes there are things that it would like to do that do not go through. I recall 90-day detention without trial. Parliament prevented it from getting that through. The restriction of trial by jury; again, Parliament restricted getting that through. There are times when the Government is—and should be—stopped from getting precisely what it wants out of Parliament.

Q133 Chair: Those issues tend to be ones of continuing controversy rather than, "We're in opposition. You're in government. We'll just stop your bills. We'll stop your business". They are of a different order and I think what I am trying to distinguish is that, in the general run of business in the House, we need to define a space where Members of Parliament of all parties can make sensible amendments and hold government to account for the proposals they put in legislative form to Parliament, while reassuring government that this is not just a weapon in the general guerrilla warfare of one party against another. I think those terms need to be very clearly defined. Eleanor has just given a very good example of the thinking that, if we are not careful, could lead to reform being halted because we are not clear and precise about the new territory that we are trying to grow proper accountability in.

I am going to move on now, if I may, and talk about some of the constitutional stuff because I am conscious that Nat has not had much of a bite so far. Just a general question to get you started, Nat, about making the case for differentiating between different types of legislation, constitutional and others, for example.

Nat le Roux: There is a "why" and there is a "how" here. The Government, in their response to the Lords Constitution Committee's report last year, seemed almost to deny that there was any distinction between constitutional and ordinary legislation. Of course, in terms of current parliamentary process, that comes close to being true. The only distinction is, at the decision of government, some first-class constitutional bills have their committee stage on the Floor of the House. At a level of principle, why, even in the absence of a codified constitution, should one treat constitutional bills separately?

I suppose the first point is that constitutional legislation practice is the architecture of the state and the elements of the constitution are unavoidably interconnected, so an alteration in one part of the building has unforeseen consequences in other parts. Mr Blair's attempt to abolish the office of Lord Chancellor has perhaps been an illustration of that. There is interconnectedness, which is not true of other types of legislation perhaps.

The second point is that some constitutional legislation has an effective presumption of irreversibility, despite any doctrine of the sovereignty of Parliament. Scottish devolution, for example, was understood at the time, and continues to be understood, as something that the Westminster Parliament could not in fact reverse.

Thirdly, and this is more recent, there is the re-emergence of specific structural features in constitutional legislation, which we have not seen for a long time. These are so-called manner and form restrictions, where a piece of legislation passed by an ordinary majority imposes restrictions on future Parliaments about how that legislation is to be implemented or repealed. The two examples we had last year were the Fixed Term Parliaments Act, with its provision for a super-majority for dissolution under some circumstances, and the referendum lock in the European Union Act. Those are very interesting and potentially difficult mechanisms, and something that you would not find in legislation that is not constitutional.

That is the "why". Coming to the "how", what legislative standards might one want to impose on constitutional legislation, which would be different from ordinary legislation, and how might you do that? Those different standards can be divided into two sorts. First of all, enhanced standards; the same sort of standards that you would apply to ordinary legislation, but applied in a stricter way with greater rigour. An example of that would be the requirement that consultation and pre-legislative scrutiny should not be waived on grounds of alleged urgency, if a bill is constitutional. The idea that the Parliamentary Voting System and Constituencies Bill was introduced very quickly at the beginning of a session, without any of that preparation, is something that would be contrary to these enhanced legislative standards.

Then you can think of certain sorts of additional standards that might apply specifically to constitutional legislation. One is the proposal of the Lords Constitution Committee, that a written ministerial statement should be required for constitutional bills, setting out the impact of the proposed legislation on existing constitutional arrangements. That is addressing the point on interconnectedness. Another one that occurred to us is that referendums on constitutional matters are becoming more common, but there is no agreed principle governing which type of proposed legislation might require a referendum and which might not.

As we have seen in this Parliament, a change to the voting system, which would be regarded as sub-constitutional in some states, apparently does require a referendum, but a fundamental change in the nature of the Upper House, or certainly its composition, apparently does not require a referendum. A suggestion might be, in the case of that type of major constitutional legislation, that the minister should be required to explain why a referendum is or is not being proposed. One can think of other examples.

The final point is the possibility that if the principle of separate standards for constitutional legislation is accepted, it might be appropriate that those legislative standards are scrutinised by a different committee from the general Legislative Standards Committee. The argument for doing that is, as I have tried to indicate, that some of the material is specialised; this point of interconnectedness; and finally, the general

point that the introduction of processes can in itself have a strongly normative effect. If different committees reviewed standards for constitutional and ordinary legislation, even if in fact they were applying exactly the same standards, all those in the political process would, over time, be encouraged to behave as if there were a distinct category of constitutional legislation—something that we would very much support.

Chair: That is very helpful. Paul, did you want to come in on that?

Paul Flynn: No.

Q134 Mrs Laing: We are now focusing on something very important. Earlier we were talking about any government getting its business. When it comes to constitutional change, am I right in thinking that you are suggesting that that business is, in some ways, of a more serious and more permanent nature than the normal business of government?

Nat le Roux: Yes, I would agree with that. I would not go so far as to say that government ought not to get its way in matters of constitutional change, but it should be harder for them. For a long time, up until 1997, there was not much in the way of constitutional legislation and since then we have had lots and lots of it. A lot of that constitutional legislation is piecemeal. A lot of it seems to be designed to address popular dissatisfaction with politics generally, in a rather curious way. So the alleged urgency of the Parliamentary Voting Act is explained in terms of popular concern about MPs' expenses by at least one minister, when it seems to me to have really nothing to do with that at all. Yes, I agree with you, these are structural matters that are to do with the rules of the game, rather than the game, and the standards should be higher.

Q135 Mrs Laing: I entirely agree with you on those points. If it is accepted that the standards should be higher—I think a lot of people would agree with that—is there a case for saying that the passing of such legislation should be subject to more than just a simple majority in the House of Commons and indeed the House of Lords?

Nat le Roux: There certainly is a case for that, and that is what you would find in the great majority of democracies; not only do their constitutions not change very often but when they do change there is a super-majority requirement of some type. I might in some future world think that that was desirable, but I do not think it is going to happen any time soon so I have focused on things that could realistically be achieved, which would start the ball rolling in the direction of making constitutional change both more coherent and more difficult for individual governments.

Q136 Mrs Laing: Could it be said that there is something of a precedent in the Fixed Term Parliaments Act, some parts of which do require more than a simple majority in the House of Commons to bring about the particular end, which would be the dissolution of Parliament?

Nat le Roux: Yes, depending on which side of the debate one is on. That is, at a level of principle, a sort of "own goal", isn't it? It is a concession that under certain circumstances super-majority might be appropriate.

Mrs Laing: Yes. It is a concession, isn't it? It is beginning to set a precedent: if it has been done once, it cannot be argued that it cannot be done at all. That is helpful. Did Sir Nicholas or Lord Butler have anything to say on those issues?

Sir Nicholas Monck: I have nothing on this.

Lord Butler: I think it was admirably put.

Q137 Mrs Laing: What about the actual classification of a matter being constitutional or not? I come down again to what we were discussing earlier, namely, conflict between party political activity and parliamentary activity. You can never take the politics out of anything that happens in the Palace of Westminster; members of a government will find a way of putting an argument that suits them at the time. Of course they will. There is nothing wrong with that. It is the very nature of our democratic engagement. There will be times when it suits a government to say, "Such and such is constitutional legislation", and it could be that the very same issue at another time they would wish to identify as not being constitutional. Do you see a way in which rules could be laid down here? We are straying into the realms of the Chairman's favourite subject of a written constitution. I wasn't thinking of that. I was just thinking about this very specific issue of identifying constitutional legislation.

Nat le Roux: It is very difficult. At the Constitutional Society we are engaged in an exercise at the moment to see if we can improve on the current definitions that are kicking around, but the essential problem is this: most of the attempts to define matters or legislation, which are constitutional, come down to a list of subject matter. If some proposal is on that list or conforms to that list, it is constitutional and if it doesn't, it is not.

The difficulty with that is that while we can all agree, or think we can agree, that at the core some things are obviously constitutional, there is always a grey area where, as you say, it can be argued either way. These list-type definitions—Sir John Baker's is the one that has had the greatest currency recently—end up using words like "substantial" or "significant". So "significant alterations" or "substantial alterations" or whatever it was would be a piece of constitutional legislation and, of course, then we are into subjective territory. There are some alternative approaches that you can take, but they do not really do the job because they are too narrow, so the point I was making earlier is that if there was a presumption of irreversibility I think most people would agree that that piece of legislation was, by its nature, constitutional. However, there are not very many of them, apart from the ones granting independence to colonies and so on. There are only about a dozen on the statute books. That is too narrow to be helpful.

In the end—coming to the point—someone has to decide. There is not an absolutely objective definition against which one can test whether something is of constitutional or even major constitutional importance

and everyone will agree. One of the secondary purposes behind my proposal that legislative standards for constitutional legislation should be handled by a different committee is that the effect of that is to suck that decision away from the executive and back to Parliament because, without knowing what the detailed mechanism might be, those two committees would have to divide the territory between them in some way and, effectively, would thus be making the decision about what did and did not fall within that constitutional definition.

Q138 Paul Flynn: The question of the piecemeal nature of legislation has been suggested. Can we see any mechanism that will stop that? Having seen how legislation was formed on devolution in this place, which was usually the result of horse trading within the government party itself, leading to devolution, to devo-max and then ending up in the holy grail of independence, the process is on that slippery slope. It will be done as political opinion changes. Is there anything you think you could take, which would avoid it being done on the basis of a single Act going through, that is not related to what is likely to happen in the future or what is happening in other parts of the United Kingdom?

Nat le Roux: As things stand, all one can hope to do is to change the culture to make it more embarrassing for government to introduce major constitutional changes in a piecemeal, thoughtless or self-interested way. In terms of formal processes, short of a wholesale constitutional revision—in effect a codified written constitution—I do not see any formal way that you can prevent government introducing bills that are of a constitutional nature and, if those bills happen to be piecemeal, there is no structure to prevent it.

Q139 Paul Flynn: There might be another reason for being optimistic at the moment, and that is the weakening of the dependence that so many MPs and party leaders have on the popular press, with the decline of the influence of the Murdoch press, and with that the bills that are regarded as being the worst pieces of legislation. The Dangerous Dogs Act was the result of a campaign by tabloids. The 90 days was put forward and supported by *The Sun* newspaper who excoriated those brave independent MPs who opposed it—many from the Labour Party—and stopped it happening. They were criticised as being friends of terrorists, just as the opponents of the Dangerous Dogs Act were described as people who were in favour of children being mauled by dogs. That happens to be the system here. Again, we have just had an extraordinary by-election in which a man was elected on a cause that no main party supports—the withdrawal of troops from Afghanistan—and a refusal to even discuss it.

Chair: Just before Nat comes back on that. Robin, you need to leave us, I understand by—

Lord Butler: By 11 o'clock. I have the Intelligence and Security Committee, but I do not want to be discourteous.

Chair: Not at all. On the contrary, we really appreciate you taking the extra time to stay but please feel free to attend to important matters of state. Thank you so much for coming along this morning. We will carry on with our remaining two witnesses.

Paul Flynn: If I can bring this long discourse—

Chair: Yes, if you can bring it to a question, Paul.

Paul Flynn: Yes, indeed. It assists my train of thought. I am writing a book at the moment. In fact, I have a long story about this—

Chair: No, we do not want the long story. We would like the question, Paul.

Paul Flynn: Yes. The thing is that it is not the change of culture we need; it is the elevation of the value of independent backbenchers to be recognised.

Nat le Roux: I agree with that and, going back to your point about the media, I think it is—tongue-in-cheek—actually a good thing in one way that the press take rather a limited interest in constitutional matters because it does at least have the effect of removing some of those pressures you were talking about from government, although not in all cases. The whole question of the Scottish referendum, which is going to be the looming question of the next couple of years, is one that the popular press is going to become seriously exercised about. Our experience in trying to provide public education on constitutional matters over the last two or three years is that there is, frankly, very little public interest in a lot of this territory, and that is borne out by various polls when people are asked to put various things in order of priority.

Given government's natural tendency to want to legislate and make their mark and change things—for good or bad reasons—I think it does very much come down to Parliament to do what it can about this. I am a great believer in the idea that behaviour is changed by small changes in structure and relationship and by putting small building blocks in place, which cause people to think twice about constitutional tinkering. The cumulative effect of that over time is quite valuable.

Q140 Chair: I want to get back to the Legislative Standards Committee, if I may. Nick, should it be a bicameral Legislative Standards Committee?

Sir Nicholas Monck: We did not want to give a strong opinion on that. I think that would be the simplest thing to do, and that is what the Lords Leader's Group has recommended. I think it is entirely a question for Parliament and I know this is all sensitive, so if there are two that is okay by us. It is not our—

Q141 Chair: Where exactly in the legislative timetable do you think it would be of optimum value?

Sir Nicholas Monck: Before the second reading is what we want envisaged but, again, that is a—

Q142 Chair: At that point would you be able to call in ministers to make some observations on the preparation of the bill?

Sir Nicholas Monck: We envisage that it would only be a one-session meeting, because you do not want to make it political, basically, so it is just a question of going through the standards and saying whether they are there or not; possibly with a paper from some people from the Scrutiny Unit if there were resources for that. They have said they could do it if there were resources. Then the decision would be a report saying,

"This is okay and the document provided by the Government explains why they have not done something but they have done most of it" or something like that. Otherwise, it would say, "This does need more work". So the choice for the Government would be either to do more work, which would be a delay, or bullying the thing through and overruling the recommendation of the Legislative Standards Committee, and that would be a loss of face as well as delay. We imagine that that would come into play in practice very, very rarely because, as we have said, we hope that agreeing standards would affect the behaviour and improve the quality.

Q143 Chair: The sanction is name and shame as an ultimate.
Sir Nicholas Monck: Plus a bit of loss of parliamentary time; but, yes, basically.

Q144 Chair: Some of us have held that select committee reports themselves, if you had the ability to put them on the Floor in a more rigorous way than we can at the moment, would engage select committees in a process of negotiation with government, because you would argue, "Well, look, if you can give us the nod on four of our recommendations, perhaps we will downplay the other three". Then you immediately get Parliament and the Government into a process of interaction, which ultimately would be a very productive way forward.
Sir Nicholas Monck: I agree.

Q145 Chair: Just to give you the opportunity to answer the arguments that because legislative scrutiny is so poor, what we are really doing is trying to find other ways to handle this, so we invent pre-legislative scrutiny, and we invent post-legislative scrutiny. Are we answering the fundamental problem or just bolting on another bit of mechanism and avoiding the fundamental problem that legislative scrutiny itself is inadequate and that is what needs addressing rather than—as some would argue—introducing the Legislative Standards Committee?
Sir Nicholas Monck: I notice your earlier witnesses said that very often scrutiny was quite effective and very effective. I do not think we are starting from there, but what we are starting from is the proposition that was also put forward by earlier witnesses, that if a bill reaches Parliament in a bad state there is a limit to how much change you can bring about in Parliament, and if it is fundamentally flawed you cannot do that in Parliament. I think one of your questioners said that the core business of the Parliament is to stop bad legislation. We are trying to reduce the number of cases of that, and also to give a place where your supporters club, Chairman—you used the term—can get together, and are free and can act effectively.

Q146 Chair: Yes. There was disbelief on both sides with the previous witnesses when they felt they were given a hard time by Parliament. I think a number of us on this side of the table felt we very rarely get the opportunity to use our expertise, not to give people a hard time but to genuinely probe and make sure the legislation is better, which many of us think is one of the core functions of our jobs as Members of Parliament. I think there was a little bit of a miss from those witnesses who said that.
Sir Nicholas Monck: Yes. There is the time question, which that is highly relevant to bringing in the expertise of MPs. I could say something else about time if you like?
Chair: By all means.
Sir Nicholas Monck: We take the line that a key feature of an agreement, which we have always envisaged between Parliament and the executive, would be that the executive would not have a legislative programme that was too big for it to be possible for adequate scrutiny to be provided by Parliament. That is a precondition for the whole thing; it is not detailed about rules but that is important. That is another thing that, as I understand it, the present Leader agrees with.
Chair: It is one of those things where if there is a will there is a way, if there is in fact good will. That is why I return to the question of having a very clear political declaration from No. 10 if this is to work. I go back to the concept of timetabling. When timetabling was invented, it was genuinely an attempt to cut out this nonsense of people talking on one amendment for days at a time, and actually to get proper discussion.
If I may just be allowed a brief reminiscence from the Whips' Office, I remember one of the first bills that I was in charge of and going to see Sir Alan Haselhurst with my opposite number from the Opposition. We sat down and we went through very, very carefully what we felt were the key issues. I wanted the Government to get its bill. The Opposition wanted key debates given adequate time. Sir Alan refereed in a very, very impartial way, and we agreed a timetable motion that everybody was very happy with. If you want to do it in that way, you get better legislation. If you want to use your massive majority to sledgehammer something through, you can make even the best concept useless and irrelevant by abusing the power of the majority. Again, I am feeling my way back really for Members to think about this. Unless the people at the very top say, "We want this to work", there will always be mechanisms for stopping it working.
Eleanor, I know you have one final question. Paul, did you want to come back?
Paul Flynn: A very brief one.

Q147 Mrs Laing: Of course, the time to which the Chairman is referring was, I think, when timetable motions were not automatic. They had to be justified by the minister to Parliament as a whole and, because they had to be justified, the minister had to speak to them. Now the minister speaks for about two minutes and that is the end of it. It is assumed that there will be a timetable motion, and surely there can be no doubt that that is a curtailment of democracy.
It is not for me to make points but to ask questions. If the Legislative Standards Committee, which many of us support and think would be an excellent idea and an improvement to our legislative process, were not to be accepted by government or not brought in,

is there a halfway house whereby the purpose of a Legislative Standards Committee, and the statement of compliance and so on, could in some way be incorporated in the work of pre-legislative scrutiny as it currently stands?

Sir Nicholas Monck: I think it could be. At the moment, on the Legislative Standards Committee, our feeling is that the first thing to do is to agree the standards. There is not really very much point in arguing about whether you do or do not want the Legislative Standards Committee unless there is a text for the Government to respond to—to say either, "We think this is right", or explain why they favour something else. It is an extraordinary lacuna at the moment that there is no agreement about standards between the executive and the Parliament. It seems very odd. To answer your specific question, when a draft bill comes in for pre-legislative scrutiny, it would be possible at that point to do the same thing as we have described, and for that to be taken into account and possibly, when the bill comes back the next time, you might just want to revisit it—the Legislative Standards Committee. It might be a good way of dealing with that. From our point of view, the prime thing is that there are agreed standards or at least government-supported standards, but hopefully agreed.

Paul Flynn: I recall the torment at 3 o'clock in the morning with the Cardiff Bay Barrage Bill. The Bill straddled three Parliaments, and I vividly recall inventing a mythical creature called "the barking Grangetown rat" to a House that was exhausted or inebriated at 3.30 am in the morning when we had reached amendment five of 250 amendments tabled by Rhodri Morgan. Looking back on that, and knowing the faults of any change you make, I hope that if we are working together—which I very much hope we will on this—we will be conscious of the fact that by introducing new reforms we do not introduce new weaknesses as well. That is the difficulty when the pendulum swings from one abuse of the House and we end up with something that might be an absurdity at the other end. I just want to thank everyone for their evidence this morning, and I hope that this can be a way forward for all of us.

Q148 Chair: Any comments?

Sir Nicholas Monck: No, I think I have made the points that I would have made on that.

Nat le Roux: So have I.

Chair: Excellent, there is nothing that you want to put on the record that we have missed. You have the opportunity to write to us as well and I would appreciate keeping the dialogue going. We need to be exact about how we get this done. We also need to get the political side nailed down and make sure that government feels that it can still get its business, while treating us respectfully as a partner that can contribute to legislation.

Nick, Nat, and Robin in his absence—I thought at one point we had the football system where the armband would be passed to Chris, who would leap out of the dugout and come to the table—thank you so much for your time this morning. I really appreciate it. Thank you so much. Thank you, Members.

Thursday 5 July 2012

Members present:

Mr Graham Allen (Chair)

Mr Christopher Chope	Simon Hart
Paul Flynn	Tristram Hunt
Andrew Griffiths	Mrs Eleanor Laing
Fabian Hamilton	Mr Andrew Turner

Examination of Witness

Witness: **Dr Ruth Fox**, Director of Parliament & Government, Hansard Society, gave evidence.

Q149 Chair: Welcome, Ruth. I saw you the other evening, but I did not get a chance to speak to you at the Hansard reception in Speaker's House. It was across a crowded room. It is nice to see you. It was a nice event, as always. Do you want to make some sort of opening statement about standards in the quality of legislation, before we ask questions?

Dr Fox: I will make a few comments. You have received our written evidence. The research on which we based that evidence and our book, *Making Better Law*, which I imagine a number of you will have seen, was based on research from 2009, and we published it in late 2010. We have done some limited work, it has to be said, but we have done further work looking at the last Session in terms of further bills that have come forward. We might want to talk about any improvements there have been, or not, in the last Session.

We recognise, as a Society, that the quality of legislation is in many ways highly subjective. It emerges from a political process so it is subject to negotiation. As a consequence, it is never going to be perfect. Our contention in our work as a Society has historically been that policy is subject to the partisan battle but, before you get to that, there are ways, in terms of procedure, that you can improve the quality of the product nonetheless. The focus of our work has been on how to improve the process and procedure to improve the product.

We recognise that procedural change alone is not going to be enough. If there is going to be change, there also needs to be cultural and attitudinal change in the approach to legislation, both in the Executive and in Parliament. What we have tried to do through our work, which I hope comes through in our evidence, is to develop ideas around what those procedural changes might be to try to give some effect to bringing about cultural and attitudinal changes and to providing some kind of restraint on the Executive's desire to push as much legislation through as possible. That would be useful. That is the perspective that we come with.

Chair: Thank you.

Q150 Mr Turner: It seems to be assumed that Government will try to push extra work through constantly, almost. Do you think that is the case for this two-year-old Government?

Dr Fox: It is difficult to say, because we have only had one Session, albeit one of two years. You find at the beginning of every Parliament for a new government that you get a higher volume and a desire to legislate quickly. Inevitably, because of the way in which our system operates, you get bills that are prepared quite quickly and in haste. It is difficult to be absolute about it, but you can see the pattern of approach, for example, in the way in which the Academies Bill emerged very quickly, without any official policy consultation, immediately after the election. It went through the House very quickly, and there were concerns, including from the then Chair of the Select Committee on Education, about the haste with which that legislation went through.

If you look at the size of the bills that are going through, the Conservative party, when it was in Opposition, would talk strongly against the number of large Christmas-tree, omnibus bills that the previous Government took through Parliament after Parliament, yet we are seeing some of that happening again. The Localism Bill had to be published in two parts, for example, with a lot of disparate provisions.

There are issues about consultation not having concluded in that bill in respect of social housing provisions, yet those provisions were in the bill and had gone through four public bill committee sessions before the conclusion and recommendations of the consultation had been published by the department. You are seeing those kinds of issues again in this Parliament, so there are some similar problems.

Q151 Mr Turner: So the Coalition is making the same mistakes as were made by previous governments?

Dr Fox: Yes, there are many of the same mistakes but, in fairness to them, I would add that for a number of big bills the Government has provided more time at Report stage, for example. There have been more two-day Report stages than in previous Parliaments, where that did not tend to be the norm. The Government are trialling explanatory statements on amendments, albeit perhaps not on the bills I would like them to be trialled on. Nonetheless, there is a willingness to consider that kind of change.

At the end of the day, if the policy process is flawed, there is only so much that procedure can do. The Health and Social Care Bill illustrates that. If the policy problems are there, there is only so much that the procedural changes can accommodate in terms of improvements, no matter how long you spend discussing it.

Q152 Mr Turner: So the problem, in a way, is not what would a legislative standards committee do, but what would the Government do to make it possible for a legislative committee to be involved?

Dr Fox: That relates to our point about cultural and attitudinal change. It has always struck me, particularly when we do our research seminars and so on, that there are people in government who recognise some of the problems, but they will make a strong defence about why they are unavoidable. There are people in Parliament who are concerned about the quality of information that is provided to support bills, some of the drafting issues that they are concerned about, the lack of time and so on. There is a whole set of problems that parliamentarians have.

You then have parliamentary counsel who will have concerns, perhaps about the quality of drafting instructions, the timescales for the bills that are being produced, and there is a debate about the degree of complexity or simplicity in drafting that takes place, yet there does not seem to be any kind of forum for the parties to the process to have a dialogue or discussion about it. I do not think that a committee inquiry of this kind is the forum for that dialogue to take place, but there needs to be some kind of mechanism or means to have a dialogue about what the difficulties are and what difficulties parliamentarians find when scrutinising bills.

There is then a discussion with counsel, bill teams, and ministers about those problems. I do think some of them can be ironed out. Sometimes, however, some of them cannot be ironed out: because the difficulties that parliamentarians have with drafting issues, for example, might arise because of an expectation in the law and the fact that there is precedent, and there are issues about how it might be legally interpreted. Sometimes you get problems of drafting for popular parlance, which does not necessarily help with the drafter's other audience, which is the judiciary and lawyers.

If we could have a broader dialogue to bring together people to talk about those issues and talk them through, you might be able to cut through some of this. The legislative standards committee alone is not a mechanism for that, but you need to have that dialogue before setting up such a committee because that is the mechanism by which you would engage in what the standards are.

Q153 Mr Turner: So it is not that we need a committee operating a certain standard by getting involved in all the bits of legislation; it would be more about having an examination of a particular bill, trying to make it better and trying to make some changes? I would have thought that that would be more useful than having a tick-box exercise, as it has been described. Do you agree?

Dr Fox: Yes. We certainly do not want a tick-box exercise. I acknowledge that, if there is no cultural and attitudinal change, there is a risk that it could become that. At that point, you have to say, "We've trialled this and it doesn't work, so we will stop." I think where it would become a tick-box exercise is if you agree a set of criteria and standards, if ministers or departments have to certify them and if there was just a certification process.

It is about trying to push upstream and changing attitudes in Whitehall about the process and to think a little bit more about Parliament's needs in the legislative process. It is about your ability to scrutinise and what you need at your disposal in order to undertake effective scrutiny. It will inevitably depend on the committee's membership, how the members conduct it and their approach. If it is seen as a mechanism for guerrilla warfare to thwart the Government's legislative programme, whichever government it may be, it will not work. If that is the approach that is taken, it will not work, and we should not start.

If you can get to a situation where a committee of Members is engaged in these issues, looking at them in the broad sweep, bill to bill, and engaging constantly with departments about criteria that have been drawn up in advance mutually with government officials and ministers, about what your needs are, what their needs are, what counsel's needs are, and if an agreement is reached at least about minimum standards of levels of information—as we outlined in our evidence, there are a number of questions you might want answered about the proposed legislation—you end up with a situation where, upstream in Whitehall, they have to think, as they are beginning the process of developing the bill, about what will happen when they get to the final stage. The evidence in the House of Lords—purely on delegated powers, it has to be said—is that the Lords Delegated Powers Committee—from my engagement with government officials, is that they are thinking about the needs of that committee quite upstream in the process. We want to get a situation where they are thinking about other things as well.

Q154 Mr Turner: Last question. Tell me if I am wrong, but I get the impression that you feel it is something that we could do—it would not be a decision that these things are piled up throughout the legislature, and it would not be doing it the same as the Executive, but we could look at one or two bills to start with. It might be this Committee—no, it was not this Committee. It was like a committee of three parts, with Members here, and officials—

Dr Fox: There is a process that has to take place before you form a committee. The committee should either be of Members of the House and/or a bicameral committee. That would look at the context of every bill. There is a process to go through before you get there, which is about deciding what the standards are, what the criteria are and what it is you want in terms of quality of legislation. What are the minimums? What is the expectation that both Houses should have of government in terms of the production of the legislation? I am talking very firmly about the technical process, not about policy. Policy is for the scrutiny process, which is why you are here. It has to be more about the procedural and technical quality sides.

Parliament will clearly have a view. You will have a view about what that ought to be. You will have a view about what your colleagues find difficult in

scrutinising bills, and about the lessons to be learned from different types of bills. I don't think it is going to work if you suddenly decide what these are and then insist on the Government doing them. The way to ensure it is not a tick-box exercise is to engage government in a dialogue about it. That is not to say that you should settle for a lowest common denominator approach, but I do think a dialogue is important beforehand in order to reach a mutual view about the quality of legislation.

Whatever you decide has to be translated, on the Executive side, into their guidance on developing legislation—the Cabinet Office guidance that goes to departments about how bills should be put together. There is a two-stage process: there is the formal committee structure and the pre-discussion and dialogue.

Q155 Tristram Hunt: Is that how it differs from pre-legislative scrutiny, in that it is going to be pushing the culture upstream? How would the Legislative standards committee differ from one doing pre-legislative scrutiny?

Dr Fox: Pre-legislative scrutiny will look at policy in a way that this wouldn't. There is an issue, for those bills that do get pre-legislative scrutiny, about how to manage the procedural side. You would have to think carefully about the interface there. You also have to think about the interface of a legislative standards committee with other committees that are looking at some of the technical aspects, such as delegated legislation.

Our concern is that, while there has been a little bit more draft legislation, it is still not the norm. The legislative standards committee could take a view that if something has had pre-legislative scrutiny then its passage through the legislative standards committee is likely to be quicker. One of the questions that the legislative standards committee could ask—the approach to the criteria and the questions it should ask the Government about its preparation—is, if a Bill has not had pre-legislative scrutiny, why not?

Q156 Tristram Hunt: Where does it fit in the timetable?

Dr Fox: We have outlined a number of options. It depends on whether it is a single-House committee or a bicameral committee. You could do it pre-introduction. My concern would be whether, for a House of Commons committee, that might lead the Government to a position of strategically thinking about possibly more Lords starters for the more difficult bills. What do you do about legislative standards in relation to Lords starters? That would be an issue.

You could have it between First and Second Reading. You would need the advice of the clerks on the technicalities of that in terms of Standing Orders, but that would be an option.

Q157 Tristram Hunt: That becomes quite politically difficult, does it not? If a Bill is introduced at First Reading and goes to the legislative standards committee, is given a D and has to be reworked, few Government business managers would be in favour of that. That would then, one hopes, lead to a degree of culture change over the years.

Dr Fox: Yes. That is the balance to be struck. Where do you want to position the restraint? If you have the process pre-introduction, it is likely to attract less attention and it would be easier for the Government. There is then a risk that they are not going to take it as seriously. It really depends on what the sanction is. We suggested that there should be a report by the committee: it is either recommended and goes through, albeit you might list a number of concerns about it, or you say that there are some fundamental problems with it and we don't think it should go through in its current state unless X, Y and Z have been remedied.

The Government could have the option of taking it away and remedying it, perhaps quite quickly. It comes back and it then goes through. The ultimate sanction is that the committee says to the House, "I'm sorry, this just is utterly inadequate, we think there is a fundamental problem that is going to cause difficulties here that ought to be remedied" and the House has to take a view.

The protection from the Government side is always that there will be a vote and it has the option to whip it. In a sense, it does not ultimately thwart their programme. It is an embarrassment factor and a reputational factor, and it could cause difficulties in that sense. There is a balance to be struck about where you want it in the process. Both could work, but one would be more serious than the other, if you like.

Q158 Tristram Hunt: As you suggest, there would be no barrier to whipped votes on the committee?

Dr Fox: No, that is the incentive to the Government to be an active participant in this. You need to think about incentives to government, and why it should engage productively in this process. Understandably, from a business manager's perspective, the Government's concern will be that this is just going to be used as guerrilla warfare—this is just going to be used to thwart our legislative programme. Our argument is, "No, it is not, that is not the intention, you can get this through but you might have to suffer a bit of reputational damage". They get that with bills anyway, even without it.

Q159 Tristram Hunt: The upside is that you would have more parliamentarian involvement in the process. Shouldn't elements of this have been dealt with upstream before it even gets to First Reading? Is it not a problem of the Executive and officials, rather than parliamentarians?

Dr Fox: Yes, it is, but the problem is that it is not a partisan issue, it does not matter which government it is; you end up with the same difficulties. The problem is that, because they can do it, they will do it. Parliament is in a position where at the moment it has to, in effect, accept every piece of proposed legislation that comes to it in whatever state it is in and consider it at that point, regardless of the acknowledged inadequacies there may be in policy preparation, consultation and drafting. Our argument is that Parliament can maybe think about trying to stem that a little bit and push it upstream by making them think

harder and work harder for the bill before it gets to this place.

Q160 Tristram Hunt: Is it your vision for it to be a requirement for every bill? There will be certain bills that need to be done in a day. In that case, will they just be whipped through? Would this stage allow that to be avoided? Or maybe they are the ones that particularly need it.

Dr Fox: Yes. That would be one of the criteria and questions that would have to be looked at. One of the things that the legislative standards committee would look at is, is the fast-track proposed for this bill actually necessary? I gave evidence to the Lords Constitution Committee a few years ago on their emergency fast-track legislation inquiry. If you look bill to bill, it is quite rare that every Bill that is pushed through on a fast track really needs to be on as fast a fast track as it is on. You might want to push it through at some speed, on a shortened timetable, but it is very rare that it need to go through as quickly as it does. That is one of the things that the committee could ask.

Yes, there is an issue that if it is going through on a very quick process, in a day or a couple of days, then serious questions have to be asked about the process. Often in those situations you have to revisit the legislation later anyway. One option might be that the committee could say, "If you want to put this through, could we have something like a two-year review clause or a sunset clause for consideration?" It might do that or you might choose to leave it to the scrutiny process. That would be a dialogue to have about how best to deal with emergency legislation.

Q161 Mrs Laing: If one takes the basis that a legislative standards committee is a good idea in principle, what steps could be taken to ensure—this is probably a difficult question, but I will put it this way—that the committee was doing a serious piece of non-partisan consideration, rather than party-political? Might I put it to you that anything that happens in Parliament is political with a small "p", and that much of it is party political? How can we ensure that a legislative standards committee does not just become another step in the party-political balancing act, the seesaw of party against party?

Dr Fox: That relates to the dialogue that takes place beforehand, the decisions that are made about the breadth of the criteria that that committee is going to look at and the questions that it will be able to ask. This House has committees that have the proven capacity to look at things on a technical basis. To ensure that the dialogue has taken place and that there is mutual agreement between the Government and the Executive about what those standards should be, you would reflect them in the work of the legislative standards committee, and they have to reflect it in their guidance to bill teams, ministers, drafters and others upstream.

This is where I think it is important that it doesn't get into the policy substance. I accept that it would have to be carefully worked through with the drafters and the lawyers about where you get into technical issues of drafting and where those hedge over into policy, but the clear remit of the committee would be to err on the side of the technical, not the policy. Once you get into the substantive nature of the policy, that is when you are going to get into the political battle. If you get there, then it will not work. It is the drawing up of the criteria that are important, and the agreement of them beforehand.

Bluntly, if there isn't an agreement about what those standards are, I would say don't start with a committee. If you cannot agree on them, I don't think the process is going to work. It will simply be Parliament and the Executive butting heads politically all the time. If the committee were to end up in a situation where it was constantly at odds with the Government, where it was constantly engaged, not in a partisan battle but in an Executive-legislature battle, it has failed in some ways or the process has failed—government and Parliament will both have failed in the process—because there hasn't been the dialogue, there hasn't been the agreement in order to reach an accommodation about what the standards are.

Q162 Mrs Laing: That was helpful. I will follow up with a specific example. Pre-legislative scrutiny is still fairly new, and it is arguable whether or not it is a worthwhile stage in the legislation process. There is a bill before the House right now, a very controversial bill on House of Lords reform. It had pre-legislative scrutiny by a joint committee of the two Houses for eight months or more. One of the criticisms in the joint committee report was that clause 2 of the draft bill would have no effect in law. The Government have now brought forward a second bill, or a new version of the bill, where they had rightly, and to their great credit, completely changed clause 2. That would suggest that the work of the pre-legislative scrutiny committee had been worthwhile. I say as an aside, Mr Chairman, it is a pity that they did not listen to the committee on all the other clauses, but I am now making a very political point, whether it is party-political or not—

Chair: Do you think there will be a question soon, Eleanor?

Mrs Laing: The question is one of making a distinction between criticism of parts of the bill that certain politicians do not like for political reasons and those that are technically deficient for legal and legislative reasons.

Dr Fox: I do not underestimate the difficulties of the process. That is why I say that dialogue needs to take place and there needs to be mutual engagement and agreement before you initiate the committee. If you do not have that agreement, if people cannot decide at least at a minimum level where that line is, it will not work. I think that line can be defined.

It goes to what do you want to look at. What is it that members find difficult about bills in terms of the scrutiny process? Setting aside the big policy issues and the divisions, there are bills that have inadequate impact assessments or not enough information supplied for them. You do sense with some impact assessments it is a cut-and-paste job. There are wildly different approaches to them with departments. Is there a way to use that committee to drive up the standards of those so that Members are provided with

a better evidence base? Having a discussion about what information you want to be provided about bills, from your perspective, that augments the impact assessments and effectively creates a business case. I do think there is an argument for rationalising the impact assessments and the explanatory notes to create a coherent business case that is reflected more widely across departments in the approaches to the information that they provide to you. There could be justifications for why a bill has not had pre-legislative scrutiny or does not have Keeling Schedules.

Some of the questions that you might ask or some of the criteria that might apply to the model set of standards might not apply to some bills at all. In that case, it is a check box that, no, that is not relevant to a particular type of bill. In other areas, it might be, and they would have to give justification for why they are doing what they are doing in process and procedural terms. That is where you get away from the policy questions.

Where there is this difficulty about policy and process is in the drafting and understanding how it is done. Are they being too particular in the drafting? Is it too long-winded or too complicated? That is an issue about the complexities of drafting, different audiences and the difficulties that you get there. I am not sure that a legislative standards committee alone can resolve that. I do think it would be useful if the committee could, both beforehand and during the ongoing process, provide a forum for a dialogue about why certain bills are drafted in a certain way. I sometimes think that Members think that parliamentary counsel are being difficult or are trying to hide issues in the policy. The alternative argument is that there are good reasons in law, based on what has gone before in the particular area of law, that need to be drafted in a certain way. That does not necessarily make it easy to scrutinise, but have to be done because of the way in which our legal system works. We should not overplay what this committee can achieve. It is not going to create perfect gold-standard legislation. There are all these complexities that come into play. It is about making government think and work a bit harder for their bills.

Q163 Paul Flynn: The Dangerous Dogs Act 1991 is regarded by most people as a legislative atrocity. It was described by the parliamentary counsel who gave evidence to us as being technically well drafted. There were two Bills, one in 2001 and one in 2006 in the legislative and regulatory reform system. The second bill in 2006 was enacted to explain what the 2001 bill meant, because it was incomprehensible. As an example, the Dangerous Dogs Act 1991 might have been well drafted technically, but politically it was a piece of hysterical nonsense. Would you regard the other bills—the 2001 bill—as being examples of bad legislation?

Dr Fox: What is bad and deficient, and what is quality, is quite a subjective view, and does go to issues of politics. On the technicalities, was it deficient? As I understand it, there had been a government consultation on dangerous dogs beforehand, before the hysteria and the media focus on the couple of attacks that had taken place. The Government already had a consultation and policy process in train to consider what they might do to deal with the dangerous dogs problem. It was their decision. They chose, albeit—as one can understand—under media pressure, to put a bill through, I think, in a day, heavily guillotined at that time because it was pre-programming. Effectively, it was exhibit A in the emergency legislation library. I think Counsel do think it was well drafted, given the policy problem that they were asked to resolve.

If you want to think about how this committee might have applied to the Dangerous Dogs Act 1991, I do not think that a committee can solve a fundamental policy problem at the heart of what the Government was trying to do. In many ways, the Secretary of State wanted to achieve a very simple thing, which was to effectively eradicate pitbulls. The problem in law, as I understand it, was that he was introducing a piece of targeted regulation and when you get into targeting you get into problems of ambiguity, definition and compliance. Counsel struggled to define pitbulls in legal terms to avoid those issues of compliance and of which dogs would be covered, and that was where the difficulties lay. In a sense, it was not counsel's problem; it was a policy problem.

Would this committee work? Because it is a piece of emergency legislation, if the decision was that every bill was going to this committee, the committee would ask, "Does this need to be on such a fast-track? You have been considering the policy issue for some months". The complaint of the then Home Secretary was that everybody had agreed with what he wanted to do—all the stakeholders, the RSPCA, the Kennel Club and so on, had wanted this—but when the bill was produced they turned tail and deserted him. They were engaged in a broad policy objective, and they wanted that, but when you produce a bill and give legislative or legal terminology to what you want to achieve—the bill was produced and Second Reading was four days later. They pushed everything through in a day. People did not have a real chance to engage with the detail and complexity of the drafting to address the policy problem. This committee might work, by saying. "We don't think it should go through in a day, for X, Y and Z reasons, we want it to have more time". Would that have resolved the drafting and policy problems? I do not know. I am not a lawyer, to be blunt, but it might at least have had an opportunity to suggest that it should have a little bit more time.

Q164 Paul Flynn: That was a very full reply, and I am grateful for it. What was absent from that reply was the mood, what was happening at the time. There was a tabloid campaign to terrify the nation that, unless we had legislation, a large percentage of the children of the country would have their faces bitten off by dogs. Those who had the temerity to stand up and suggest that was not a sensible approach were excoriated by the Minister by saying, "You are in favour of young children being savaged by dogs", and they were made to look foolish, and that was the lead in the tabloids the next day.

What you are making the case for is slower legislation, rather than speeding legislation through, which is what we were told we should have. Clearly,

this was reacting to a tabloid campaign, and governments want to be hooked up to a drip feed of adulation from the tabloids every day. It is part of the government addiction, and it is a novel characteristic of modern parliamentary life. Your explanation was a very full one. What do you think we should do to guard against legislating in haste?

Dr Fox: If you had the committee, it would take a view on the fast nature of the fast track. There ought to be consideration of provisions, so if the Government wishes to push a bill through quickly then you might have an automatic review clause after X amount of time, you might have sunset clauses and so on. Whether that is done through the legislative standards committee engaging with government and persuading them of that, or through the scrutiny process, as sometimes happens, is open to debate. If a government wants to legislate in haste, then it should have to make some concessions for the House to come back and consider it, to ensure that the implementation of it has been as was intended. Clearly, with dangerous dogs it was not.

Q165 Paul Flynn: We asked parliamentary counsel for an example of good legislation and bad legislation, and he suggested that a good example was the Defamation Bill, which I believe was actually drafted by a member of the House of Lords. That is rather surprising, perhaps. Do you have a list of atrocious legislation and brilliant legislation that you want to show us?

Dr Fox: I focus more on where the problems are than on what is good. The problem with the good is that you do not hear about it. It is like good news that way. I will give you some examples of issues that were problematic, referring to my notes. The Coroners and Justice Act 2009—I do think there is an issue about big omnibus Christmas-tree bills, where everything gets shoved into the department's opportunity to legislate, and you end up with a whole set of disparate provisions that Members find difficult to scrutinise. Are you talking about legislation that is difficult and deficient in the sense that it is difficult to implement from a legal perspective, or is it difficult for Members to scrutinise? Our focus has very much been on what is difficult to accomplish in this place in terms of scrutiny. Omnibus or Christmas-tree bills have lots of disparate provisions. One example would be something like the Coroners and Justice Act 2009. I will not list the many provisions that the Act included. You only need to look at the long titles of the bills to see that.

Inadequate internal consultation, which can lead to late amendments: again, the legislative standards committee might help here, in that one of the required checks on the Government would be about whether it had done its internal consultations early enough. It may sound surprising, but DCLG did not consult other relevant departments on the Planning Bill in 2008, those being the Department for Business, Enterprise and Regulatory Reform and DEFRA. As a consequence, they ended up with 70 pages of late technical amendments on Report, because they had not done their own internal consultations. That is extraordinary in some ways.

I mentioned the Localism Bill, where the department brought forward a bill and the consultation on the social housing provisions had not yet concluded. That just seems to be an inadequate process in those terms. This is one more for the lawyers, but a lot of things are raised because of duplicative powers or remedies. One example is the Violent Crime Reduction Act 2005. Many people felt—similarly to what you were talking about in relation to the dangerous dogs legislation—that there was this impetus to legislate in response to press issues, rather than about the real legal need. You could look at the inappropriate delegation of powers in relation to the Legislative and Regulatory Reform Bill—the "abolition of Parliament Bill"—and public bodies and so on. There are a number of examples.

Chair: I am conscious of the time. Are you finished on this, Paul?

Paul Flynn: Yes, I am finished. Thank you.

Q166 Mr Chope: I have a quick point about dangerous dogs. At the time, Alan Clark and I were the two ministers who had Rottweilers, and there was a big move to try to include Rottweilers within this legislation. It was not the whole problem that there was inbuilt ambiguity as to what we were defining as a dangerous dog. Although it is easy for counsel to say, "Well, this was perfectly drafted", how can any bill be perfectly drafted if it has an inbuilt ambiguity in its provisions?

Dr Fox: In a sense, it cannot be perfectly drafted. They obviously did not say this, but I would argue that a draft can only be as good as the policy that underpins it. If the policy is fundamentally flawed, the draft is going to be flawed. I do not see that as avoidable. It is the policy process and what you want to accomplish. In this instance, what they wanted to accomplish was relatively quite simple, it seems, from a public perspective. Translating that into a legal remedy, for the legal mischief that they were trying to resolve, was quite complicated, and goes to that definitional problem. I am not sure that it was a good draft if you can't then implement it effectively.

Q167 Fabian Hamilton: I have two questions, but I will be brief. Just following on from the dangerous dogs legislation, I was not here at the time, but we all remember the media fuss about it. Another type of legislation that is often rushed through in emergencies is anti-terror legislation. Following the 7 July 2005 attacks, there was very urgent legislation to try to counter that, partly through pressure from the media. It was controversial, it went through in haste and then to everybody's shock and surprise in 2008 that legislation was used against Iceland to freeze the assets of its banks here in the UK. I have to say that still has reverberations. How can we avoid that? I suppose that we can't avoid governments using legislation for things that it was not intended for, but how can we ensure that legislation is much tighter, especially when it refers to taking away people's liberty on accusations of terror offences? There was the whole 42 days thing, which was lost in the House.

Dr Fox: In that case, a number of clauses and schedules were introduced very late, at Report stage.

There are issues about scrutiny at Report stage in the time that is given. What happens if the Government does bring forward completely new provisions at Report stage, or substantially revises them? I do think there is quite a strong case for recommittal. There is a question of where you draw the line regarding how much amendment and so on, but if they introduce something completely new to a bill I do think there is a case for recommittal, probably not of the entire bill but of those provisions for consideration. That is one way.

A second way might be of less value but, where they make amendments, explanatory notes might help, and I think we have to test that out and see. Recommittal is one of those cultural and attitudinal things. If they know that is going to happen it makes them think and work more for the provisions, and they can't just push it in easily. If they want to accomplish something like that, something is required of them to do it a little bit more than at present.

Q168 Fabian Hamilton: Dr Fox, do you think there is any way of Parliament preventing governments misusing legislation, using it for something for which it was never intended?

Dr Fox: You have the opportunity for post-legislative review, which we have not seen a lot of thus far. The commitment is to review after every three to five years from Royal Assent. There is an argument about where you do it, but that might be a means for Parliament to revisit it, something like that, and saying, "That is an inappropriate use".

Q169 Fabian Hamilton: Could your proposal in your evidence, that a legislative standards committee should be able to call ministers before it to account for their department's preparation of a bill, be used for post-legislative scrutiny? In using that power, how could you avoid such a committee becoming a political tool, rather than a quality assessment?

Dr Fox: The same issues about the approach to avoiding the legislative standards committee becoming a political tool apply at the post-legislative stage. You have an evidence base. We have talked about the Government having to present an improved business case for its legislation at the outset to the committee. The post-legislative scrutiny committee can reflect on that later, on whether it has lived up to what the intention was. I don't think that resolves it in terms of anything that comes in at Report stage. Time has passed and it is gone. However, I do think you could use that as a means to reflect more broadly on whether the Government has accomplished what it intended. If there are completely new areas that are not within what Members thought was the scope of the bill, then you can have a dialogue. However, you are getting into policy, so I think that is going to be more partisan, that is going to be a more difficult process than the earlier upstream stage.

Chair: Ruth, I am so sorry, we have gone over time. There is a lot more still to say, but you have the option of dropping us further information, which we would be very pleased to receive. It is nice to see you again, and thank you for coming along. Feel free to stay with us.

Examination of Witnesses

Witnesses: **Professor Dawn Oliver**, Emeritus Professor of Constitutional Law, UCL, and **Mr Mark Ryan**, Senior Lecturer in Constitutional and Administrative Law, Coventry University, gave evidence.

Q170 Chair: Good morning, Dawn. How are you?

Professor Oliver: I am fine, thank you.

Chair: It is nice to see you. Mark, welcome to the Committee. Thank you for sparing your valuable time to talk to us this morning. Would you like to start with a general introduction?

Professor Oliver: Perhaps just a few words. I very much welcome the interest your Committee has in legislative standards, because I think they are extremely important and there is a real problem about them. Picking up on the evidence that has been presented to you that I have read, a major advantage would be brought about if the work of a legislative standards committee or something of that kind had a big effect upstream in government, so that when policy and bills are being prepared those in charge know that they will get into trouble downstream and they will not have any excuse if they know what the standards are. That seems an excellent proposal.

There are obviously questions about a legislative standards committee straying into merits and politics. On process, the requirements for proper consultation and provision of information are excellent, and that should not be problematic, but it is important not to be too chary of getting into substance or merits because obviously there are matters to do with human rights compatibility, international law requirements and constitutional issues that are important and substantive. Often, they are not that political. I think it would be a pity if those in charge of scrutiny felt that they could not go into that sort of thing because it looked too much like substance.

Mr Ryan: I will just explain who I am. I am a lecturer in constitutional law, so my main responsibility is teaching a cohort of undergraduates the principles that underpin the British constitution. On top of that, I undertake research in the area of constitutional reform. In the last couple of years, I have produced a couple of conference papers on the Fixed-term Parliaments Act 2011 and the Constitutional Reform and Governance Act 2010. My main interest is House of Lords reform.

In terms of the remit of a committee, quite a lot could be done at all three stages—the pre-legislative stage, the passage of the Bill through Parliament and the post-legislative stage—but the key, although it is quite

difficult, is about trying to rebalance Executive-parliamentary relations. The power is with MPs to do something about the situation. There is that clash between the Government and Parliament.

I would say this because I am a constitutional lawyer, but I contend that constitutional law and constitutional bills are of a higher order and I think they should be treated differently. I would like to see something like a joint committee on the constitution, which would look at constitutional bills of first-class importance in draft. That is what I would like to see, and that is my suggestion.

Q171 Simon Hart: Following on from that specific point, and from the earlier evidence you heard from Ruth Fox, how would you define the constitution? Is there a watertight definition that you have in the back of your mind?

Mr Ryan: There is no sharp dividing line between public and private law. It must be possible because we have a House of Lords Select Committee on the constitution that looks at constitutional issues. Government business managers make the decision, don't they, in terms of a bill being referred to a committee on the floor of House? It must be possible. I would say that a constitutional bill is one that relates to the structure of government, its powers and responsibilities and how it is controlled. It is also about how the individual relates to state institutions. That is a broad definition. It could include criminal law, as criminal law is about the relationships between the individual and the state. That is essentially how I would define a constitutional bill. It is often said to be like an elephant; you know it when you see it. I am sure if we had a joint committee, they would know it when they saw it.

Q172 Simon Hart: I presume you would say that they would be able to identify the proportion of a Bill that was constitutional, but not a constitution bill itself. Do you agree, Dawn?

Professor Oliver: Yes. We need to distinguish bills or provisions in bills that are of major constitutional importance. There is a convention that they are taken in a committee of the whole House. Robert Hazell of the Constitution Unit analysed what had happened to various bills that might be of major constitutional importance over a period of time and there was not much consistency, but the system rubs along. What is different is clauses in bills that are not particularly constitutional but raise constitutional issues. No one is suggesting that every little constitutional issue should be dealt with on the floor of the House; the Constitution Committee of the House of Lords deals with those, and I think very well. There is also the Joint Committee on Human Rights and the Delegated Powers and Regulatory Reform Committee. There are committees that deal with, raise issues and ask for justifications and so on about these sort of mini-constitutional issues, if you like, but they are very important. We already have provision in the legislative process for dealing with constitutional issues, either big bills or other measures. A lot of this is done in the House of Lords, not in the House of Commons, so we should ask how the House of Commons and its committees should come in on this. I think it would be desirable if they did.

Q173 Simon Hart: That takes us back one step. Mark, you mentioned having a different process for constitutional bills and the question of whether there should be a sort of bus lane for them where they can be pursued at a different rate. Can you expand on that? Is it just a matter of timetabling and managing the sort of mundane things that are attached to normal bills?

Mr Ryan: I would like to see bills of first-class constitutional importance—not every constitutional bill—being treated differently. I would like to see them being published in draft and put before this joint committee. I had a quick look at the last parliamentary Session, 2010 to 2012, and selected three Government Bills, which became Acts that I regarded as first class: the Fixed-term Parliaments Act 2011, the European Union Act 2011 and the Parliamentary Voting System and Constituencies Act 2011. I regarded those three bills or measures as first-class and should be treated differently. They should be submitted in draft first and considered by a joint committee, because constitutional law is of a higher order.

It should be above party politics. There is a difference between a government having a manifesto commitment to do something on the environment and health and pushing a bill on that through Parliament—because the Government controls Parliament or the House of Commons—and a manifesto commitment to reform the constitution, because the constitution does not belong to the Government or to Parliament.

Q174 Simon Hart: Is that the same as saying that we should have a free vote on Lords reform on Monday and Tuesday next week?

Mr Ryan: I think that Parliament should act as parliamentarians. First-class constitutional matters are important. The House of Lords Select Committee said that significant constitutional change will outlast the Government that introduces it. There is a lot to be said for that. If we look at the Human Rights Act 1998 and the Constitutional Reform and Governance Act 2010, it should be above party politics. Obviously it isn't, but it should be. I would like to see them treated differently, because they are of a different nature or order. They are about the structure of the state and will outlast the particular political party that happens to be in government that has a particular programme that it wants to pursue.

Professor Oliver: I cannot give you an answer about a free vote on the House of Lords Reform Bill. That is very political.

Q175 Simon Hart: Of course it is—that is the problem. I am quite keen to hear from people who are not getting rung up over the weekend by whips to ascertain a view on the matter. I know where I stand on it, but I wonder if your vision of ending up with a better constitutional product includes a provision whereby people should not be whipped and issues should not be timetabled. Is that or is that not your view?

Mr Ryan: Certainly, I would say that consideration of the constitution should not be programmed. It is up to

parliamentarians—MPs—how they process that time and they have to exercise some self-restraint. It certainly shouldn't be guillotined. I do not think that it should be programmed, unless—this is quite radical—you could have some kind of constitutional business committee, which could agree the amount of time for a particular constitutional bill, so it is separate from ordinary legislation, because I think it is of a higher order, it is different and it should be treated differently. It should certainly not be guillotined, and I do not believe in programming.

Q176 Fabian Hamilton: Briefly on what my colleague Simon Hart has just mentioned and on the response that you gave, Mr Ryan, forgive me if I have misunderstood you or if I did not hear properly, but did you say that the constitution is not the property of the Government or Parliament?
Mr Ryan: The constitution does not belong to Parliament. We have Dicey on parliamentary sovereignty, and Parliament can pass any law that it chooses, but the constitution belongs to everybody.

Q177 Fabian Hamilton: Most of us would agree with you, but the problem, in the absence of a written constitution, is that it actually is the property of Parliament because the constitution is determined by statute, not by a document. How do we resolve that?
Mr Ryan: You could have referendums. I suggest in my written evidence to the Joint Committee on House of Lords Reform that there should be a referendum on the reform of the House of Lords—along with other people as well. This is quite controversial and radical, but I am a firm believer in referendums. I know that Professor Bogdanor is quite interested in referendums as well. I think that significant constitutional issues should be put to the people, and a precedent has been set with the vote on the alternative vote. In other countries, for example Ireland, the constitution belongs to the people.

Q178 Fabian Hamilton: Because it is written.
Mr Ryan: Because it is a codified document, yes.

Q179 Fabian Hamilton: Should we not have a written constitution?
Mr Ryan: I think we should have a written constitution, and I think that we should ask the people more than we do. My view on constitutional reform has always been that Parliament is very introspective or inward-looking, and that it does not seem to look out very often. I think it needs to engage more with the people.

Q180 Paul Flynn: Professor Oliver, I am fascinated with your contribution about the situation in Australia, in the State of Queensland and in New Zealand. Do you think the systems there have been successful in improving standards of legislation?
Professor Oliver: I do not have up-to-date knowledge about how they actually work, but in Australia, because the Senate committees have legislative standards these are now reflected in their equivalent of the *Guide to making legislation* and so on. It is an example of how the work of parliamentary committees will have effects upstream. Australia is quite comparable in some ways; it is a Commonwealth system, it sits in Westminster style and so on. What we can draw from that is that we can reasonably expect a government will take account of legislative standards.

Q181 Paul Flynn: Take the examples from Queensland. The majority of them seem to be protections of people's rights, including the rights of Aborigines to their traditions and to island customs, as well as other rights that we all find commendable and which should be protected. Are you enthusiastic for the introduction of a system here where we have a list to guard against unintended consequences of legislation that departments or the Government in their enthusiasm to legislate might overlook?
Professor Oliver: I think that a set of legislative standards would provide part of a safeguard against legislation producing unintended consequences, if that was your question. I don't think that a legislative standards committee could guarantee everything, but it would make government take account, upstream, of the implications of what it might do.

Q182 Paul Flynn: Most of the Committee had a chance to meet five members of the New Zealand Parliament yesterday and we found that a very stimulating session. One of the things about their advisory committee on legislation is that it is packed with lawyers—lawyers from Parliament and so on. Do you think that works? Have you any indication of whether that is the wise thing to build on, to have people with a specialist point of view rather than having lay people on such a committee?
Professor Oliver: I wish I had met these New Zealanders, too.
Paul Flynn: They are still here.
Professor Oliver: You know more than I do about that. The New Zealand approach is very different from what you are considering and I do not think that anyone here is seriously considering an extra-parliamentary independent body that would scrutinise bills and advise government and Parliament on them. When I wrote that article, I was looking at a range of possible ways of improving legislation. I could talk about the New Zealand one, but I do not think that is really what you are concerned with. You are more concerned with what parliamentary committees can do.

Q183 Paul Flynn: They are still in this country at the moment. They are off to Croatia tomorrow, I think. I am sure that you could pursue them there. Will you be writing another article based on how they are doing? It is great value for us to see comments on other countries, particularly ones with similar traditions to ours, and to look for models that we could recommend.
Professor Oliver: I will put that on my list of things I might do. That is not something that I am working on at the moment, though.
Paul Flynn: But it will be now, I hope. We look forward to your next report.

Q184 Fabian Hamilton: Following on from what Paul has said, one thing that struck me yesterday at our very excellent meeting with the Speaker and four of his colleagues from the New Zealand Parliament was the built-in mechanism for delaying legislation, so that it can be carefully thought about—obviously there would be pre-scrutiny. My understanding—correct me if I am wrong—is that its bills go into a Select Committee system, different from our Select Committee system, and it could take up to four months to scrutinise a bill. If that four-month scrutiny was not fully used the bill still couldn't be passed into law in less than the four-month period. What do you think about a built-in delay to any legislation? We were talking earlier about emergency legislation, which is rushed through very hastily and, of course, we often repent at leisure on its inadequacies. We have discussed dangerous dogs legislation and some anti-terrorist legislation. Would it be one way to improve the quality of legislation simply be to have a long statutory gap between a bill being published and its being enacted?

Professor Oliver: I had not thought of that, I must say. It might be a bit arbitrary. Given we have a system of bills having to be passed within a Session, you would get nothing much coming through the sausage machine for a while. It sounds a bit arbitrary to me, I must say, but there might be other, more flexible, ways to build in delay than always four months. It is an interesting thought. I am afraid I had not come across that system before, so I do not really have a view on it.

Mr Ryan: Just in terms of timing, we can criticise a government for being too hasty but sometimes we criticise them for delaying for too long. To take the Constitutional Reform and Governance Bill, you could say that the Government took too long to respond to the joint committee's report. By the time the Bill was produced in July 2009 it was obviously going to take part in the carry-over procedure and it was going to end up in the wash-up. There the Government was clearly taking too long. Sometimes, the Government acts too quickly, for example, Parliamentary Standards Bill and the Fixed-term Parliaments Bill. Those are two good examples. In fact, the Parliamentary Standards Bill is probably a bad example, but the Fixed-term Parliaments Bill was certainly an example of the Government rushing legislation. You have to get a balance. Sometimes we criticise the Government for being too hasty, but sometimes they are quite slow. They can be quite slow in responding to reports, too.

Fabian Hamilton: So that delaying aspect of the New Zealand system is perhaps not appropriate for us here in the UK, where there is much more traffic coming through.

Q185 Mr Chope: Yesterday in Parliament, the Prime Minister said, "What is required is swift inquiry, swift action and swift legislation", in response to the concerns about what is happening in the banking industry. Can I ask you specifically about that? What is proposed at the moment, as I understand it, is that there should be an inquiry, which will report by the end of the year, and the conclusions of that inquiry—to the extent that they are accepted by the Government—would then be incorporated in Government amendments to a bill that has already gone through this House and is making good progress in the other House. Do you think that is a good example of how to legislate, or do you think it would be better to have a separate bill to deal with the specific problem that the House is concerned about at the moment, and which will be the subject of either an inquiry of the House or a judicial inquiry, depending on what happens today?

Professor Oliver: It sounds as if it would short-circuit some of the necessary scrutiny. If the Government's plan is to add in important new provisions at a very late stage that will not give the various committees the opportunity to do what they ought to be able to do in scrutinising, amending and making comments on the bill.

Q186 Mr Chope: As we ponder this issue as a Committee, we find that the Government, perhaps with the encouragement of the Opposition, is heading headlong in the opposite direction and proposing to amend an existing bill and use that as a vehicle for introducing this legislation.

There is quite a lot of scepticism among some members of this Committee about whether any legislative standards committee would be anything other than a tick-box exercise. Professor Oliver, you raised that issue, in a sense, and answered it by saying that you have absolute confidence that the people serving on such a committee would not use it as a tick-box exercise. How can you be sure of that?

Professor Oliver: If it was a joint committee, you would get a wider range and possibly less political—but don't let's get into that. There might be advantages in it being a joint committee. If the committee had however many special or legal advisers who report and draw committee members' attention to what might seem to be weak evidence or not a very full impact statement, and indicate where more information or more consultation should have taken place, that would avoid a tick-box. What I certainly have in mind, and what I assume your Committee would have in mind, would be the legislative standards committee would say, "We have read the Government's version of the evidence and it seems to be not very good" or whatever it is. "There might not seem to be anything in the impact statement about whatever financial implications and so on, and this is inadequate." Or they might say, "This is very thorough, very full and fine". I do not see why there should be a tick-box approach at all. The standards should be neutral.

Q187 Mr Chope: Let us compare that with what happens with the Joint Committee on Human Rights, which has a fixed set of standards, namely the human rights legislation, so it is able to say whether, in its view, the various provisions comply with that. To avoid it being a tick-box exercise, are you suggesting that there should be a detailed list of standards against which this joint committee, for example, might pass its assessment of each provision in the bill?

Professor Oliver: Yes, I do, or of the bill overall. Has the Government indicated what evidence there is in

support of the view that this is necessary and that it is not covered by existing legislation? What is the policy behind this? That would lay the foundations for post-legislative scrutiny in due course. What about the regulatory and other impact statements? It could include the material that you currently get in the regulatory impact statement, it could include the human rights impact statement, it could include a constitutional impact statement and a financial one. Other committees might be concerned with matters of more substance, such as environmental impact. I am not suggesting that the legislative standards committee should get into more content, substance, merits. There are other things, such as human rights, international law obligations and compatibility with our European law obligation. Those are important standards and they are pretty neutral.

Q188 Mr Chope: What about simple things like clarity and lack of ambiguity? Wouldn't they be top of the checklist, in a sense, because it is the ambiguity that is inbuilt in quite a lot of legislation by design, particularly EU legislation, which creates an appetite for judge-made law, takes things outside the control of Parliament, and makes it difficult for the ordinary citizen to know where they stand vis-à-vis the statute book?
Professor Oliver: Yes. That is a very technical thing. It certainly could be one of the standards. It would have to be written down as a standard.

Q189 Mr Chope: In a sense, is what I have just described not one of the most important standards?
Professor Oliver: Yes.

Q190 Mr Chope: How could you get a committee to go through a bill line by line and say, "Where the ambiguities are in this; what does it mean?" Would they not have to draw up quite a detailed report if they were going to do that sort of scrutiny exercise?
Professor Oliver: I take your point entirely. That is why I think it would be important for the committee to be serviced by legal or political advisers, which, after all, is what the Joint Committee on Human Rights and the Constitution Committee have. When you get into very technical matters, I would be a bit concerned about the extent to which the ambiguity comes out at this very early stage in the legislative process. That would be dealt with in a Public Bill Committee as well. I am not sure about the barriers to progress.

Q191 Mr Chope: You have obviously studied how Public Bill Committees work in practice. It is easy to say—and it is probably the right answer—that it is the responsibility ultimately of Members of Parliament, but issues of ambiguity in Public Bill provisions may be teased out when you are dealing with a Private Member's Bill that is hotly contested, but in the mass of Government legislation most points of ambiguity are never really tested at the Standing Committee stage, are they?
Professor Oliver: Probably not. I have not done a big study of that so I will accept your point on that.

Q192 Mr Chope: I wish to ask about the issue of having separate standards for constitutional legislation. If that was to be accepted, would those standards be scrutinised by a general legislative standards committee or a different committee? What is your view about that?
Professor Oliver: Probably both, I would expect. The legislative standards committee, as I understand the idea that is developing, is to provide early scrutiny that will look at the question of whether the Government has admitted or accepted that there are constitutional implications in this bill, or does it fall within what should be a bill of first-class constitutional importance. Without then going into a detailed consideration of how else it could be done, it is drawing the attention of the two Houses and the Government to the fact that there are constitutional issues that need to be looked at. One would expect, in due course, the House of Lords Constitution Committee and the Joint Committee on Human Rights to look at it accordingly.

Q193 Mr Chope: How do you think scrutiny as it is at the moment could be improved? Could we add new requirements for more detailed explanatory notes?
Professor Oliver: Yes, very much.

Q194 Mr Chope: Or extra materials? What else do you think could be done?
Professor Oliver: I think that the Government should provide Parliament with information about the consultation process that has been gone through. There should be expanded explanatory notes and regulatory and other impact assessments, so information about how the Government expect the bill to work and what effect it has in relation to regulation and so on. Then, the legislative standards committee—which is a sort of threshold committee, it is not going into amendments and so on to bills, as I understand it—will report to Parliament that the information provided by the Government is defective, that there are gaps in it or that it seems to be thorough, for instance.

Q195 Mr Chope: What do you think would happen then, assuming we have such a committee and it makes a report?
Professor Oliver: First of all, one hopes that the Government would have been careful beforehand, as it knows that it might well get critical reports from the committee. Then, one would expect the members of the two Houses, who are involved in the Second Reading and the committee stage and so on, to pick up on those points, plus the Select Committees that will be taking an interest. The Constitution Committee and the Joint Committee on Human Rights and so on—and the press, of course—will have their attention drawn to any criticisms that are made about the bill or, come to that, to the fact that the bill has been given a clean bill of health by the committee.

Q196 Mr Chope: Mr Ryan, you have spoken about endorsing Lord Rooker's idea, that you should not have starred amendments, effectively, but starred clauses, the ones that have not been scrutinised. How

would that work? Sometimes they can be debated, but the key issues, for one reason or another, are not really dealt with, or are glossed over or not addressed by the members of the committee that is examining them. Sometimes it is because the technical issues relating to ambiguity and drafting are not the issues that attract the attention of the Opposition members on that committee. How would you differentiate between those clauses that had not been scrutinised at all, and had not even been discussed, and those clauses that had been discussed but not scrutinised in the way in which they should have been?

Mr Ryan: It is important to draw Parliament's attention to those clauses that have not been considered. I think there were concerns with the Regulatory Reform Bill in 2001 with clauses not having been considered and there were definitely concerns about the Constitutional Reform and Governance Bill going through. I remember reading Hansard and I do not recall there being any mention at all of the clause concerning the Act of Settlement. I do not think there was any debate on it at all. It wasn't a technical clause—it was just restating the law—but I would like to have seen just a little bit of discussion about it, given that it was going to become law. If it goes from the House of Commons to the House of Lords you have to identify them for the House of Lords, and draw attention to Parliament and the public to the fact that those clauses have not been considered.

On the question of whether something is technical or not, I am not sure how you deal with that. Some clauses will not be considered because they are technical; some clauses might not be considered simply because there has not been the time. Some of them are difficult to identify.

Q197 Chair: Can I just press this definitional stuff a little bit more? Mark, you talked about a higher order of law that is about constitutional stuff. Could you define that a little bit more accurately for us? There is quite a spectrum of possibilities. Where is the cut-off point between what is of the higher order and what does not quite make it to the higher order?

Mr Ryan: Do you mean first-class and second-class?

Chair: Yes.

Mr Ryan: If we were to treat constitutional laws as being of first-class importance differently from those of second-class importance, we might have some debate over what exactly is first-class and what is second-class. I think there would be less debate over whether something is constitutional or not, but you might have more debate deciding whether something is first-class or second-class. It has been suggested that if it is first-class it fundamentally affects the state. A second-class or secondary constitutional issue would be something that maybe just alters the system of governance, but is not as structurally important. For example, the three examples I gave earlier are relevant. The Fixed-term Parliaments Act 2011 clearly affects the state, creating five years between general elections. It affects the ability of the individual to vote. The Parliamentary Voting System and Constituencies Act 2011 is an interesting one because I would split that. I would say that the parts concerning boundary changes are secondary, but I would consider the issue concerning the referendum to be first class. The European Union Act 2011, dealing with referendums—that is something you could see particularly in a constitution. If the measure affects the state fundamentally in a structural way that would be regarded as first class.

My vision would be to have something like a joint liaison committee to sift Bills and to decide whether or not they should be considered in draft. Then, the joint committee on the constitution would look at that and would decide whether it considered that bill to be of first-class constitutional importance and therefore whether it should be considered in draft. Effectively, it would be for the joint committee to make the decision on that.

I think we would probably have arguments on that. The danger, I suggest, is: what is the problem? Suppose we have a secondary constitutional bill that is given first-class treatment. Are the rivers going to run dry? Is the sky going to fall in? What is the problem if we make a misjudgment or there is a miscalculation? I accept that it might be difficult, at times, to decide what is first-class and what is second-class. The Government might have a very different view from parliamentarians, and academics might have different views as well. The reason I suggested first-class was that I did not want all constitutional bills filtering through the committees, because that would just be too much. I thought it would be like an experimental device to see how it works. We could try it with first-class constitutional bills. If it is successful, you could use it with all constitutional bills. I still maintain that all constitutional bills, whether they are first class or second class, are of a higher order, and they are more important than consumer laws and they are more important than environment laws.

Q198 Chair: Let me take you another step forward about when we make a decision on this. When is the definition? Do we want the definition to evolve through what is currently normal parliamentary practice and convention? Do we want to sort out all the definitional stuff before we get into the first discussion about a constitutional bill?

Mr Ryan: I do not think that you can be too prescriptive. I go back to the point I made earlier. We know that something is unconstitutional when we see it. It is the same with the constitution; you know when something is constitutional. A joint committee would know when something is of first-class constitutional importance. I do not think that you can be too prescriptive on this. There will always be exceptions. It is all about shading. I would expect the joint committee to make that decision and say, "We consider that bill there to be of first-class constitutional importance". Hopefully that should apply to only a couple of bills—to one, two or three a year—so it should not be too onerous. That is the reason I suggested first class.

Q199 Andrew Griffiths: Forgive me for my late arrival. I was asking a question in the Chamber. Mark, you have said how important constitutional bills are,

and how they are more important than consumer bills and those sort of things. What is your view on the use and importance of referendums in major constitutional changes?

Mr Ryan: I believe that we should have referendums on major or significant constitutional issues. The precedent was set last year with the vote on the electoral system. I would like to see one on the reform of the House of Lords, which I put in my evidence to the joint committee. I think there should be a referendum on major constitutional issues. That is what happens in lots of other countries. They will have a referendum on a major constitutional issue. In Ireland, they have a referendum on every constitutional issue. In Italy it is optional, I think, but it is mandatory in Ireland. I would like to see them on significant, fundamental constitutional issues. As I said before, I think Parliament is too introspective and too inward-looking, and it does not look outwards quite enough. I believe in having a referendum on significant constitutional issues.

Whether you can engage the public is another matter. Having said that, I understand that opinion polls have been commissioned that indicate that the public are quite in favour of referendums, notwithstanding the turnout last year. I think an opinion poll suggested that the people would like four or five major issues each year—not necessarily constitutional issues—to be decided by referendum. I am in favour of referendums. After all, the people are the constituent power.

Professor Oliver: I am afraid I am a bit of a sceptic about referendums. I do not think I can produce a formula for when a referendum is appropriate or not appropriate, but we all know that the turnout in referendums can be low. We all know that those who vote are often taking an opportunity to express their dissatisfaction with the Government or whatever it is. There is no reason to think that the result of a referendum will be a wise result. All it tells you is that 50% plus one of the people who bothered to vote were in favour of or against whatever it is. I worry a lot about referendums being used to relieve politicians, government and Parliament of their responsibility to do what they think is wise and right or necessary, or whatever it is, for the country.

Of course I do not say no referendums. As far as devolution was concerned in relation to Northern Ireland, it was absolutely essential to have referendums. I can't give you a formula for when it is or is not appropriate, but I am just a sceptic about it. It can provide an excuse for government, if a referendum takes place and the result turns out not to be satisfactory, to say, "Don't blame us, we gave you the choice".

Q200 Andrew Griffiths: Do you think there should be a formula? Do you think you could work out a formula where you could say this meets the criteria that are of such importance to the constitutional settlement that we should have a referendum?

Professor Oliver: It would be nice if one could. One needs to be as clear as possible about why a referendum is appropriate. When it came to devolution, especially in Northern Ireland, it was self-evident that there was no point in going ahead if the people were not in favour of it. That was very clear. Why should there be a referendum on something? There might be a concern that the people are just not going to like whatever it is that the Government is proposing. That is probably why the referendum on whether there should be a regional assembly in the north-east of England was necessary. There is no point imposing something on a population that is absolutely not going to co-operate and is not going to like it. I am only asking the question; I cannot give you the answer. What is the point of a referendum?

Chair: I think we are probably not going to go there.

Q201 Andrew Griffiths: Let us change tack and talk about sunset clauses. I am a big fan of sunset clauses. I worked in the European Parliament for a bit, and I was very keen that any legislation that went through should be time limited to force the Government, the civil servants, whoever was responsible, to come forward and argue the case for why that piece of legislation needed to remain, to make a convincing argument and if they couldn't make a convincing argument or circumstances changed, for that piece of legislation to fall. That seemed to be a good way to constantly refresh legislation and make sure it was up to date. There is an argument that says that constitutional change, because of its importance and government's unwillingness to revisit these things all too often, is a specific area where sunset clauses could play a valuable part in forcing us to re-examine the success and effectiveness of constitutional change. Do you have a view?

Mr Ryan: I would say where legislation has been rushed and where there has been no draft there should be sunset clauses. We almost had one with the Fixed-term Parliaments Bill, with the Lords amendments, where the five-year term would lapse and be subject to renewal by resolution of both the House of Commons and the House of Lords at every Parliament. Their justification was that they did not think that the arguments for constitutional reform had been made out so we should make it a temporary provision. Under the Act, the Prime Minister is required to set up a committee in 2020 to review the Act and its operation. I think there should be sunset clauses in constitutional legislation, because of its importance, particularly if it has been rushed—certainly, the Fixed-term Parliaments Bill was rushed—if it has not been considered in draft and there has been a lot of pressure to push it through. Sunset clauses are very useful as a post-legislative scrutiny device.

Professor Oliver: For legislation that has been rushed through, particularly if it has not been properly scrutinised in either House, especially the House of Commons, there would be a strong case for the presumption of a sunset clause. A lot of law cannot be undone. You cannot suddenly undo Scottish devolution because there is a sunset clause. You have to be very careful about where the running out of legislation is going to be provided for.

Mr Ryan: There is also an issue of resources. If we are going to have a report at the end of the three or

five years, who will undertake it? Is it going to be a Select Committee or the Government? Government should not necessarily be resistant to these sunset clauses because they might be beneficial to them. The report might say, once it is reviewed, that the legislation is very useful, it has served its purpose, there have been no problems in its operation and it will be something for the Government to be proud of. Governments should not necessarily be concerned about sunset clauses.

Q202 Andrew Griffiths: Professor Oliver, why do you say that devolution could not be undone? I understand that, from a political perspective it might be very difficult to do but, constitutionally, if the Scottish or Welsh public were of a mind, there is no reason at all why it could not be undone. A sunset clause would at least give the opportunity to have debates about the successes and failures of constitutional change.

Professor Oliver: I have a big defect, which is that I take things too literally. A sunset clause to me means a clause that whatever it is runs out and stops being in force after, say, two years. Obviously, you could not do that with something like devolution. I was not implying that you could not ever undevolve things. Forgive me for having been rather literal. If, by a sunset clause, we mean an automatic post-legislative review then, yes, a lot can be said in favour of that.

Mr Ryan: I would add, if we had, for example, an anti-Scotland Act 2012, which repealed the 1998 Act, that would be unconstitutional. So going back to the earlier point about what is unconstitutional, I think that it would clearly be morally unconstitutional for Parliament to pass that if there had not been a referendum in Scotland. That would be a good example of something that I would regard as unconstitutional, but perfectly legal.

Chair: I thank colleagues and our witnesses. This has been a very informative session this morning, and it gives us more pause for thought on this very interesting issue. Thank you so much for coming this morning.

Professor Oliver: Thank you for inviting us.

Thursday 13 September 2012

Members present:

Mr Graham Allen (Chair)

Paul Flynn	Tristram Hunt
Andrew Griffiths	Mrs Eleanor Laing
Fabian Hamilton	Mr Andrew Turner
Simon Hart	

Examination of Witnesses

Witnesses: **Rt Hon Nick Raynsford MP**, **Rt Hon Lord Maclennan of Rogart** and **Lord Norton of Louth** gave evidence.

Chair: Thank you so much for sparing the time to come in this morning, gentlemen. We are looking forward to what you have to say. Our apologies for delaying you for five minutes; we had some private business to conclude. Since there are three of you and quite a few Members, unless you are desperate to make an opening statement, I would like to jump straight in on the questions and get started. I invite Paul Flynn to start us off.

Q203 Paul Flynn: Dogs bark, babies cry and politicians legislate, sometimes to give an appearance of activity, however futile that may be. All the evidence we have had suggests that there have to be reforms. Can you tell us: was there ever a golden age of legislation?

Mr Raynsford: I don't think there has ever been a golden age of legislation—that is one of the myths of political life—but I think there was a period when there was not such a high volume of legislation, and when it probably was the case that Parliament was able to give more individual attention to individual bills, and therefore to achieve the effective scrutiny that the system supposedly provides for, but which sadly, in my experience, is not always effective.

Lord Norton: I would endorse that there has never been a golden age, either in Parliament or particularly in legislative scrutiny, as I put it in my submission. If anything, it is slightly less bad now than it was 30 or 40 years ago. The biggest change, I suppose, is the switch from Standing Committees to Public Bill Committees. There is slightly more time devoted to Committee Stage than there used to be, and the Government are slightly more willing to consider amendments, but the points are relative. In other words, you are starting from an incredibly low base of bills being rushed through and the Government not being willing to consider amendments. That has normally been the case. It is not a case of going back to some previous age; it is looking forward to what can be achieved and, to some extent, building on what, so far, has been marginal success. If you take Public Bill Committees, they are a very good idea, although they are limited in what they can achieve—the potential is not realised, not least because of pressures of time.

Lord Maclennan: I don't think there can be or could ever have been a golden age, if what you are looking for is legislation that is viewed objectively by all Members of Parliament. That is partly because, in our system, we have a Parliament that is dominated by the Executive and, consequently, as soon as they have published their legislation, they regard it as a stand-or-fall issue. All we can do is ameliorate.

Q204 Paul Flynn: We have had evidence that we have not had a golden age but we have been passing through a leaden age. There was an extraordinary number of bills that went through Parliament recently that did not go anywhere. They went through Parliament, but nobody ever bothered to put them into practice. Who do you think should be responsible for ensuring that we have higher standards in legislation?

Mr Raynsford: My view on this one is that Parliament needs to be tougher in defining its expectations. I believe there should be a statement of the standards that should be expected. It is right for Parliament to develop that. My own view is that the legislative committee—I forget the official title of the Cabinet committee, but the parliamentary procedures and legislation committee—should require clear evidence that every bill that is proposed for introduction by the Government meets those standards. The minister responsible should be accountable for that.

Lord Norton: I would endorse that. It is important that Parliament has ownership of its own processes for determining what standards it would expect of the Government. Once you do that, you impose a burden on the Government by making it clear that that is what you expect of them, so it is the Government who have to do the work and the justification, but then bring it before a structured process of which both Houses have ownership.

Lord Maclennan: I broadly agree with what has been said, but responsibility for the quality of the legislation must rest with both the Executive and Parliament. There needs to be a good deal more transparency and accountability on both sides. I would endorse the recommendations of the House of Lords Leader's Group on Working Practices on the establishment of a Legislative Standards Committee, which would, if its criteria were agreed, result in a great deal more openness on the part of the Government about their processes. That, it seems to me, would focus not on policy, but on whether the job has been done with proper attention.

Q205 Paul Flynn: Do you think there is a danger with committees and the set-up that we have, and with all committees looking for objective truth, in that they

tend to divide along political lines? If you had a committee that was dominated by members of the Government party, there would be a tendency to defend the status quo of the existing legislation, rather than be critical. Do you think we can have a committee that can be a seeker after the holy flame of objective truth?

Lord Maclennan: I think that we would be going with the flow if we set up such a committee. I think there have been improvements in scrutiny, but there is a long way to go. It has been suggested by some that the career of a parliamentarian need not necessarily include promotion to ministerial office for good behaviour. Both Houses of Parliament are increasingly conscious of that parliamentary role.

Lord Norton: I think it is doable. There are problems, but not necessarily the problem that you have touched upon. You can distinguish criteria of this sort, which are to do with standards, rather than necessarily the merits of legislation. Yes, there might be an overlap, but they are distinguishable. We have set up committees that effectively engage in that type of detached scrutiny. I suppose there is the European Scrutiny Committee in the Commons, and we have the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee in the Lords. It is doable.

My worry would be a simple, practical one of engaging the commitment of Members to the work, if I can put it like that. Members are extraordinarily busy and the committees are already overloaded. That leads me to a view about the positive side of contemplating a joint committee. That would not only draw on the commitments and skills of Members of both Houses, but also, insofar as there is a problem that you have identified, address it, because the Government would not necessarily have a majority on a joint committee. It would be utilising the skills of the second Chamber and would include Crossbench Members. The experience of joint committees is that you temper any inclination to partisanship. A combination of what one is focusing on, plus a committee of that type, would lessen the likelihood of the sort of problems that you are touching upon.

Mr Raynsford: I take a slightly different view on this one. I agree entirely with your analysis that there is a tension between the objectives of Members of Parliament, who are almost all elected as members of a political party and see one of their principal objectives as supporting that party—that is inevitable—and the wider role of scrutiny, which can at times result in conflict with the party policy. It seems to me important to avoid too many opportunities for direct conflict between the Legislative Standards Committee and the Government. The danger of having the Legislative Standards Committee checking whether every single bill conforms is that it would, I think, produce a lot of flashpoints. That is why I personally prefer a model of the Legislative Standards Committee keeping a wider overview, possibly giving more attention to post-legislative scrutiny, which we are very poor at and where there is a lot more need, and generally setting standards, but not getting into the nitty-gritty of judging whether every individual bill meets every standard, which I fear could create quite a lot of tension between Parliament and the Executive.

Lord Norton: The problem would be addressed if there were very clear criteria that the committee was utilising. That reduces that opportunity, and plus the committee would be operating with advice. You would appoint legal advisors or draw on the Scrutiny Unit as well. That would reduce the problem you have identified.

Q206 Chair: How do we convince government that a strong Parliament can be an effective partner, rather than a threat?

Mr Raynsford: My instinct on this one is that we ought to pursue the line that has already been referred to. Paul's question referred to Lord Butler's evidence that 77 bills had, in part or in whole, not been implemented in the last Parliament. My concern is wider than that. Lots of bills have been implemented, but no one has the slightest idea whether they have been effective and whether they have met the objectives that were announced when they were being introduced. That is why I feel there is a lot more need for post-legislative scrutiny, which I feel a Legislative Standards Committee could co-ordinate, making use of individual departmental select committees, which are probably best placed to do the detailed work on that. Then it could inform government, in the nicest possible way, when expectations have not been met. That is the powerful way of saying to the Government, "We aren't necessarily going to challenge you on your political objectives, but we are going to challenge you if you say you intend something to happen and it doesn't".

Lord Norton: I suspect—and I hope—that you will want to come on to post-legislative scrutiny. Your particular question is crucial. You will probably have difficulty persuading the Government as such, intellectually, however much you tell them that good government derives from having a strong Parliament. Government benefits from improving the quality of legislation. However much you tell the Government, some ministers will accept that, in the same way that, when departmental select committees were set up, some ministers recognised that ministers benefited from appearing before select committees—it gives them the opportunity to justify what they are doing and to make their case clear—but, generally, ministers tend to be wary. Government has to be persuaded by practice—by Parliament itself taking ownership of the process and setting up the process and getting it under way, and then the Government realising that the world has not come to an end and that we have, in fact, benefited from having to stand back and think, "Why are we doing this? What are the criteria by which we measure success?"

I quoted the evidence from the Constitution Committee when we heard from the Joint Committee on Human Rights about the effect it was having on the Government, which was moving from a culture of assertion to a culture of justification. One works towards a similar thing, but it is driven by Parliament setting up the mechanisms in the first place.

Lord Maclennan: I would suggest that the Government would be more open to a co-operative

relationship with Parliament than in earlier years because there has been such a decline in respect for our decision makers. That is across the board. If they can spread the responsibility in a transparent and accountable way—here I slightly disagree with Nick Raynsford. This needs to be thought about in advance of the decision making on the legislation. If the procedures are such that the public—particularly the interested public or the affected public—have an opportunity to take part in this process, and if they can be satisfied that there has been a proper opportunity for attitudes to be fed in, expressly stated and then answered, this is not to be seen as something that is a heavy weight against the Government; it is a sharing of responsibility. As we all know, ministers have so much to do that they cannot always get down to the fine print in every departmental issue. With the sheer volume of legislation that we now have, that problem is exacerbated. Even Cabinet committees—on legislation—are to some extent overburdened by these issues. A process that is agreed between the two—there are nine bullet points in the working practices report from the House of Lords—would seem not to challenge policy, but to challenge process. That is how you could make it less of an adversarial situation.

Chair: Whichever way the Committee goes in terms of its recommendations after taking evidence, we need to have, as part of our case, that Parliament is capable of doing effective accountability and reviews. There are some examples of that, and some from this very Committee. We could then be viewed as an effective partner, rather than as an adversary. That will take some very neat drafting.

Q207 Simon Hart: Just a quick follow-up to something that Nick Raynsford said. I think he said that one of the frustrations was that nobody really knew, in some cases, whether legislation had met the objectives that had been set. I think the frustration—and I put this to you—is that they do know that they have not been met. That causes damage to the reputation of Parliament, which Lord Maclennan touched on. I wondered if you felt that you had underplayed the situation.

Mr Raynsford: I would agree with you if the minister was there in three or four years' time to assess what the impact was, but because of the other process that is very destructive to good legislation—the excessive turnover of ministers—very often the caravan has moved on and no one is asking the questions, because no one actually remembers what the legislation was previously introduced for. I would call that a score draw, if I may, with your question.

Simon Hart: The poor old public does; they are the ones living with the consequences.

Lord Norton: One of the points about the value of post-legislative scrutiny is that some people will say you don't need it because, if legislation goes wrong or goes belly-up, we know about it—it is in the media. But with quite a good degree of legislation it is not that it has gone disastrously wrong; it is either it has not had the intended effect, or it has had no effect at all. We never bother to check that, as I put in the submission. Part of the parliamentary culture at the moment is that success is judged in terms of Royal Assent. It is passed and that is it—"I have got my bill; thank you very much." We do not then come back to it on any systematic basis, and that is a core failing.

Q208 Chair: Parliament has a role here; we are distinct and separate from the Executive. Nick, you will be pleased to know that, since July, we have been doing a sister inquiry on reshuffles, and that may allay one of your concerns, I hope. There has to be that distinction between what Parliament's role is—certainly, good government needs to do it as well, in its own way—and Parliament, having initiated and passed the legislation, needs some function to monitor how well it used its time on that legislation.

Lord Norton: Absolutely. That is where Parliament is now starting to fall behind. Particularly when you look at post-legislative scrutiny, there is now post-legislative review by departments since the Government accepted that recommendation. Two cheers for what has gone on so far, but what has not happened is Parliament setting up a body for post-legislative scrutiny. It is left to departmental select committees to consider the reviews, but select committees are overloaded and do not have time to do that systematically. You get these reviews on important Acts, but they fall by the wayside. You need a systematic mechanism—a committee on post-legislative scrutiny—to ensure that departments pursue best practice and that no post-legislative review on an important Act falls between the gaps and is not considered by Parliament.

Chair: If I may, I want to get back on track. I am sorry—both from myself and from Simon Hart—for that diversion.

Q209 Fabian Hamilton: Just a thought on what you said: presumably, the codification of all the legislation in particular areas of activity would also help, if Parliament was able to codify them. That is a different discussion, I know.

I wanted to ask you whether you agreed with the Hansard Society that the explanation for deficient legislation "lies in a complex confluence of factors primarily related to volume,
attitude, preparation and deliberation".

Mr Raynsford: I put it in a slightly different way in my submission to you, but can I paraphrase that briefly? There is too much legislation—that, I think, is the first of their points—and that is a problem. Secondly, too much of it is prepared in haste. Thirdly, a lot of it is prepared to prove a point or to show that something is being done, rather than with a view to its effect and impact. Those are the three fundamental problems. Our evidence—certainly my evidence—is very much about how you resolve those issues.

Lord Norton: I would agree with all that, partly because I did in my submission. The problem that I would add to it is that I do not think it is just the Government acting in haste; it is Parliament acting in haste, because you are rushed to get the measures through. Part of it is the discipline of the sessional cut-off. As I mention, the Government still proceeds on the tidal wave principle of bills having to be introduced, with Second Reading at the beginning of

the Session. Therefore, there is a pressure. Committees, at a particular time in the year, have got to rush to get them through. The volume of legislation has increased—not the number of bills, but the length of bills. I would also add that it is not just a quantitative dimension, but qualitative as well in terms of the complexity of measures. That increases, whereas parliamentary time and committee availability cannot—it is finite. It has become more of a problem. There is a problem with government, but there is also a problem with the parliamentary process. You have to look at all those to explain why we are in the situation that we are in.

Q210 Fabian Hamilton: It is perhaps just as well that we are not going to reduce the number of MPs. At least we have 650 MPs. Sorry—I did not want to introduce a note of controversy.

I do not know if Lord Maclennan wishes to add to what has been said about the Hansard Society.

Lord Maclennan: I broadly agree with the statement from the Hansard Society. If the matrix of guidelines that were recommended by the Lords group on working practices were followed, that would diminish the problem of scrutiny to some extent, because the matters would have been pre-considered by the Government in preparation—just as nowadays a bill is considered to be conformable with the Human Rights Act, and we have memoranda of explanation for most bills. If we had a more precise requirement, which I think needs to be agreed by very particular definition between Parliament and the Government, I suspect that the process would become a bit simpler, and ministers and their officials and civil servants would know what they had to follow, what they had to disclose, and how they were seeking to justify what they proposed. That should come at a very early part of the legislative process, before anything has been put to Parliament.

Q211 Fabian Hamilton: We have already touched on this, but to what extent do you think legislation is increasingly viewed as evidence of action? All governments are guilty of this. On Monday, we are going to be discussing the Infrastructure (Financial Assistance) Bill, which, as I understand it, is entirely unnecessary to the infrastructure plans of the current Government. I am giving that as an example. All governments do this; it is not just the coalition. To what extent is this increasingly the case?

Lord Norton: I think it has always been the case, but it has been exacerbated in recent years. That is one of the values of the Legislative Standards Committee: to force government to think, "Is there an alternative?"—not only, "What is the problem?" but, "Is there an alternative to legislation?" A lot of it is not that you need new legislation; it is actually the enforcement of existing legislation. I agree with you that it is a case of "something must be done" and therefore you get rushed legislation. That is why you need a structured process in Parliament. The danger is of Members getting swept up in the "something must be done" mentality as well—"We must show we have done something and we have legislated." It comes back to my point about passing an Act of Parliament and then full stop—success. There is a key problem there.

I would put it in a wider context: it is not simply confined to the Government; it is part of the culture of expecting the Government to legislate. Some Members take the view that we need legislation, and then complain when the Government are not bringing forward their bills. One needs to have a culture shift to ask, "Why do we need legislation?" There is a tendency to see it as an answer, rather than standing back and thinking, "Well, what are the alternatives?"

Mr Raynsford: I agree very much with that. The key to getting things better lies in both upstream and downstream scrutiny—upstream, before legislation is even written, with all the key questions about why it is necessary, what the alternatives are, why those alternatives are not potentially effective and who is going to be responsible for implementing it, because, very often, it will involve agencies or other bodies. Are they adequately equipped to do it? Are they in support of this particular course of action? All these questions need to be asked before legislation is even contemplated. I am not sure that that is the case at the moment. I have already made the argument in favour of the downstream analysis—has it had the effect it was intended to have?

Q212 Fabian Hamilton: If we had codification, we would know, to use Monday's example, what legislation we already had to ensure that the infrastructure plans could go ahead, with assistance if necessary, but we don't—I don't; I don't know about anybody else.

Lord Maclennan: The second bullet point of the Lords report requires, as a criterion, an explanation of why legislation, rather than other means, was necessary to fulfil the policy intention, and why such legislation is being brought forward at this time. If that were set out, it could forestall a lot of the problems.

Q213 Chair: Before Tristram Hunt comes in, I just want to get back on to the point that if ministers accept that Parliament has a right to get involved in some of this detail and in some of the accountability—I think that is an easier ask than what I am about to say—do you think the civil service themselves would be keen and delighted to have Parliament poring over detail and getting them to rewrite stuff and giving them good ideas about other things to do? Don't we need to win them over, too, to prove that Parliament could contribute in a positive way to the development of legislation?

Mr Raynsford: The answer is yes, but it is not the case that all civil servants—certainly in my experience—are hostile to parliamentary scrutiny. Some of them see it as a nuisance, no question. One of the biggest obstacles that I found as a minister was not having a direct channel to talk to parliamentary counsel about the bills for which I was going to be responsible. The civil service believed that they were the correct channel to talk to parliamentary counsel, and the idea of a minister having a direct conversation with parliamentary counsel about how the bill is being written and whether it really will achieve the political

objectives was very difficult. There are structural issues as well as attitude issues in the civil service.

Lord Norton: Once you start the process, civil servants get used to it, as I have said regarding the Joint Committee on Human Rights—moving from that culture of assertion to one of justification. They get used to it. Civil servants, once you get into that practice, will probably not find it a particular problem. It is quite a constructive opportunity to think through and justify the legislation. Again, Parliament is the driver. Once you say, "We are going to do this," it is a case of getting on and doing it, and preparing it in the way that Parliament expects.

Lord Maclennan: May I just add as a footnote that it is a very long time since I was a minister, but my experience was that departmental lawyers would lock horns with parliamentary draftsmen if they were put up to see that there was a problem? Sometimes, the departmental lawyers got the better of the argument, but the culture and the political ambience in which these decisions are taken is moving in the right direction so that there is greater recognition. That is partly because civil servants have to answer directly to departmental and other committees, and they can only say, "That is a matter of policy for the Secretary of State," in certain clear circumstances. I think there is a better dialogue going on now between the civil service and the Executive and Parliament.

Q214 Chair: Sometimes, certainly as a Backbencher trying to promote particular ideas or constructive proposals, I feel that we are regarded as insurgents—"Policy is made here. We in Whitehall do this; it is not your job." I want to make sure that we overcome that—not to Backbenchers per se, but to Parliament as a whole—so that it is legitimate for Parliament to say, "We agree with a lot of this bill, but some areas are fundamentally wrong. We have constructive ways to engage with you. You don't need to feel that it is all or nothing, or that it is threatening. We do have stuff to offer." I am sure colleagues have examples. I have served on bills with colleagues from all parts of the House—the Criminal Justice Bill, the Education Bill and even Finance Bills—where you look around at the talent and experience that has been vested in those people who have been elected by the people, and you think that that is not being expressed. They are all being told to come along, read their papers and sign their correspondence, and we are all losing because of that. The Members are frustrated, and we get less good law because we are not sucking in that experience.

Lord Norton: I think that that is a slightly different problem, but it falls into the totality of what I was talking about. One is what we are considering—improving the standards of the legislation brought forward. You are touching more on the merits of Members making a case for whether it is a good or bad bill. That can be improved by reform within the processes that Parliament utilises. It is part of the problem I mentioned earlier. You need to look at it holistically in terms of legislation—pre-legislative scrutiny, the legislative process and post-legislative scrutiny—and see the connections between them, but recognise, within the legislative process, that part of the problem is how Parliament goes about the task itself.

Part of it, as I touched on, is time. You are constricted because of the current pressure of the sessional cut-off. We are distinctive in the United Kingdom because of that discipline of a sessional cut-off; there is really only one other nation in a similar situation. With most Parliaments, you have the length of time of the legislature—typically four years—to get something through. We impose the discipline of the Session. That limits Parliament when you have an increasing volume of legislation. You may need to address how to craft more time so that Public Bill Committees can do their job and absorb what they are told in evidence before getting down to considering amendments. There is not time at the moment. If you adopted a cut-off, but not the Session, of saying that once a bill is introduced, it must be passed within 14 months, as the Constitution Committee recommended, you would still have the discipline of a cut-off, but you could carry over bills, you could have a staggered introduction of bills, you would have more time to consider them if it is a 14-month period, and there would be more time for Public Bill Committees. In a more structured parliamentary year, you could spread out committees more and make better use of the resources of Members. There would be more time to engage in detailed scrutiny. That would be part of the picture. I was going to make a point in further response to Mr Hamilton's earlier point. He said, "There are multiple problems; there are multiple answers." That is my point. The Legislative Standards Committee is necessary, but not sufficient.

Mr Raynsford: On the reform process, Lord Maclennan rightly said that there has been progress on various attitudes, and we have moved forward in various respects, but I am always struck by how we do not go as far as we should and how we often accept an incomplete and rather unsatisfactory compromise. I can give two illustrations. One is one that Lord Norton has already referred to—the Public Bill Committees. The introduction of evidence sessions is a very important reform, as it allows an opportunity for the Committee to hear from expert witnesses before they get into the detailed process of scrutinising the bill. But, while that is a useful reform, there is no opportunity to distil the evidence that has come in those evidence sessions, to reflect on it and to amend the bill, if appropriate, in response to that. You go immediately from the evidence session straight into the traditional line-by-line scrutiny without a period of time to reflect and decide whether there is a case for some improvement or change. That seems to me to be unsatisfactory.

Secondly, we are now prepared to allow the carry-over of some bills but let me give the illustration of the Local Government Finance Bill, which was subject to carry over. Because of the way in which the carry-over terms are written, that bill received its Second Reading at the very beginning of this year and a Committee Stage in January, and then it was parked because, if it had completed its Commons stages and gone to the Lords, the procedures would have prevented it being carried forward into the next Session. It was parked from the end of January until

just before the end of the Session so that it would not fall foul of that slightly arcane rule. Once again, that is an illustration of slow progress and not getting it fully correct.

Lord Maclennan: I was rather impressed by the evidence on this point that was led to your Committee by Daniel Greenberg. I agree with Lord Norton that there is a need to concentrate minds. It may be that the Session is not the right unit of time. Nonetheless, having something drag on indefinitely—or being parked, as Nick Raynsford said—does not necessarily lead to better-focused scrutiny or to the evidence that may have been put on the table being taken on board.

Q215 Andrew Griffiths: Lord Norton, you have already touched on the point about a Legislative Standards Committee. I would like to probe a little bit more on that, if I may, and whether you think that that sort of mechanism could be used to improve the standard and quality of legislation that is put before Parliament.

Lord Norton: That is a key to it, because it imposes a discipline on government. The downstream consequences and the benefit to Parliament is that if you force the Government to think more clearly about why they are doing it and bringing it forward, justifying it and ensuring that it has had pre-legislative scrutiny, Parliament benefits as the likelihood is that there is less need for amendment later on. Indeed, there may even be less legislation brought forward. If you improve government reflection and justification, there are enormous benefits. It is a cultural thing. Once you start doing it, the Government get into what becomes a habit of thinking through, "Why are we doing this? Why are we preparing it in such a way? Have we ensured it has gone to pre-legislative scrutiny?" so that pre-legislative scrutiny becomes the norm and not the exception. Once you start doing that, and ministers start to realise, "Actually, this isn't the end of the world," or, "Oh, we are actually producing good legislation. We are justifying what we are doing. We are thinking through the criteria by which we can judge the success of the measure."

That comes back to my earlier point about successes or the impact of the measure, not whether it is passed. If you do that at this stage, you are also enhancing the capacity for post-legislative scrutiny, because you are putting on record the Government's criteria for success—you have a fairly objective measure, or at least not the views of the post-legislative scrutiny committee as to what the bill was about; you are judging it against what the Government say it was meant to achieve. If you do that at that stage, you have in place the basis for post-legislative scrutiny. That is the purpose of a Legislative Standards Committee. You ensure that you move from the present situation to one of consistent best practice in the preparation and presentation of bills to Parliament. The Government benefit from that process. Parliament will also benefit. You might see less legislation, but it also has the means for more effective scrutiny of that legislation. Parliament has to be the driver. If you rely on the Government doing this, it may not happen. If it does, the Government still have ownership of the process. Parliament has to have ownership of the process of ensuring that those standards are met—government benefits and Parliament benefits.

Mr Raynsford: I agree.

Q216 Andrew Griffiths: But is it possible for Parliament to produce that sort of list—that set of standards? How does it become a living thing, rather than just a tick-box exercise in which the civil servant says, "Yes, we've done that and we've done that"?

Lord Maclennan: If you have a committee overseeing the criteria, it can go back to the Government and say, "Sorry, you haven't fulfilled that particular issue. You haven't answered that question." I keep referring to the nine points in the Lords criteria. For example, if the Government had not explained why the legislation was necessary to fulfil the policy intention, it would be open to the Legislative Standards Committee not to question the policy, but to say, "You haven't explained. You haven't put it forward." It is not enough just to have the defined matrix—you need to have an overseer. My view is that it would be highly likely that governments would get used to this and start conforming with the requirements, rather than having things shuttling backwards and forwards.

Lord Norton: A point to bear in mind as well is not so much about generating the list. Various bodies that have given evidence have identified a list. As Lord Maclennan has said, the Leader's Group on Working Practices in the Lords came up with nine criteria for assessment, which I think are fairly robust. The other point I would make, of course, is that what the Government prepare is on the public record. The House itself would be in a position to check and say, "We don't think that is a solid explanation." It is a culture. It can look at the criteria requiring the Government to provide a clear explanation and to explain what non-legislative alternatives it has considered and things like what new offences are being created. One of the recommendations in that list, which I am very keen on, is, "Have you produced a Keeling-like schedule?"—in other words, so that when it is amending earlier legislation, you can see how that is happening. That is a very valuable process. It is very rarely used, but it is very good practice. Because of the way we do legislation, bills amending earlier legislation can be fairly indecipherable without going back to that legislation, and Keeling-like schedules are extraordinarily valuable. Just getting into the practice of doing that disciplines government, and it gets into a culture of doing it. As I say, the work of the committee is on the record, so Members can themselves evaluate the work of the Standards Committee to make sure it is fairly robust in making sure that government comply with those criteria.

Mr Raynsford: It is interesting to look back at my written submission of evidence to your Committee. I find that I, too, identified nine issues in the key tests that need to be met. They may not be exactly the same, but there is a very large measure of consensus on the key criteria. The crucial thing is to get the culture change so that the Government accept responsibility to check that before they introduce a bill. Obviously, Parliament then has the ability to scrutinise, but it is absolutely vital that we do not get into tick-box exercises, which I think would be

unhelpful, but that there is an expectation that the Government can demonstrate to Parliament that they have taken those criteria seriously and are satisfied that the bill meets those criteria, and that the minister who will be introducing that legislation will be answerable and accountable on that point. Those seem to me to be the things necessary to get the real cultural change.

Q217 Andrew Griffiths: That is the crux of the thing, is it not? It is whether ministers feel their neck will be on the block if they do not have the reassurances. Is it about changing the culture of Whitehall and civil servants, or is it about changing the culture of ministers to say, "Why are we introducing this piece of legislation?"

Mr Raynsford: I think it is both. I gather that you are doing a separate inquiry into reshuffles and the high turnover rate of ministers, which can really work against this. If ministers do not think that they will be in post for any great length of time, they are far less likely to be thinking about the longer-term consequences than if they know they are likely to be answerable as part of the post-legislative scrutiny for the bill that they have been responsible for introducing into Parliament. It is a great discipline for ministers and their civil servants—because the civil servants will have to prepare the briefs—if they know that they will be answerable for what they said when the bill was first introduced.

Lord Norton: Could I complement that by saying that it is not just culture on the part of ministers and civil servants? There is also a need, to some extent, for a change of culture within Parliament itself. Members would benefit from this type of process.

I would add an aside to what Nick Raynsford was saying about looking at reshuffles. The other problem is that if you get a high turnover of ministers, there is a danger of a new minister coming in and wanting a big bill. You need to get away from that culture. I think that Robin Cook, in his memoirs, recounts an occasion on which he was commiserating with a minister because he did not have a bill to introduce. That is the sort of culture that one needs to get away from. It would be nice to have a minister who made something of the fact that they had no legislation.

Q218 Mrs Laing: It is interesting to note that here we are again, examining the eternal conflict between democracy and efficiency. Is it not a pity, Mr Chairman, that we are likely to have not only a changeover of ministers but a changeover of government every four or five years, and therefore less efficiency and effectiveness in the legislative programme? However, we would not give it up, would we? Would you agree with me that it is more efficient and effective that the chairs of select committees tend to remain in post for far longer than ministers, and therefore that the collective memory of Parliament, through select committees, can be more effective than the collective memory of ministers?

Mr Raynsford: I think the reforms that have been brought through—the Wright Committee reforms—were absolutely necessary and correct, and I agree very much that having stability and continuity in select committees is important. One of the problems I see with the current arrangements is that that expertise is not necessarily deployed to the extent it should be in terms of post-legislative scrutiny of legislation. You, in a sense, have the ability and the collective memory of why a topic was an issue a few years ago. In my view, you are in a strong position to be able to question whether changes of legislation that were introduced did actually meet the expectations. I see that as an important area, and it is one of the reasons why, in my evidence, I have suggested that the Legislative Standards Committee should not itself fulfil that function. It is far better that it should co-ordinate the work being done by departmental select committees. The role of the Legislative Standards Committee should be to see that there has been a proper evaluation and, if lessons are to be learned, that those lessons are learned.

Q219 Mrs Laing: Both Mr Raynsford and Lord Norton have given us excellent written evidence on the Legislative Standards Committee. You have to go very shortly, Nick, so can I just ask you to enlighten the Committee further on the possible alternative that you might propose, as opposed to the Better Government Initiative and the Hansard Society's proposals for a better standards committee?

Mr Raynsford: My prime concern is that we should avoid getting into a tick-box process, whereby a Legislative Standards Committee simply sits and ticks the boxes on every piece of legislation that comes through but does not really do a proper job of work, or, secondly, that it gets sucked into conflict with the Government because it is seen as an obstruction to the elected Government's mandate to carry out its policy. That is the tension that you rightly describe between democracy and efficiency. It seemed better to try to get the culture change upstream by the kind of processes that I have described, by requiring the Cabinet committee responsible for authorising legislation to sign off on all those measures that are expected in the definition of the standards, and for the minister then to be answerable to Parliament, not to the Legislative Standards Committee, as to whether those have been met. That strikes me as the way to get that culture change, while at the same time ensuring that Parliament can scrutinise. The danger of having the Legislative Standards Committee looking at every piece of legislation is the danger that I have described, either conflict on the one side, or getting into a tick-box mentality.

Q220 Mrs Laing: We would then have the better standards committee, and the Cabinet committee that approves legislation, and Parliament?

Mr Raynsford: The Government, through the legislative committee—the Cabinet committee that approves legislation—would have to have signed off that legislation met the standards required. That is trying to get the culture change in the Government to get this taken seriously. The minister responsible for introducing a bill would be answerable to Parliament on all those issues. As the bill goes through Parliament, Members—whether in a pre-legislative scrutiny phase, in the Public Bill Committee, on

Second Reading, or on Report—could question whether the bill satisfies those standards, and there would have to be answers. That is the crucial thing. The minister knows that they will be answerable and that Parliament has the ability to question whether or not a bill has met those standards. Then, after the bill has received Royal Assent and been implemented, that minister—this is why I think the longevity of ministers is as important as the longevity of select committee chairs—would know that they had to be answerable on whether the legislation had met the standards it was supposed to meet and had achieved the impact that it was supposed to achieve.

Q221 Mrs Laing: Cause and effect comes in, because if it was obvious that the bill had not achieved what it set out to achieve, the longevity of the minister might well be affected.

Mr Raynsford: Indeed. The problem, as I think Lord Norton said earlier, is that we often simply do not know whether a bill has been effective, as no one has bothered to check. It has not been a disaster and it has not provoked riots, but no one will know whether it has had any effect at all.

Mrs Laing: Mr Chairman, before I go on with this, it might be that others wish to conclude on Mr Raynsford's evidence.

Chair: I do not know whether Simon, Andrew, Andrew or Fabian wish to, while we have Nick with us briefly—I know he has to leave at 11 am.

Q222 Mr Turner: The danger is that the movement of ministers will continue to be frequent, rather than slowing down.

Mr Raynsford: That is a problem, and the more that can be done to highlight the problem—I have spoken and written about this, and will go on doing so for a very long time, and I have absolutely no doubt that I was more effective in those ministerial jobs where I had a period of four years than in those that lasted for one or two years. I am not going to be shy in saying that, and I wish more of my colleagues would say the same, across all parties.

Lord Norton: It might not be possible if the minister is not in place but, none the less, you could call the person who was the minister at the time. I say that because I know that Lord Baker of Dorking constantly has to justify the Dangerous Dogs Act to committees on that basis.

Q223 Chair: Is there anything else for Nick?

I have one thing that I would throw in. I commend this Prime Minister for having stability in government. When working with ministers of all parties, as we all do as backbenchers, it has been a good experience to be able to say, "When I came to you last year and raised the issue of whatever, you were very good in doing so-and-so. Now can you have a look at this issue?" They know what you are talking about straight away. You have met them in the Lobby, just as a backbencher, let alone with proper accountability through the select committee structure. I have found that a good experience. I hope that it can be repeated in the second half of the Government.

Q224 Andrew Griffiths: Just one thought, Mr Raynsford, in relation to this issue. One thing that has always occurred to me is that you would never, in any business or organisation, change every single departmental manager in that organisation in one fell swoop. Is one of the problems with reshuffles not that they happen too often or not often enough, but that it is a complete changing of the deckchairs on the Titanic, rather than looking at which minister is working, and is it that reshuffles should be a gradual, ongoing process, rather than an overnight revolution?

Mr Raynsford: Yes. I will make three comments on reshuffles. First, there is too much of an expectation that they will happen, and ministers expect or hope to be promoted and therefore look forward to a reshuffle. The first thing that ought to be done is for there to be a presumption that, in general, ministerial appointments are for a proper length—not necessarily the full length of a Parliament, but for the period necessary to deliver what that minister is expected to deliver, which could be three years, four years or five years, and that the person will remain in post unless they fail. If they fail, they can expect to go but, otherwise, the normal presumption should be that they will continue, as in a business, to do the job and carry that forward. If one could get that culture, it would be point Number one.

Point two is the media, which is baying for evidence of a ministerial cull at all times. Reshuffles absolutely delight the media. We have to try to get across the message that that works against efficiency. It is not efficient—this is your point—to have a wholesale change in the personnel in a department that is working perfectly well. It may not be working brilliantly—it may not be 100%—but that could be changed by one modest adjustment in the personnel, rather than by a wholesale change.

Point three is that the move of individuals should be about enhancing the performance and effectiveness of their department and the Government, rather than about making statements about who is up, who is down, is it a shift to the left or right or whatever, which I am afraid is the prism through which reshuffles are still largely measured. It is extraordinary to me—I am sure that I am not the exception on this—that competence and the ability to deliver come a very long way down the list of priorities when reshuffles are being thought about.

Chair: I know you have to go, Nick, but you have given Members a taster of the evidence that we will take on reshuffles. No doubt you will make a contribution to that as well. Thank you for coming by this morning. I know that you are pressed with other important engagements.

Mr Raynsford: I have to go to Kosovo.

Chair: Indeed.

Mr Raynsford: Thank you very much, and I am sorry to have to leave.

Q225 Chair: Thank you, Nick.

Forgive me, Philip; I had to cut you off in mid-flow earlier.

Lord Norton: I was going to say that reshuffles are also when you find out who previously held the post.

Chair: We will come to reshuffles eventually. Let us not stray too far from better standards, but—

Lord Norton: The two matters are related.

Chair: They are related.

Lord Norton: It may not look like being a golden age, but it is interesting that, pre-war, ministerial longevity was about four years. Then, in post-war decades, it more or less halved from that.

The other point I was going to make goes back to select committee service and political culture. Over the past few years, various committees and bodies that I have been on have tried to address the career structure and making service on select committees, particularly chairing committees, as attractive as ministerial office, so that one develops what you are talking about in terms of longevity and institutional memory, and a capacity really to scrutinise a department effectively. It is about trying to stop the process of having very good Members on select committees and then losing them because they go off to be a PPS or some other position. That undermines the capacity of the committees to be effective.

Q226 Mrs Laing: Going slightly backwards, I have not yet had a chance to ask you, Lord Norton, about whether you would care to enlarge upon your written evidence to us on the matter of the Better Government Initiative's proposals for a Legislative Standards Committee. I noticed that you were indicating assent when Mr Raynsford was describing how he imagined it would work. Perhaps you would like to tell the Committee a little more.

Lord Norton: Yes. I come back to the point I was making earlier, in terms of form, about the value of having a joint committee. That is not least because a bill has to go through both Houses, so you have a parliamentary body. A joint committee has the advantage of drawing on the skills of Members of both Houses, and the complementarity is important. As I mentioned earlier, it will probably reduce the partisan dimension, although I do not regard that as significant as some might. Drawing on that expertise would be extremely valuable.

As I touched on, there are precedents in terms of some of our extant committees undertaking this type of checking that bills meet the standards that Parliament has set. I adumbrated the list from the Leader's Group, which has been mentioned. One can reach reasonable agreement on what the standards should be, but it is then the task of the committee to ensure that government are actually delivering on them. I very much agree with Nick Raynsford that it is then a matter for each House itself to ensure that those standards have been met and to question the minister. He or she is answerable for that. The House has the advantage of the committee's report. That is invaluable. In the Lords we have committees that engage in standard scrutiny in respect of delegated powers and secondary legislation and then report, and it is then up to the House what they utilise that report for. That is the value of the exercise.

Q227 Andrew Griffiths: Can I just come back on that point, if you don't mind, Lord Norton? If we have this committee, what is the ultimate sanction? What is the ultimate stick that it carries? We could have a situation where the committee says, "We don't think you've prepared properly for this piece of legislation. We think it's been put together too swiftly." The Government may say, "Actually, this is a party-political point. We are addressing an issue, and the committee is being partisan," and just ignore the recommendations. What sort of power should such a committee have?

Lord Norton: There is one sanction that the committee has: it reports to the House. It is the oxygen of publicity that is crucial. The House then has the report at its disposal. If the committee reports, "Look, this has not met the standards," it is then up to the House to challenge the minister.

I do not think that it is quite the problem you are anticipating, in the sense that we are talking about legislative standards, not the merits of the legislation. A minister would have to explain, "I am sorry; we couldn't think up any reason why we wanted to bring this bill forward." You can see the difficulty a minister would have. The fact it is not partisan, as it is in terms of standards, means that the minister is on a sticky wicket, because you cannot make a partisan appeal. That is the value of it.

We also find that once you get into this process and ministers accept it, it is not so much a problem. When you have pre-legislative scrutiny, where it happens it tends to work well, and the Government do not seem to have a problem with it. This emanated from a recommendation we made on the Constitution Committee. If you bring in a bill quickly and want to fast-track it, the Government have now accepted that the minister has to come to the Dispatch Box to explain why and give a justification. That is now part of standard practice. It is not so much the merits, but it is a matter of explaining and making sure you have thought through why you are doing it. You might disagree with the reasons, but as long as the Government have come forward with reasons that can be probed by the House, that is the key thing. Ultimately, it is the House, but it is a report from the committee that informs the House. By having a committee, you can check standards and ensure consistency. It is a way of ensuring best practice.

Q228 Mrs Laing: Can I take you further on that, and perhaps Lord Maclennan will want to come in on this, too? In what way would this type of scrutiny differ from what happens at the moment in the Committee Stage of a bill when a Member puts down what we call probing amendments? I recall from when I used to challenge bills from the Opposition benches that when you are leading for the Opposition, the technical procedural way to examine something is to put down what becomes known as a probing amendment. Usually it is something like "leave out 'may' and insert 'must'". We would have a debate in Committee about whether the minister "may" do such-and-such, or if they would be mandated by Parliament and "must" do such-and-such. I suspect that what we are now considering would be better than that, but I wonder whether you could expand on that.

Lord Norton: It would not so much be better, but it is different, because you are probing something else.

You would, I suspect, have to put down a probing amendment to ask why the Government were bringing the bill forward. What this is concerned with is standards. You do not draft amendments relating to why a bill does not have a Keeling-like schedule. That would not lend itself to amendments. To some extent, whereas amendments deal with the detail of a bill, here one is talking about looking holistically at the process. It is not better; it is just that you are examining something that is different and not really covered at the moment. That is the key point. Essentially, what you are dealing with is the framework, whereas what the committees deal with is the substance of the legislation.

Mrs Laing: I think that is the key point, so I am glad that we have that on record.

Lord Maclennan: I agree with that, broadly. It would be helpful if the committee addressed the point of how these procedural requirements are to be met and what the time scale might be in respect of anticipation of the legislation coming before the House. It seems to me very important that this should not be an opportunity for an individual to get up and put a probing amendment down. It should be a matter that the House as a whole would have the opportunity to consider. If this process of answering these procedural questions is a requirement for the Government, they will come round to answering these questions.

Another point that has been made, which relates to what Mr Hamilton said earlier, is that there should be an indication of how a bill relates to existing Acts, and whether opportunities to consolidate such legislation arise or have been considered—and if not, why not? I cannot see this as being adversarial between Parliament and the Government. It is really about giving both the opportunity to do better and having that recognised by the public, which is so disenchanted at the moment by how things happen. If we get these heads right and we make something of it and present these things properly, you can always bring the public in on the consultation side, or on the specialist stakeholder side—whatever it may be. They will comment on whether they think that the criteria have been met.

Q229 Mrs Laing: Can I move on to a different aspect of this issue: the categorisation of bills—differentiating between different types of legislation? Do you think that there are grounds for making a distinction between constitutional legislation and other types of legislation? I appreciate that Lord Norton could probably write three books on this.

Simon Hart: He probably has.

Lord Norton: The point that I would make is in my submission. There is a problem, but it is a problem with government, rather than Parliament, because Parliament does distinguish. We certainly do in the Lords in relation to the constitution, because we have the Select Committee on the Constitution. We are responsible for determining whether a bill is of constitutional significance. We devised—or rather, I devised, and the Committee accepted, and it has stood the test of time—the two Ps test. When a bill comes forward, does it affect a *principal* part of the constitution, and does it raise an important issue of *principle*? If it meets the two Ps test, we report. You get bills that are constitutional, as they affect the constitution, but they can be fairly minor. We adopt that test and we distinguish. We then report to the House and the House has the benefit of a report. We have found that to have been extremely influential. On human rights legislation, we have the Joint Committee, which also reports. There is also the minister's certification on the bill. Parliament is actually doing quite a reasonable job in that respect. For those measures that you might think require enhanced scrutiny, dealing with human rights and the constitution, we have committees dealing with that, which report to the House.

The problem, which I allude to in my submission, is actually with the Government, who do not make that sort of distinction, and I am afraid that the present Government are even worse than the last one in the respect of just regarding legislation as legislation. There is no distinction within the Government to say, "This is constitutional legislation, so we must have a more thorough process of examining it". It is just brought forward—it is a bill. The Constitution Committee recently produced a report on that and made this point. Unfortunately, the Government's response was, "Well, legislation is legislation." I am afraid that it is an uphill struggle. The problem is within the Government. On the Parliament side, we have mechanisms in place that recognise the need for the enhanced scrutiny of measures that affect human rights and the constitution.

Lord Maclennan: A working party has been set up—to which I belong—by the Constitution Association and others on the question of the definition of constitutional law. It will not report for a little while, but there are other aspects to the distinction, such as whether a larger majority should be required in Parliament for such a measure. At the moment, that is not something that can be determined by Parliament, because we would need legislation to define that, in my opinion. As Lord Norton said, the Government do not make any distinctions at the moment, or they do so in a very ad-hoc way—sometimes in the past, anyway—by allowing debates on matters of constitutional importance to be taken on the Floor of the House. That was their decision. That seems to me to be not satisfactory.

Q230 Mrs Laing: Is that not in itself a recognition of a definition and of a differentiation—the fact that all stages of constitutional bills are taken on the Floor of the House? Does that not create a precedent for the definition of a bill?

Lord Maclennan: There is a precedent there, but the Government will dismiss it as not necessarily being in line. It behaves as a court of appeal on those matters. It does seem to me that we need a statutory definition that would empower Parliament to make the decision on this, and I would not be unhappy if the courts were invoked on that.

Lord Norton: I think that Parliament might have a strong view on that last point. The Constitution Committee, in its report on the process of constitutional change, argued that the Government should have a more differentiated process. We made a

recommendation about bills of constitutional significance. We had our own legislative standards—a list. I am arguing here, in effect, that that could be writ large to all legislation in terms of legislative standards.

The problem is within the Government. A bill comes forward to the House. If it is of constitutional significance, the Committee Stage is on the Floor of the House. As I mention in my submission, the approach there is the elephant definition—you know one when you see one. To some extent, Parliament has some control of that. If the Government say they will refer it to a committee, Members can cause an almighty row. Had it been suggested that the House of Lords Reform Bill should go upstairs, it might have caused a few comments.

In a way, the House has some control over that aspect, once a bill comes before the House. It is really about what happens before then, in terms of how the Government deal with it through a recognition that bills of constitutional significance should be treated differently through the scrutiny that they receive in government and the attention that they receive—Green Paper, White Paper and consultation—before they ever come before the Cabinet committee.

Q231 Simon Hart: We seem to have slightly avoided talking about the role of the House of Lords in being a potential brake on the production and passage of legislation. I do not want to get into the whole Lords reform debate again, but I would be interested in your view about whether the Parliament Act in its current form has the potential to undermine good legislation. It is always at the back of the Government's mind that it could be used in the instance of a standoff between the two Houses. As we know, the regularity with which it is used has increased hugely in the past 20 years compared with the first 40 or 50 years of its life. Have you got a view on that?

Lord Norton: I would make a distinction. You could argue that the Parliament Act has been used slightly more recently than before, but that is from an extraordinarily low base. Since 1949 the Act has been employed only four times. The distinction that I would draw is that the Parliament Act is used to get through measures that the Government wish to get through. In other words, it relates to the substance of the bill, rather than the form of the bill.

In terms of legislative standards, the Lords already has committees engaged in different aspects of the scrutiny of legislation, particularly secondary legislation. We have the Delegated Powers and Regulatory Reform Committee, which is concerned with order-making powers put in bills. We then have what is now the Secondary Legislation Scrutiny Committee, which used to be the Merits of Statutory Instruments Committee. It looks in detail at statutory instruments once they are promulgated. I am on the Committee, and it really does rather detailed scrutiny. It is not the most exciting body of legislation, but that is necessary. It is a matter of standards that is processed, rather than the substance. Given that, the Government more or less accept what comes forward from the Committee. The normal practice is to accept recommendations from the Delegated Powers and Regulatory Reform Committee. The Secondary Legislation Scrutiny Committee reports to the House, and it is up to the House what it does with the reports. We get back to departments if we feel that the statutory instruments are in some way inadequate. They might be badly drafted or ambiguous, and the departments come back and address the particular issue. In a way, that is playing to our strengths, and it draws on our expertise. People are appointed to committees because they are knowledgeable in its particular area. That is utilising it in a non-partisan sense, because it is concerned more with structure and standards, rather than the merits of measures. I would distinguish those two. The question about the Parliament Act engages with the substance—the merits—of the Government wanting to get measures through, rather than the actual process of the form of the legislation.

Q232 Simon Hart: Going back to an earlier part of the conversation, and I will come back to Lord Maclennan in a moment, would I be right in interpreting what you have said so far, and what Nick Raynsford said, as being that the creation of a Legislative Standards Committee would not—I do not want to put words in your mouth—in your view, provide further complication, in that there are already a number of committees doing this in their own different ways, or would it have the opposite effect?

Lord Norton: It would be additional. It is not overlapping with anything that is done at the moment. What we do at the Lords end is secondary legislation. This is concerned with primary legislation, and there is no other body within Parliament engaged in that particular task. It would not be treading on any existing committee's toes; it would be filling a rather enormous gap in the process of parliamentary scrutiny. At the moment, scrutiny is focused on the substance, not on the process, as far as primary legislation is concerned.

Q233 Simon Hart: You have select committees like this, you have a degree of pre-legislative scrutiny and you have various other committees. What role, therefore, is there for the Chamber?

Lord Norton: An enormous role. First, the Chamber has the report to check that the form is correct, that the standards are there and that the Government have justified what they are doing. In terms of standards, the Chamber has the report to check that the Government have complied. Then, the Chamber gets down to the substance: "What are the merits? What is the justification for this? Can the bill be improved in terms of content?" That is nothing to do with the Legislative Standards Committee, and it is everything to do with the House—both Houses. It is just the two Houses that have the authority to do that. No other body can.

Lord Maclennan: I agree with what has been said. I do not think that it would be as desirable to have separate Legislative Standards Committees for the House of Lords and the House of Commons. It would be better to have one, because the issues that are being raised about process, procedure and how legislation has been prepared do not deal with partisan matters,

on the face of it. What is imparted by way of information to one House should be available to the other. With their broad range of experience, they should be coming together, it seems to me, in asking these questions.

I do not think that the House of Lords has attracted attack from the Government because of the extent of its amending their legislation. When Meg Russell produced a big book on the reform of the House of Lords, she pointed out that 40% of the amendments that had been passed in the House of Lords—she did not distinguish between substance, policy and process—were accepted by the Government after having been opposed originally by the Government. In their evidence to the Joint Committee on the future of the House of Lords, the party leaders who spoke gave no indication that they thought that the House of Lords was abusive in its powers. Indeed, they gave it considerable compliments. I cannot see any reason why it would not be regarded as a rational and objective body to review standards. If, for whatever reason, the Commons wants to do it on its own, there is a possibility that the Lords could have their committee to review the process in respect of Government bills introduced in the House of Lords, but I would much prefer it to be one joint committee. The precedent, particularly with the Joint Committee on Human Rights, on which I served for a bit, seems to mark the way ahead on that.

Q234 Simon Hart: We have also talked a bit about post-legislative scrutiny, but we have not really talked about what we do in circumstances where major flaws are subsequently identified. On the extent to which we can impose sanctions or compel the Government of the day to rectify issues that would have been unearthed by way of post-legislative scrutiny, have you any thoughts on how we could effectively do that?

Lord Norton: You cannot give a committee the power of sanctions. Power resides with the Chamber. The committee would be identifying flaws and it would then be up to the Chamber how it addressed the particular problem. Do not forget that this is often the case. Formally, it is a report to the House, but it is also a report to the Government, rather like select committee reports. You are drawing the Government's attention as much as the House's attention to the fact that the legislation had not worked. One is doing that in the public domain—you are making public that this legislation is deficient. You get the discipline that if ministers know that there is that potential, they are more likely to want to get it right in the first place.

Lord Maclennan: I agree with what has been said, but I would add that it would be appropriate, if a standards committee made criticisms, for the Government to be given an opportunity to publish their reply before a measure was brought to the House. In fact, I think that that should become part of the normative treatment.

Q235 Simon Hart: One last point arising from the discussions on reshuffles, which I know is the subject of a different inquiry. A now former minister happened to mention in a corridor conversation in the past couple of days that part of the problem that he came up against in his tenure in his department, which resulted in legislation that was not up to the standard that he himself would have liked, was simply the sheer overwhelming volume of work that is imposed on them. That may sound like a bit of a whinge, but I do not think that it was. The point was that there is simply no space to stand back and look objectively at some of the things that we set ourselves to do, or that we are set to do. That, he thinks, was a major contributor to a poor product coming out of the Government. Is that something that has always been the case, or is that a symptom of politics in 2012?

Lord Norton: I think it is becoming worse. It is becoming exacerbated. It is a case of imposing discipline on the Government in terms of priorities. You do have that problem, and it is not confined to the Government. When you think about Parliament, historically this has happened with the House as well. If you want to achieve reform, you can normally do so at the beginning of a Parliament, before Members get stuck with the day-to-day business of responding rather than thinking proactively about the very institution of which they are Members. It is the same with getting the Government to stand back, think about what they are doing and justify it—and getting their priorities right. What is more important, if you are going to change the law of the land, than making sure that you get it right in the first place? I do not think that you can use the excuse of, "I'm sorry, but we're far too busy. We can't think about why we are doing this legislation; it is just that something must be done." That is the value of it: it imposes a discipline on the Government. If the Government know they will have problems with a measure unless they justify it, they will find the time to do that. Less important things will then not be given the priority that they are at present. That could be an explanation, or it could simply be an excuse, but if you impose that discipline on the Government, they have to do it and have to prioritise. I cannot see what is more important than ensuring that you get right legislation that will impose burdens on society if it otherwise may not work the way you want it to.

Lord Maclennan: I would add that legislation should not be the first resort; it should be the last resort. If the powers exist already and can be exercised in the interests of the public to handle the issue administratively, that is perfectly reasonable. We have all kinds of remedies against administrative abuse, like the Ombudsman and so forth, and we have judicial review, but it seems to me that legislation is too often introduced to flag up the Government's concern about a particular issue without actually considering whether it is really necessary. If they are required to say why, as part of this process, I think it could have the distinct effect of diminishing the volume of government.

Lord Norton: Paradoxically, if they are thinking about it, they are creating work for themselves, but it may be that if you stood back and thought about it, you might think, "There are alternatives already. We don't need the legislation."

Q236 Mr Turner: Lord Rooker suggested that any clause or schedule that had not been scrutinised in the

House of Commons should be flagged up for their lordships. Indeed, many things, it seems to me, are going in at the last stage even in the House of Lords. Perhaps those things could be law for only two years.

Lord Norton: Yes. There is an argument that if you go through this process of legislative standards anyway and the Government think more seriously about the legislation that they are bringing forward, there is less need for later amendment, because you have thought it through earlier, rather than it being a later afterthought. The whole argument for this Legislative Standards Committee is that it might reduce the likelihood of that happening.

There is the recommendation that if a bill comes to the Lords, and if substantial clauses have not been considered, that should be reported to the Legislative Standards Committee so that the House may be aware of it. There is also the recommendation that, if there are substantial changes to bills going through, the Government would produce a new report to the Legislative Standards Committee if they affect the criteria that had been set by the Committee.

Q237 Mr Turner: Keeling schedules show the text of an Act as it would have looked before the bill and after the bill. I am not sure what happens in the stages where two or three different proposals are inserted. How would that happen?

Lord Norton: I make the distinction between Keeling schedules and Keeling-like schedules. A Keeling schedule is part of the bill. Therefore, draftsmen do not like it, because it causes all sorts of problems. A Keeling-like schedule is something that is produced independently of the bill. Where a bill, particularly, is amending an earlier Act, rather than lots of Acts, you take the original Act and show the crossings-out and amendments that were made to it, and you publish that separately. That is for guidance—it shows what is happening, but is not part of the legislation. It works particularly when there is substantial amendment to an earlier Act, rather than several Acts. If it was more than one, it would be taking the provisions of those Acts, showing the striking out and what is inserted, so you get a feel of how it changes the earlier legislation. At the moment, if you just have the bill, it will say, "in place of Section 5 of the earlier Act, insert the following", so you know what is being inserted, but you have to go and look at the earlier Act to see what on earth is being replaced. It is helpful to Members, as they can see straight away the scale of the change and how it has been changed.

Q238 Mr Turner: Sorry—was that a "lite" one or an ordinary one? Did you say "Keeling-lite"?

Lord Norton: The Keeling-like schedule? Yes, that is the separate one. Keeling schedules are the same, but the difference is a formal one, in that a Keeling schedule is actually part of the bill—part of legislation—and draftsmen worry inordinately about that as it can cause problems. If it is done separately, it raises no issues of that sort, and it is merely for the information of the House and is useful material for them. It is very rarely done, but when it has been done, it has been extremely helpful.

Q239 Mr Turner: Is it likely that the number of bills published for pre-legislative scrutiny will increase to the point that we do not need legislative standards?

Lord Norton: No. In all circumstances, you still need to be checking, because you are still talking about justification and things like that. The criteria for legislative standards would be extant anyway. That is not the problem. The problem is persuading the Government that pre-legislative scrutiny should be the norm rather than the exception. When, in the Constitution Committee, we did our report *Parliament and the Legislative Process*, we were keen to encourage the Government to take that further forward. At the time, the Government's view was that they wanted pre-legislative scrutiny to be the norm. They then started to row back from that. The minister in the Lords gave an explanation. I have read the words, but I still have not the faintest idea what they were saying. It has plateaued to some extent—it varies, but they have not been able to deliver on that. The real challenge comes back to a culture shift of the Government thinking that a bill should be published in draft and subject to pre-legislative scrutiny, rather than that being the exception. At the moment, the Government have to think, "Shall we publish this in draft and send it to pre-legislative scrutiny?" We want that to be reversed so that the automatic presumption is that it goes to pre-legislative scrutiny, unless the minister makes a compelling case why it should not. That is the real challenge. Again, it is a cultural thing. It is partly to do with the nature of legislation, but it is also to do with the nature of ministers. Some are quite open to it and see the value of it, and know that they will benefit from it. Certain ministers have had a reputation for being wholly against it: "No, no pre-legislative scrutiny. This is my bill, and I want it as I want it. It must come forward." It is tackling that type of attitude that is crucial. The way to do it is through imposing that discipline in terms of making clear what Parliament expects from government and from ministers.

Lord Maclennan: The use of the Green Paper in the past was considerably more helpful to Parliament than it has become. The number of Green Papers seems to be diminishing considerably. They at least gave Parliament and the public the opportunity to contribute to the debate about what should be the end point. We are now faced with legislation of such extraordinary complexity in Parliament that a Green Paper would not necessarily engage people. It would set out the principles of what lay behind it, but it would not give you any kind of indication as to whether those principles were effectively being translated into the legal language of the bill, or whether they were adequate or counter-productive. Pre-legislative scrutiny should become the norm, and the major exceptions might have to be financial legislation, which, if pre-announced, would lead to speculative activity, or emergency legislation of one kind or another. What would be regarded as emergency almost speaks for itself. In any event, the Government should make a statement as to why it is different.

Lord Norton: That prompts a thought. You have that particular category of emergency. The Government

say that there is an emergency, and sometimes the emergency is not as great after the event as it appeared to be at the time. If a bill is fast-tracked or rushed through, that limits what you can do in terms of standards and in terms of what Parliament can do. It strikes me that one thing you might want to reflect on in that regard is that, if it is emergency legislation that has not gone through the process, would one expect a sunset clause in that legislation so that there is a chance to review it before renewing it, even though it is extant? It might be a way to offset the Government saying, "Something must be done. It's an emergency," by saying, "Yes, we'll pass it quickly, but subject to a sunset clause of two years or whatever". That might be a way of addressing that particular problem.

Q240 Mr Turner: Thank you. I do not know whether we could find the minister who spelt out something that even Lord Norton could not understand.

Lord Norton: That is quite a good challenge to ministers. The point is that legislation can be extremely complex, and the challenge to the Government is to explain the complexity. The challenge of how to express it in clearly understandable language is in itself good discipline for the Government, and that is part of the standard—to make sure they are actually doing that.

Q241 Mrs Laing: It is not a surprise that some ministers would get a C- if they submitted it to Lord Norton in another capacity.

Lord Norton: I merely observe that, with legislation at the moment, I might be using rather a lot of red ink.

Q242 Chair: To understand where you feel the Legislative Standards Committee would fit in the timetable, what is the optimum spot for this consideration to take place? Is it between First Reading—the presentation of the bill—and Second Reading? Is there enough time in that slot? Do you have another focus?

Lord Norton: That is an extremely important question, and I have been thinking about it. The Leader's Group recommended before Second Reading, and that is appropriate, but the key question is how far back you can start the process. The obvious one would be that the committee considers the bill the moment it is introduced. Then, of course, it is extraordinarily tight in terms of the time available to be able to report to the House. It strikes me that one consideration might be to refer the bill to a standards committee before First Reading so that when it is actually introduced, it carries, if you like, a certificate that it has been considered by the committee. That might be one way of doing it. You could start the process before First Reading: there is referral to the committee, which considers it, and the bill is then formally introduced. That would also have the advantage that, if the committee identified problems, it might have interaction with the department and the minister so that they might say, "We had better change it before it is formally introduced." That avoids the embarrassment of the report being published and people saying, "This is deeply flawed," just before Second Reading. That way, it allows the Government to have time to improve the bill before it is on the public record. I was having exactly the same sort of thought as you about the timings, and that was my initial conclusion.

Lord Maclennan: To give the Government the opportunity to make good any deficiencies, the answers to the questions should be published along with the bill to enable everyone to come in on the act so that the Government have the best opportunity to make any revisions before it has to be discussed.

Chair: This has been a very helpful session. One of the key things is that we need to resolve the process, and you have been very helpful in doing that this morning. Alongside that, we need to add how you resolve the art of politics around this. Often we have good process, but if the will is not there to co-operate and to want to do better, you can be thwarted. I have often said that those of us who helped to invent pre-legislative scrutiny did so because legislative scrutiny was inadequate. With legislative scrutiny, we have all sat on bills and been told to shut up, not contribute and the rest of it, but had legislative scrutiny been effective, we would perhaps not have needed to have done that. We are in the position of trying to devise a network of accountability so that we can make a contribution to government. One key thing that has come out again today is that we need to make sure that the Government and the civil service are comfortable with this. First, we need to prove that Parliament can make a substantial difference and do something useful in a process that is to be welcomed rather than feared. How we craft that will test Members around the Committee and the staff who work for us, but that is central to advancing this project.

Thank you all very much for coming in. Philip and Bob, it was very good to see you—and also Nick, in his absence. I need to put on record my apology to Tristram, because I misunderstood when he was leaving, which meant that he did not get his chance to ask questions. I will put that right next time.

Thank you colleagues for coming; that was a fascinating session.

Thursday 18 October 2012

Members present:

Mr Graham Allen (Chair)

Mr Christopher Chope	Tristram Hunt
Sheila Gilmore	Mrs Eleanor Laing
Fabian Hamilton	Stephen Williams
Simon Hart	

Examination of Witnesses

Witnesses: **Sir David Lloyd Jones**, Chairman, **Ms Elaine Lorimer**, Chief Executive, The Law Commission, and **Mr Adrian Hogarth**, Parliamentary Counsel, The Law Commission.

Q243 Chair: Sir David, would you mind saying something to start us off because we are now on a different topic, or would you like to jump straight into questions?

Sir David Lloyd Jones: If I may, I will say something please, but I will keep it very brief. My name is David Lloyd Jones. I am the new Chairman of the Law Commission, having recently succeeded Sir James Munby. I am accompanied this morning by Elaine Lorimer, who is the Chief Executive and Adrian Hogarth, who is our Parliamentary Counsel, and is one of the embedded Parliamentary Counsel within the Law Commission. We are very grateful for this opportunity to give evidence to the Committee on behalf of the Law Commission and we hope to be of assistance.

The quality of legislation is a matter of great importance to the Law Commission. We try very hard to achieve a high standard in the draft legislation that we prepare, but we realise of course there is always room for improvement. In this regard we undoubtedly enjoy a number of advantages. Within the Commission there is considerable legal expertise in many different fields. We are in a position to consult widely and thoroughly on the state of the existing law, perceived deficiencies and proposals for reform. Our independence from government permits engagement with a wide range of parties who value our objectivity and our impartiality. Our system of peer review involves expert scrutiny of reports and draft legislation. We have our own embedded Parliamentary Counsel. We have the advantage of a special parliamentary procedure, which is particularly suited to law reform measures, and we have time within which to consider law reform and draft legislation in depth.

I should perhaps mention that others are likely to be much better placed than we are to assist the Committee in relation to efficacy of particular parliamentary procedures. They will have more experience than we have. When in 2006 the Commission produced a report on post-legislative scrutiny, it was able to report only after extensive consultations with parliamentarians, in particular with those with a detailed knowledge as to how the legislative process works.

The work of this Committee has caused us to revisit the work that was done by the Law Commission in 2006 in relation to post-legislative scrutiny. The Law Commission found that there was a strong case for the introduction of a more systematic approach to post-legislative scrutiny and, indeed, this had overwhelming support from consultees. It seems to us that this could be relevant to the matters currently under consideration, in particular the Commission's proposal that there be created a new Parliamentary Joint Committee on post-legislative scrutiny, which was indeed the central plank of its recommendations in 2006. It was not implemented by the Government, and it seems to us that this Committee may wish to examine the recommendations made by the Law Commission at that time, to consider the extent to which the reforms that were implemented at that time have been successful—a matter on which we have little or no information—and to look again at the proposal for the creation of a Joint Committee with powers to conduct post-legislative scrutiny. Thank you.

Q244 Simon Hart: You mentioned in your opening remarks your role in examining the state of existing law. I just wanted to get clear whether, when you do that, you are looking at the quality of it or the currency of it and whether there indeed is a difference. What I thought I read into your evidence was that really you are just looking at making sure that it is relevant for the age in which we live, or are you actually looking for flaws, in a sort of sunset capacity and recommending ways in which those flaws once they are identified can be eradicated?

Sir David Lloyd Jones: We are looking at both. We have to look of course at the question of whether the law is up to date, whether it continues to meet the needs of changing social conditions, the changing needs of commerce and whether it keeps up to date with technological developments. In addition to that, we are looking at the quality of existing legislation. It is fundamental that legislation, that the law generally, should be accessible and intelligible. There have been occasions when it has been a matter of concern to us that the state of legislation has been confused or obscure. That, no doubt in conjunction with other considerations, has led us to take up a project. Going to specific examples, in the current work of the Commission—the work we are doing on family financial orders and their enforcement—we described the current state of the law as hopelessly complex and procedurally tortuous. The available enforcement mechanisms were contained in a wide range of legislation. It was our view that members of the

public, legal practitioners and, at times, even the courts had difficulty in understanding the legislation. That was one reason why we took up that project.

In the case of taxis and private hire vehicles, the private hire legislation was not introduced until 1976—1998 in the case of London—and the team working on that observed in their consultation paper that many regarded the original Act as hastily constructed and ill thought out.

Again, we have a current project on wildlife, where the principal modern Act, the Wildlife and Countryside Act 1981 has become so amended as to make it difficult for a non-lawyer to use. So the answer to your question is that we are looking at both. We are looking at the intelligibility and accessibility of the law in addition to questions as to whether the substance of the law meets modern needs.

Q245 Simon Hart: In which case, does your continued existence, does the ongoing role of the Law Commission suggest that what we are doing here is relentlessly churning out stuff that is not of a particularly satisfactory standard? If the answer to that is yes—and obviously one can criticise for doing things not in sufficient detail or not devoting sufficient time—is there a way in which an independent organisation like the Law Commission can, I was going to use the word collude, but that is probably the wrong word, work more closely with Parliament without compromising its independence, so that we gradually reduce the workload that we are obviously currently imposing on you?

Sir David Lloyd Jones: I do not think you can draw any conclusions of that sort from the continued existence of the Law Commission. We do not see our task as finite. I am told that we now have some special paint on the Forth Bridge, which means that they do not have to keep on re-painting it, but a paint has not yet been invented that would enable us to say our work is complete. A major part of the work is keeping up to date with developments. We do not see that as ever finishing. Forgive me, the second part of your question was?

Q246 Simon Hart: Whether there is a way in which there could be a closer relationship between Parliament and the Law Commission in production of good law in a way that does not compromise your independence.

Sir David Lloyd Jones: We have quite a close working relationship with Parliament already. You will be familiar already with our reporting obligations. We report regularly on the adoption of programmes and the individual reports are placed before Parliament. We then are closely engaged in supporting Parliament throughout the implementation of bills. There are three specific procedures in which that takes place, in which our role is enhanced. One is in the case of statute law repeals, where the Commission's team assists the Joint Committee on Consolidation Bills by giving evidence. A second is in the case of consolidation Bills, and there have been over 200 of those enacted since 1965, where the Parliamentary Counsel liaises with the Parliamentary and Legislation Committee and the Government Whips with a view to securing approval for the bill to be introduced into the Lords by the appropriate minister. Then the drafter of the consolidation Bill will give evidence before the Joint Committee on Consolidation Bills.

The third, and it is perhaps the most important in terms of substantive law reform, is the new House of Lords procedure, by which non-controversial Law Commission Bills can be introduced into the House of Lords. This has a number of advantages. It means that measures can be placed before Parliament, which may not otherwise get before Parliament at all. It also, in our view, ensures there is very thorough scrutiny of the proposals put before Parliament. In advance of today, I was speaking with David Hertzel, who is one of the Law Commissioners responsible for the recent Consumer Insurance Bill, and he told me that he is confident that the committee hearings would have revealed any significant inherent problems with our proposals.

Currently before the Lords is the Trusts (Capital and Income) Bill, which has come from the Law Commission. That is going to receive its Third Reading next week and then it will be coming here. During the course of its progress before the House of Lords, the Commissioner, Professor Elizabeth Cooke was present as a witness before the Committee, and she was present throughout the Second Reading and Committee stages. In advance of that she was able to brief the members of the Committee as a group and the individuals who were not able to be there in relation to what is a very technical matter of Chancery law—the difference between income and capital in the receipts of trustees. I have seen a very recent exchange of emails in which it has been proposed that it might assist the Commons Committee in due course if Professor Cooke were able to provide a briefing in advance of its consideration of that very technical matter. This is an area where I hope we might be able to develop the ability of the Law Commission to assist Parliament.

Q247 Simon Hart: My last question is that you mentioned also in your evidence about the kind of institutions which occasionally make submissions to you as to what law you should be looking at. Does that include, has it ever included, or should it include the work of Select Committees? Should we be encouraged to be making submissions to you on the basis of some things we discover around this table?

Sir David Lloyd Jones: Most certainly we would welcome that, whether submissions in the consultation process came from individual parliamentarians or from committees, that would be particularly welcome. The strength of the ultimate recommendations depends on the thoroughness of the consultation process. In addition to that, it has occurred to us that after the consultation phase, at the point before any bill is introduced into Parliament, again it might be appropriate for us to make presentations as to the nature of the proposals and that might result in a deeper understanding of the difficult matters that are often addressed in the matters we have to deal with.

Simon Hart: Thank you very much.
Ms Lorimer: I was just going to add one point in addition to that. That is that we will, in the ordinary course of events, be going out to consult on our next programme of law reform within the next few months, so there will be an opportunity there for this Committee or for parliamentarians to put in recommendations or proposals as part of that consultation process.
Simon Hart: That is helpful. Thank you.
Chair: Simon, thank you for that and apologies for delaying you. We really appreciate that.
Simon Hart: I will clear off now.

Q248 Mr Chope: Just on that very last point. Do the Government have the final say in what you undertake as your programme?
Sir David Lloyd Jones: No. The present arrangement is that we undertake projects under a protocol, which is an agreement between the Law Commission and the Lord Chancellor. We consult on the projects that we wish to pursue. In the current eleventh programme there were about 200 suggested projects and we ended up selecting 14 of them. We notify the relevant minister. Under the protocol the minister is expected to agree that the department will provide sufficient staff to liaise with the Law Commission and, in addition, to give an undertaking that there is a serious intention to take forward law reform in that area. So we will not take on a project on this basis unless that is the position. I suppose in that sense there is a veto.

Q249 Mr Chope: If the minister says we do not want you to do this, we are not going to co-operate, then you cannot do it?
Sir David Lloyd Jones: If that happened then we wouldn't do it because there would be little point. The history of the Law Commission has, over nearly 50 years, provided many examples of important projects that have come to nothing and that have been a waste of time.

Q250 Mr Chope: What proportion of bills that reach the statute book have the Law Commission's imprint on them?
Sir David Lloyd Jones: I cannot tell you the proportion, but in terms of numbers, at any one time we would expect there to be one or two ordinary bills before Parliament. The adult social care Bill, which has recently been published, is based largely on a Law Commission report. Under the special procedure we would expect one or two bills before Parliament. Previously, under this procedure, there have been the Perpetuities and Accumulations Act 2009, the Third Party (Rights against Insurers) Act 2010, the Consumer Insurance Act 2012. There is currently the Trusts (Capital and Income) Bill before the House of Lords and there is a Scottish measure to be introduced very shortly in relation to partnerships.
In addition to that, occasionally private Members will take up proposals from the Law Commission. Mr Greg Knight MP took up the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Bill, which received Royal Assent last year. Then we have currently a statute law repeals Bill, which has just been introduced. That is the nineteenth in the history of the Law Commission. There is one of those every four years on average. In addition, there are consolidation Bills introduced. We do not have any current consolidation Bills before Parliament. The number of consolidation Bills has reduced significantly in the last five or six years. We are currently working on bail and in addition on cooperatives and friendly societies.

Q251 Mr Chope: In respect of a bill that does not derive from one of the Law Commission's recommendations or pieces of work, do you or can you have any role in working with the Bill team or advising Parliamentary Counsel on the drafting?
Sir David Lloyd Jones: Generally we have not because we have no particular knowledge of the subject matter of these other Bills. On occasion informal approaches are made to our Parliamentary Counsel for assistance.
Mr Hogarth: I can say from the other side, sitting in the Parliamentary Counsel office, that I have occasionally spoken to somebody at the Law Commission if I happen to know they knew something that was relevant to a difficulty we had. We would sometimes consult our colleagues in the Law Commission as to what was feasible by way of consolidation, or something like that. In the main that is not something one would do more than on the odd occasion.

Q252 Mr Chope: Do you think that the advice that you give in drafting should be made available to Members of Parliament when they are scrutinising these bills?
Mr Hogarth: Is this in relation to all Commission bills?
Mr Chope: As a general proposition. I will give you an example in a minute.
Mr Hogarth: I think the formal answer is that the information is legally privileged. My client is the Government and it is really for the Government to decide whether or not that information is released.

Q253 Mr Chope: But surely if the whole idea is for Parliament to be able to be producing good legislation, then it is important, is it not, that we are made aware or able to put the points, if the Government is receiving advice to the effect that there are inconsistencies or there is ambiguity and lack of clarity in their drafting?
Mr Hogarth: I think I will just have to stick by what I said before, which is that it is not really up to me to comment on.

Q254 Mr Chope: Perhaps I can give one specific example. I happen to be Chairman of the Mobile Homes All-Party Parliamentary Group. This Friday, tomorrow, there is a Second Reading of a Private Member's Bill to reform the law in quite a complicated area, but it affects a lot of people who are resident on what are known as park home sites. The private Member, who is promoting this bill on

behalf of the Government, was told at a relatively late stage what everybody wants to happen, which is regarding the provisions in the implied terms in a contract that gives the site owner the right to effectively bar the sale of a park home to a subsequent resident, and which is often subject to abuse. The promoter of the bill was told at the very last minute that there was now legal advice to the effect that you could not do that in respect of existing contracts because it would be retrospective and you could only alter implied terms in respect of a future contract, although there are examples on the statute book where that has happened. I wondered whether you thought in that sort of situation, trying to improve the quality of legislation, whether it would be useful if it was the practice of everybody putting their cards on the table, because it seems that there are two different views about this. One view is now prevailing over the other, but it means that we as legislators do not have all the information before us in deciding whether to move an amendment or push an amendment and so on. Do you think there might be the means here to try to improve the quality of legislation by having equal access to the legal advice?

Sir David Lloyd Jones: Forgive me, I cannot of course comment on that specific example that you raise, or indeed whether it is appropriate for the Government to be waiving privilege in that or in any other case. So far as our own procedures are concerned, these sorts of problems should be identified at an early stage. That is I think one of the advantages that we have, which, as I mentioned at the outset, is that the process of consultation paper followed by consultation, followed by an in-depth investigation at that point, contemporaneously with the production of the draft bill should throw up the sorts of difficulties which you identify, and those are then open for consideration and identified at a very early stage.

Mr Hogarth: I can say, having drafted a Law Commission bill, admittedly a few years ago now, where retrospection was a very live issue, that the Commissioners gave very anxious consideration to the pros and cons of making reform retrospective or not. The report of the Law Commission dealt with the point at some length, I seem to recall, so basically the points of view and the views the Commissioners took on it were made very public. Were that bill to have been debated, which I think in the end it was not, parliamentarians would have been perfectly well informed about the issues, and it is ultimately a policy choice as to whether you make a provision retrospective or not. Legal advisers advise, but others decide usually I think.

Q255 Mr Chope: Thank you. So basically your message is it is in advance of the legislation where the work needs to be done. It is much better to do it early on and get it right in advance rather than trying to clear it up later.

Sir David Lloyd Jones: Absolutely.

Q256 Tristram Hunt: Did you say there was a consolidation Bill on co-ops and friendly societies?

Sir David Lloyd Jones: There is no bill at the moment, but the work is in progress at the moment.

Tristram Hunt: That is a sort of tidying up of overlapping—

Sir David Lloyd Jones: Yes, it involves looking at layers of legislation and effectively codifying, consolidating them within one measure and making the law intelligible and accessible. The other one we are looking at at the moment is one that I am more familiar with from wearing my other hat. That is bail. A judge who has to deal with a bail application has to look at a large number of different provisions in different statutes. There is a clear case there for a consolidative measure, which will make the law far more accessible.

Q257 Tristram Hunt: Would you be including asylum with the Ecuadorian Embassy now?

Sir David Lloyd Jones: I don't know that we are going to embark on that one.

Mr Hogarth: Could I make a slight correction? They are called industrial and provident societies. Friendly societies are similar but different.

Q258 Tristram Hunt: What is the timetable on those? Your work is on those at the moment. That will, as it were, bubble up over the next—

Mr Hogarth: It is early days and it is very hard to tell how long a consolidation exercise will take until you have done at least half of it. We haven't got that far yet. I think the plan is to try to come up with something that might be fit to be consulted on some time next year.

Q259 Tristram Hunt: I also wanted to ask you about your own internal processes in terms of your processes of peer review and internal examination. How does that take place?

Sir David Lloyd Jones: It takes place at every stage of the process. There are four commissioners in addition to the Chairman. The Chairman is always a judge. Nowadays, the Chairman is always a member of the Court of Appeal. Currently, we have two professors of law and we have a solicitor and a QC. Each of them leads a team. We have one team on public law and one on criminal law, one on family law and trust property and one on commercial law and common law. So they have different expertise. Each paper that emerges from the Law Commission, whether it is a consultation paper or it is a report with recommendations on a particular area, with the further draft bill, will have been considered by all the Commissioners. Everything that goes out is a product of this collegiate process. Our expertise is in a different fields. Nevertheless it is often very valuable having lawyers from different disciplines examining those reforms and their merits. This week we have all been looking very closely at contempt of court. Professor David Ormerod has produced a draft consultation in relation to that and we have all been poring over it.

Q260 Tristram Hunt: In terms of the investigation of this Committee, and following on from Chris's questions, it seems that if you have a legislative

scrutiny committee as part of a stage of the passage of a Bill and parliamentary process, from your perspective—at least from your answers to Chris—that is far too late. Is that right?

Sir David Lloyd Jones: No, because for measures that are introduced in the ordinary way, Parliament has not always enjoyed the very lengthy scrutiny that we have been able to carry out. We have the real advantage of being able to spend a lot of time going though the matters very thoroughly. You may want to consider whether some of the procedures that we followed could be adapted within the parliamentary structure. For our part, we think that it may be of assistance if we were to consult more extensively with parliamentarians, and in particular if we were to make presentations in relation to the measures we are proposing for law reform.

Q261 Tristram Hunt: At what stage would you see that happening?

Sir David Lloyd Jones: It could happen at the consultation stage. We would welcome that because it would, in due course, strengthen the proposals that we make. It could also occur before the introduction of the draft bill.

Q262 Tristram Hunt: That could be done without upsetting Parliamentary Counsel. Would that be done in a collegiate and helpful manner?

Sir David Lloyd Jones: I don't know whether it would upset Parliamentary Counsel or not.

Mr Hogarth: Parliamentary Counsel are very thick-skinned. It would not bother us at all. I think the concern sometimes is that if it is done after the introduction of the bill and if it generates the sort of points that we take up because we feel that we can improve the drafting, it is sometimes difficult then to make amendments or to get the departments to persuade ministers and Parliament to take the amendments. So it is better from our point of view if that process could happen before introduction because that then will improve the quality of the bill that is introduced, which then makes the parliamentarian's job that much easier because you should not be distracted by drafting points. But it needs to be at a fairly advanced stage so that you have a text that is reasonably reliable. It may not be the final draft, but it is pretty much there. That is the point at which at my level, the sort of points Parliamentary Counsel are interested in, is the best time to have the last attack on the wording to try to get it right. Any input from anybody is welcome as long as one has the time to do something about it.

Q263 Tristram Hunt: In practical organisational terms that would require massive beefing up or expansion of expertise within the Law Commission.

Sir David Lloyd Jones: Not necessarily. There are two stages here. The greater involvement of parliamentarians within the consultation phase could easily be accommodated as matters stand. Usually we have consultation periods of three months. That might well be a sufficient period within which to consult parliamentarians as well, whether that were done on the basis of individuals or committees. If that were possible it would, as I have suggested, strengthen the end product. It might also assist if once a bill has been produced and a final recommendation made, we were able to brief parliamentarians in relation to the recommendations. That might assist in informing the debate that then takes place within Parliament. It is something that is now institutionalised in the House of Lords in the new procedure, and we would be very keen to assist in establishing something very similar here.

Q264 Fabian Hamilton: In your written evidence to us you highlighted your important role in the consolidation of legislation, and I quote, "As part of its statutory functions in relation to law reform, the Law Commissioners always have responsibility for the production of consolidation bills. The aim of consolidation is to make statute law more accessible and comprehensible both to those who have to apply it and those who are affected by it". In its written evidence to us the Better Government Initiative stated, "Our feeling is that the first thing to do is to agree the standards". In drafting a parliamentary list of standards for good quality legislation, what is your view on including questions for departments to answer, firstly whether consolidation has been considered, secondly whether the bill follows a Commission recommendation, and, thirdly, why the Government have chosen to depart from a Law Commission recommendation, if it does?

Sir David Lloyd Jones: Yes. It seems to us first that it is sensible to have a list of questions that should be addressed. It seems to us that perhaps the first question to be asked is whether legislation is necessary at all. It may well be that there are instances where the desired result can be achieved through administrative action or through delegated legislation, so it may not be necessary. So far as our projects are concerned, it is unlikely that the law reforms needed could be achieved without primary legislation, so I think we are ticking that particular box as far as our proposals were concerned.

Similarly with consolidation, it is right that consolidation should be considered at every stage. But, here again, consolidation—setting to one side the secondary consolidation exercise—in our law reform proposals is unlikely to achieve what is necessary to be achieved. The Committee should also bear in mind the time that a consolidation exercise might take. You have heard from Mr Hogarth the view of Parliamentary Counsel that these are quite substantial exercises and they do unfortunately take a long time. Again it is an appropriate question to ask. In the case of our proposals for law reform it is unlikely that consolidation would provide a satisfactory answer.

As to the third part, I would hope that it would be apparent to parliamentarians whether or not draft legislation was or was not the product of the work of the Law Commission; I would hope that we might have been able to publicise our proposals sufficiently that parliamentarians would know. Where it might be valuable would be to know to what extent legislation is or is not reflective of proposals from the Law Commission. It sometimes happens that proposals for

reform can be put forward and they may be proposed to be implemented in part.

Mr Hogarth: The Chairman is entirely right. In my experience it is very seldom that in terms of a proposal for legislation, not particularly Law Commission bills but any legislation that has traction in a department, consolidation would be a complete answer to whatever the issue is. It sometimes happens that when a proposal does not find immediate favour to be in a programme that perhaps consolidation is then considered as the next best thing. Indeed, I do not know because I am based at the Law Commission now, but I suspect that the consolidation we are dealing with about the co-operative societies is an example of that. There is a feeling that the law is very disjointed and that something needs to be done about it. Perhaps there could be a proper bill if people felt there were some flaws in the law, but doing a consolidation is probably a large part of what is needed. The current law is based in about 12 Acts and any number of orders and things.

Sir David Lloyd Jones: Could I add to that? In a situation where a law reform measure is implemented, it may then be appropriate to consider whether consolidation is appropriate. You cannot do it as part of the same exercise because you do not know what is going to end up on the statute book so far as the current bill is concerned. Once the law has been passed and received the Royal Assent, then it may be appropriate to consider those matters.

Q265 Fabian Hamilton: It seems to me that those bills most in need of consolidation are some of the finance bills because they affect so many previous financial measures going back decades often. Can I move on to accessibility and intelligibility of statute because this is obviously very important to all of us and certainly to the public, on whose behalf we are acting? I understand that the use of purpose clauses is controversial. We know that purpose clauses state the Government's overriding objectives in legislating with a particular bill. Lord Norton of Louth, who gave evidence to us, was very much in favour of the use of what he called Keeling Schedules, which showed the proposed amendments to an Act on the face of an Act, which seems eminently sensible to me. Does the Law Commission consider that the following drafting techniques are useful in meeting its aim of improving that accessibility and intelligibility of statute: firstly purpose clauses, as I have mentioned; secondly, sunset clauses, which can be very controversial; and, thirdly, those Keeling Schedules that Lord Norton mentioned?

Sir David Lloyd Jones: Right. Could we take each in turn?

Fabian Hamilton: Sure.

Sir David Lloyd Jones: As far as purpose clauses are concerned, it seems to us that these would sometimes be useful provided that it is part of the scheme of the bill. But really this will often be a matter of judgement for the draftsman. If you are going to have a purpose clause, it is very important that it is accurate, and it is very important that it is comprehensive because in due course when the statute comes to be interpreted, that purpose clause may be very influential in the interpretation of specific provisions of the statute. A requirement always to have a purpose clause, it seems to us, could cause difficulty, both in getting the wording right and in fitting a clause into a bill that perhaps did not truly require one.

However, we are persuaded that there are real advantages in publishing somewhere a statement of policy objectives. This is a matter that we touched on in our 2006 report on post-legislative scrutiny, when we said there was strong support for the view that a statement of policy objectives should be provided at publication of a bill. There were different views as to where it should be located. Some of the consultees favoured purpose clauses on the face of the bill itself, others thought that it should be in the Explanatory Notes and others thought that it should be included in the regulatory impact assessments. The Law Commission's view in 2006 was that it may be that regulatory impact assessments were the best place for a clarification of policy objectives.

Sunset clauses are not a matter of which we in the Law Commission have any particular experience. It seems to us that they could have a place in primary legislation but they are unlikely to be of use in the case of our proposed law reform measures. We make proposals for law reform, which we hope will have a long-term effect. In subordinate legislation there might be greater scope for the use of sunset clauses. We understand that very extensive use of sunset clauses is now made in some jurisdictions in Australia in subordinate legislation. It may be that a duty to review legislation after a specified number of years coupled with a power to amend or repeal with incidental powers to sort out the consequences might be a more satisfactory way forward in some instances than the rather drastic measure of a sunset clause.

Q266 Fabian Hamilton: Perhaps I may interrupt. I seem to recall that sunset clauses were particularly controversial in the debate over terrorist legislation some few years ago, certainly following 11 September 2001.

Sir David Lloyd Jones: I can understand that there may no doubt be some types of legislation put before Parliament where Parliament is of the view that drastic remedies are called for for a limited period, and it may be acceptable to Parliament only if there is a sunset clause.

Q267 Fabian Hamilton: It was the inclusion of sunset clauses, if I remember rightly, that persuaded certain Members who were against that legislation to accept it.

Sir David Lloyd Jones: I can understand it. The field within which we operate is not usually as exciting. We hope to make provision for long-term law reform, for law reform that will last and so it would not normally be appropriate to include a sunset clause in the sort of law reform measures we are putting forward. But we can see real scope for sunset clauses in subordinate legislation. That would have the additional advantage that it may reduce the number of measures. It would force Parliament and force government to look repeatedly at the state of the law. It would concentrate the mind because there is a cut-off date.

The third technique was Keeling Schedules. Our understanding is that the use of Keeling Schedules has now largely died out. We had notice of this question and we had discussions within the Law Commission in relation to it. It does seem to us that if they are accurate, they duplicate the effect of the main body of the bill. If they are not accurate they are going to cause really serious problems because you have an inconsistency between the body of the bill and the schedule. However, we do think that it is important the draftsmen, legislature and the judicature should have a clear understanding of the effect of the textual amendments effected by the bill. It is very difficult coming to a statute which simply sets out a whole series of amendments. It makes no sense at all unless it is read in conjunction with a number of other documents.

We note the Hansard Society proposes that Keeling-like schedules should be included in the explanatory notes. We can see that there may well be occasions where many complex amendments are made to an earlier Act on which such an explanation of the effect of the proposed amendments would be essential. We also see from the draftsman's point of view it is an important discipline, an important exercise to work through these proposed amendments and to be able to see the text as amended while he is doing his work. It is not a matter on which we have had any particular experience. The reason for that is that our draft bills tend to be putting forward an entire new measure rather than making technical amendments to an earlier legislation, although that is not invariably the case.

Fabian Hamilton: That is really helpful. Thank you very much.

Q268 Mr Chope: I have just a quick supplementary. One of the causes of concern to many of us is the fact that there is a lot of statute law that has not been commenced. It is one thing talking about sunset clauses, but some have not even had sunrise. Do you think there is an argument for saying that after a particular period of time if a statutory provision has not been commenced, that it should automatically be deemed to be repealed?

Sir David Lloyd Jones: Not necessarily. However, when the Law Commission looked at post-legislative scrutiny in 2006, this was one of the matters to which it drew attention. It would be an important matter for consideration at that stage as to the extent to which a measure has been implemented and if not, why not?

Q269 Mr Chope: You would not go further and say there should be some automatic—

Sir David Lloyd Jones: It is not really for the Law Commission to have a position in relation to that. I certainly would not suggest that there should be any automatic result, but it is a matter that is appropriate for consideration in the face of post-legislative scrutiny, a very important matter to be considered.

Q270 Mr Chope: You are coming up to choosing your next three-year programme. Would it be possible for people to put in a bid for you to revisit the whole issue of post-legislative scrutiny, sunset clauses, what happens with the sun risers—

Sir David Lloyd Jones: We will be opening the consultation next year and inviting submissions as to appropriate projects to be included in the twelfth programme. Indeed, it would be entirely appropriate for there to be a suggestion that post-legislative scrutiny be considered. However, this is a matter that has been looked at fairly recently by the Law Commission. It does seem to us that not a great deal has changed since that report was made. Others would be in a much better position than the Law Commission to comment on the extent to which the reforms introduced by the Government following that report have been effective. We note that the central recommendation made by the Law Commission, that is the creation of a Joint Committee, was not carried forward at that time, the Government explaining that it would detract from the standing of departmental committees. It seemed to the Law Commission that there were real advantages in having a joint committee, which would have a greater breadth of vision, and, indeed, lessons that might be learned from post-legislative scrutiny might be given wider application as a result of their being considered by such a joint committee.

Mr Chope: Thank you.

Q271 Chair: It might be helpful Sir David if you make a particular point of flagging up the possibility of consultation on things that you might look at to our Select Committee structure through the Clerk to the House. I have no doubt that individual Members might pick up the consultation. I do not know if they are entered individually, but certainly perhaps the House structurally could engage with you so that the message gets outs. There may be items that are in Committee that I might wish to bring to your attention and for your consideration.

Sir David Lloyd Jones: I think that would be very helpful. I would be very happy to do that. I should explain that I am frequently in correspondence with Members who write about current projects, often prompted by constituents. That is not always the case.

Q272 Chair: I suspect that interaction may be a little bit like the one that Members have with constituents who write in green ink. It may be that they are valid, but none the less there may be a more structured approach that we could have, such as an item on the agenda and consider it seriously for a couple of months. It is possible that we may not even send anything your way after that consideration, but there may be things that colleagues could helpfully put into your process.

Sir David Lloyd Jones: We would certainly welcome that.

Chair: Sir David, can I apologise again to you and your colleagues for the slight delay at the beginning and the overrun that we had with our previous witnesses. Certainly this has been worth waiting for. It has been a fascinating session with you. It is open to you to comment further, as you see our evidence being taken with other people, if things occur to you and you think you would like to comment on, please feel free. Finally, would you please pass on our good wishes to all those who work in the Law Commission.

It is a very unsung and unrecognised part of our body politic and the work that is done there is very much appreciated by my colleagues in the House.

Sir David Lloyd Jones: I really appreciate that sir. Thank you very much. I will certainly do that.

Chair: Thank you Sir David, and thank you colleagues for coming along.

Thursday 10 January 2013

Members present:

Mr Graham Allen (Chair)

Mr Christopher Chope	Fabian Hamilton
Andrew Griffiths	Mrs Eleanor Laing

Examination of Witnesses

Witnesses: **Rt Hon Andrew Lansley CBE MP**, Leader of the House of Commons, Lord Privy Seal, and **Adam Pile**, Head of the Parliamentary Business and Legislation Secretariat, Economic and Domestic Secretariat, Cabinet Office, gave evidence.

Q273 Chair: Andrew, it is very good of you to come here and talk to us. I appreciate what a busy morning this always is for you to come. It is very good to see you. Congratulations on your new appointment, which is of very great interest to the Committee. You will know that we are looking at a number of issues at the moment. Today, it is particularly about improving the legislative process. We are keen to hear where you, as the new boy, full of radical, reforming ideas, would like to take us. Would you like to make some sort of opening statement?

Andrew Lansley: May I just say a few words?

Chair: Of course.

Andrew Lansley: This is by way of opening on my part, and also to introduce Adam Pile, who leads the group in the Cabinet Office, which is responsible, as a secretariat, for the Parliamentary Business and Legislation Committee.

Speaking from a personal point of view, I may have been Leader of the House for only four months, but the important work that you are doing, looking at improving legislative standards, is something that all of us, from our various perspectives, have been engaged in for a very long time. As a civil servant, in a former life, I first wrote instructions to counsel 30 years ago. As somebody in the business community, I can remember that we got engaged in trying to stem the rising tide of regulations from Government. When I came into Parliament as a member of the Opposition, I went through the night trying to improve legislation, and saw a great deal of the character of how legislation was scrutinised in Committee—sometimes well, sometimes very poorly.

I say all that because one of the things that I bring to this is that getting legislation right is hard. I hope that that is well understood. I know that it will be by this Committee. It is easy to look at things and say, "If you'd just rendered it into plainer English, it would be fine." Actually, very often, you can try as hard as you might, but sometimes the legislation has to be very specific because, otherwise, it is not clear and none of us wants to create uncertainty in the legislation that we pass, nor even say something that appears on the face of it to mean something but, when interpreted by courts, could mean more than one thing. We have to get these things right. Working at it is a hard thing to do.

I come to this as a reformer by inclination but a conservative by nature. I suppose where that gets me to is that I am always looking for improvement, and improvement is generally available, but it has to be proven, and you have to add value, not just change things for the sake of it. This is an area where I think that sometimes we have to distinguish between reforms that are clearly going to make progress and change things for the better, and proposals for reform that probably would not add value and would not change things for the better. That is slightly in the sense of, "We must keep changing things, imagining that we are improving them as a consequence."

I really welcome your inquiry, which gives you an opportunity not least to distinguish between those things. We come to it with quite a lot of progress already being made. My predecessor, George, and colleagues have made a lot of progress just in the last couple of years. We are very clear, as I just said—we can continuously improve the way in which we scrutinise legislation and we can hope to deliver better legislation and improve legislative standards.

In particular—and I hope this is something we can talk about a bit through the course of this evidence session—as chair of the Parliamentary Business and Legislation Cabinet Committee, which, for these purposes, I will call PBL, if you are happy with the acronym, I am responsible for the strategic planning and management of the legislative programme, with the advice of Parliamentary Counsel. Parliamentary Counsel have clear objectives for the standards that Bills and Acts should meet. I am committed to ensuring that those are in force. I think you have taken evidence from First Parliamentary Counsel and Parliamentary Counsel in the course of your inquiry. In PBL, under George and myself, we have become proactive and forward-looking, asking difficult questions of those who wish to bring forward legislation.

As a Cabinet Committee, it is, to that extent, not immediately transparent. On the work that is put in not just by the Committee, but through the secretariat and through Parliamentary Counsel, in getting legislation to the right place before the point of its introduction, there is a great deal of very hard work that is necessary in order to make that happen. It is challenging in a Coalition as well, because we have the difficult task not only of ensuring that the very limited parliamentary time for the legislative programme is used to the very best effect, but of brokering agreement in relation to legislation not only between departments but between political parties. That means that there are considerable challenges, but nonetheless we have been able, at the same time, to

increase the extent to which legislation is published in draft and is subject to pre-legislative scrutiny.

Aside from the question of a legislative standards committee, your Committee have primarily been presented with evidence relating to the preparation of Bills before introduction. That is important, but it is only one part of the life of the final Act. I would be interested to hear from you and this inquiry whether you have identified any potential improvements in the parliamentary processes for scrutinising legislation. In particular, I would look at a number of initiatives that I have been interested in and that we are pursuing: the public reading stage, explanatory statements to amendments, different formats of presenting legislation, interweaving and interleaving. I would also look, I hope, not only at the scrutiny of legislation but at post-legislative scrutiny. There has appeared to be a rather low overall engagement by Parliament and select committees with the processes of post-legislative scrutiny, but that could help us in ensuring that future legislation is as good as we can make it. That, I know, is our shared objective.

Q274 Chair: That was very helpful, particularly your list at the end of things that need further attention. I think we share that agenda with you.

A couple of quick things: Parliamentary Counsel—is that misnamed? Is it not really Executive or Government Counsel? Should not Parliament itself have a legal capability to deploy on these issues?

Andrew Lansley: Of course, Parliament does have a legal capability. When you took evidence from the Office of the Parliamentary Counsel, as they made clear, there is a degree of interchange between Parliamentary Counsel—I think they have a member of the Office of the Parliamentary Counsel on secondment to the House on a regular basis.

Adam Pile: Sometimes.

Andrew Lansley: Sometimes—regularly, if not continuously, from my recollection of the Public Bill Office. As an Opposition Member for many years and as a shadow spokesman, I quite often worked with the Public Bill Office to get amendments into shape so that they were effective at doing what we wanted them to do.

Q275 Chair: But more mainstream legal advice about a position, rather than the drafting of clauses or lines?

Andrew Lansley: The House authorities can always work with the Office of the Parliamentary Counsel, and do so. They do so in preparation for legislation, and they do so continuously throughout the progress of legislation. I do not see the Office of the Parliamentary Counsel as in any sense being something that we reserve for Ministers. It is not that sort of legal advice. It is not the kind of legal advice, for example, that is Privy advice to Ministers; counsel are responsible for the quality of the legislation, and their relationship with the House authorities is an instrumental part of enabling the House to do its job properly, as well as Government.

Q276 Chair: But as a Backbench Member, while inspiration arrives, I have never felt that I have had an intimate relationship with Parliamentary Counsel, even to the extent, for example, of trying to draft a Bill—having open discussions with them on drafting a draft Bill on something that is very close to the Committee's heart on a recent report. You did not get the sense that there was a desire to engage actively in anything other than the wording around the Bills.

Andrew Lansley: Of course it depends. In all these discussions it is very important to distinguish between policy and drafting. Very often, people think they want to engage with Parliamentary Counsel on drafting but, in truth, they want to engage with officials and Ministers on policy. When the policy is clear, and if Ministers have agreed what the objective is, the role of Parliamentary Counsel is to ensure that that objective is given the best possible effect.

Q277 Chair: Conceptually, this is about whether Parliament is an equal and a partner, and can make a serious contribution, rather than being at the tail-end of a process that begins at, and is largely within, the Executive—and then there is an add-on at the end. There is a very different sense of the relationship from the former to the latter.

Andrew Lansley: There may have been, in the past, a sense in which Government sought to make its decisions—Government proposes; Parliament disposes. The assumption may have been in the past—I have seen it—one of Government, when they introduce legislation, not expecting anything to happen to it, and expecting it simply to be voted through, thank you very much. That is not how we do things now. We do things on the basis of pre-legislative scrutiny. The publication of draft Bills is more frequent now than it has been in the past. That gives an active process of engagement for parliamentarians and the public in getting the legislation to the right stage, even before the formal scrutiny begins, and the formal scrutiny is an active partnership in getting legislation right.

Q278 Chair: On pre-leg scrutiny, other than emergency things and things related to terrorism or war, would you have an objective that all Bills should undergo pre-leg scrutiny?

Andrew Lansley: There are Bills for which pre-legislative scrutiny is appropriate and Bills for which it is not appropriate. It is literally something where you have to consider the merits and the circumstances of any individual Bill. I am sorry—I simply cannot countenance the idea that every Bill must be subject to pre-legislative scrutiny. I will give you an example from the last few weeks. You would say, "Oh, it is emergency legislation," but on the Mental Health (Approval Functions) Bill, it was very clear—we had to deal with it very quickly and there was no opportunity for pre-legislative scrutiny.

On the debate this morning in business questions about pre-legislative scrutiny on the Welfare Benefits Up-rating Bill, it was announced in the autumn statement, and there is a clear timetable. When you look at the Bill, it is actually a very straightforward piece of legislation. We will see when we come to the further stages, but I did not detect that the debate was

about the drafting of the Bill. The debate was about the policy of the Bill.

Q279 Chair: Do you think that we are about there, that we are about right on pre-leg scrutiny and the number of Bills, or is there a direction of travel to increase the number over an appropriate period of time?
Andrew Lansley: All our objectives, all our efforts, are devoted to trying to maximise pre-legislative scrutiny. We have made good progress. How many Bills—10, is it?
Adam Pile: Eleven in the first Session and 13 in this Session.
Andrew Lansley: Thirteen in this Session—of course this is—

Q280 Chair: Is that a majority, Mr Pile?
Adam Pile: It is not a majority, but it is a good number. It is more than there ever has been.
Andrew Lansley: And that is 13 in a single-year Session.

Q281 Chair: It is a relatively new invention. It sounds as though it is going in the right direction.
Andrew Lansley: There is a cycle to these things. Any Government would expect that, in the first Session of a Parliament, there would be a number of Bills that are very unlikely to get pre-legislative scrutiny, because they will be derived from manifesto commitments, and they are very likely to be taken through as part of the immediate requirements of the programme. In the last Session of a Parliament—we have not reached that stage yet—there must always be some possibility that any Government will look to achieve legislation before the end of the Parliament, and there may be difficulties in getting to the point of having quite the scale of pre-legislative scrutiny that we would look for. Nonetheless, we are trying to get the maximum pre-legislative scrutiny we can.
Of course, pre-legislative scrutiny has different characteristics. Some is very formal. For example, when we were preparing the draft Care and Support Bill, we had an opportunity not only for the formal pre-legislative scrutiny, which is happening now, but for what was very like a public reading stage at an earlier point. When we can, we do.

Q282 Chair: Wanting to ensure that things are dealt with before the end of the Parliament—and it is now a five-year Parliament—and keen to make sure that the Coalition ticks off a lot of the commitments that it has made to the public, one of the key things that has been raised with me by Members of the Committee was that, the other day, when the mid-term review was published, there was a mention of the creation of a House business committee, which should apparently, according to the pledge, have taken place by the coming May. It has not quite happened yet, but will happen—it is being held up because this Committee is having a look at the concept. I just needed to make clear to you, Andrew—I will drop you a line about this, obviously—that the Committee would not want to be the excuse for the Government not meeting its Coalition pledge to deal with this issue in a timely way and create a House business committee as it promised to do.
Andrew Lansley: But I hope the Committee's expectation, which I welcome, would be, looking at the Wright Committee recommendations and reviewing them—substantial progress has clearly been made through the Backbench Business Committee on giving Members of the House considerably extended opportunities to bring forward debates of a kind that are not at the behest of Government but at the behest of Backbench Members. That has clearly substantially improved that. It therefore seems perfectly reasonable to look at the Wright Committee recommendations in the light of the experience of those changes. We have made progress. The question is, how can we add value to that? I would not want to do things that pre-empt and negate the purpose of your further look at what this might consist of.
Chair: I can guarantee you, Andrew, that we will move with great expedition on this issue, so that you are enabled, if you wish, to meet the Coalition promise of bringing something forward before 10 May 2013. That will be a matter for Government, whether it wishes to meet those promises or not, but this Committee will not stand in your way and will not be an excuse for inaction, which I am sure we can explain at greater length in writing.
Andrew Lansley: Very good—I look forward to hearing from you.

Q283 Fabian Hamilton: Hello, Andrew. It is nice to see you. My colleague Nick Raynsford, among many others, noted in his evidence to us that there was no consensus on the role of legislation. He said, "There is widespread confusion about the purpose of legislation, with many media and political commentators seeing it as evidence of action—'something must be done'—or as a test of a Government's political standing (the ability to secure passage through both Houses of Parliament—rather than its likely effect and impact."
You have probably mainly answered this, but do you agree, as I am sure you do, that there is a need for improved legislative standards? If so, do you agree with the Hansard Society that the deficiencies result from a combination of the volume of legislation, the attitude towards it and poor preparation?
I suppose there are two questions there, one of which I think you have mainly answered.
Andrew Lansley: I have no doubt. We do share a view that we need to be clear about legislative standards, the nature of what legislative standards we are looking for, and to try to secure continuous improvement in that. That is what we set out to do, and I think we are making progress on that. We would all like to do less and do it better. The doing less bit is always hard, but it is one of those areas where I would say that it is in the nature of Government to fill—and we will doubtless fill—the legislative time available in Parliament. There are substantially more candidates for legislation than there is time available. To that extent we are continuously, inside Government, in a process of seeking to challenge whether legislation is genuinely required, and we will certainly try to secure that. We are continuously trying to challenge the assertion that legislation must happen now and must

happen in this form, and that it sometimes does not have the time that we would like for scrutiny. We live in a world where sometimes things just have to be done, and they have to be done to a timetable. Select committees—not this one—will be sitting there, saying to Ministers, "Why have you not done this thing by 10 May 2013?" They might say, "Actually, we could not do it because legislative time was not available." That will sometimes be true.

Sorry—I am digressing slightly—but it does get to the point: we are going to try to do less and we are going to try to do better. That has been true for many Governments in the past, and we will continue to work on that. We do that inside Government. I hope that what you will increasingly see through pre-legislative scrutiny is that we do that in partnership with stakeholders and Parliament itself in making that happen.

I read what Nick was saying when he came before you. On that particular point, more active post-legislative scrutiny would help. We have legislation that has been passed and not acted upon, we have declaratory legislation that has had no impact, we have had people trying to revisit the same issue over and over again as the years pass, through different legislative routes, and not getting the desired result. The more that it can be made clear that those kinds of approach are not the right approaches to legislation, the better it is to hold that mirror up to government generically—no particular Government, but government generically—and say, "If that hasn't worked in the past, why do you suppose that that is the proper way to legislate in the future?" We know what law is for. Law is for the purposes where we require things to happen. It is where we allow things to be spent, we require people to do things and we penalise them when they do not do them. Therefore, it is not something that should be entered into ill-advisedly.

Q284 Fabian Hamilton: I agree, and I must say that one of the very few things that I had sympathy with while we were in power—one of the very few things where I had sympathy with what the Conservative party said at the time, in opposition—was that we had too much legislation. Sometimes, some of it was not very good. On that issue of poor-quality legislation, does the Government recognise that sometimes even its own legislation is not as good as it should be? Is this a problem that is recognised by Government and, indeed, by the Civil Service?

Andrew Lansley: We are continuously looking for improvement in legislation. It is very important to understand what we mean by "not good enough". The simple fact that legislation is amended when it is in the House should not be taken as evidence that it is not good legislation.

Fabian Hamilton: No—absolutely not.

Andrew Lansley: Is it going to do what it is intended to do? You must continuously distinguish between what is policy and what is the process of drafting and legislative standards. Changes in policy resulting from further consultation and so on are going to happen in legislation. We would like it not always to be the case, but it is very often the case that we introduce legislation and need to amend it to take account of the results of further consultation and the like. Sometimes, we necessarily, for timing reasons, introduce legislation and know that we are going to have to amend it at a later stage. You could say that the amendments are clearly evidence of the inadequacies of the legislation in the first place. Well, no, they are not really. We have been clear about the scope, we have been clear about the need for amendment and the amendments will come forward, hopefully, when it is in a better state—rather that than rushing the legislation and introducing it other than in the appropriate form. It is better, sometimes, to amend it when you have the legislative drafting absolutely right.

Q285 Fabian Hamilton: Would you agree, though, that Opposition parties have a role in improving the quality of the legislation? Sometimes—most of the time—they might totally disagree with the policy, but on those rare occasions when Opposition does agree with the aims of the Government, surely it has a role in trying to make that legislation better. Yet, in my experience on the committees that I have sat on, it is very rare, either when we were in power or under the current Coalition Government, that the Government will accept a sensible amendment by the Opposition that is designed to make the legislation work better, in its opinion.

Andrew Lansley: My experience of standing committees is probably like yours. Opposition often seeks to challenge.

Fabian Hamilton: Of course.

Andrew Lansley: By their nature, many amendments are not designed to be accepted by Government. That is quite understood. Does that mean that they do not sometimes give pause for thought? Governments do respond—this is true in this House, and it is perhaps slightly more customarily the case in another place—to the scrutiny, even if not necessarily accepting the amendments. That is where quite often, on Report in both Houses, quite a lot of the structure of amendments is the consequence of exactly that kind of challenge, and that is fair enough.

I am reminded about the role of the Office of the Parliamentary Counsel as we go through legislation.

Adam Pile: You asked if the Civil Service recognised that we can do things better. Yes—definitely. One of the things that my team does each year is work with Parliamentary Counsel to do an annual lessons-learned exercise. It is almost a stock-take. We sit down with Bill teams, Bill Ministers, Parliamentary Counsel lawyers and the business managers. We discuss what worked well and what did not work well, identifying examples of best practice. Because Bill managers and Bill teams turn over each Session, it is our job to pass that knowledge on. We are constantly looking for areas where we can better, including reaching out to the Opposition, as you mentioned. Examples we have found are sharing draft statutory instruments during the passage of Bills and draft guidance. It is our job constantly to recognise where we are falling short and hopefully improve that.

Andrew Lansley: If you are looking at explanatory statements on amendments, for example, we have had

some work on that. I do not know if you have had occasion to look. I remember when the Report stage of the Small Charitable Donations Bill came before the House, in early December I think, I thought that I was quite good at reading legislation, but when I read the amendments that were published on the Order Paper with the explanatory statements alongside them, I realised that I got much more out of it. Previously, the Order Paper had not really told me much about the amendments on Report. That was rather encouraging as an innovation. It requires not only the Government to do this but the whole House—those who have not been on the Committee and are not familiar with the Bill, on Report—and enables them to see where the Opposition are coming from, if the Opposition or other Backbench Members are putting amendments down. For them to put an explanatory statement alongside would be very helpful.

Q286 Chair: When you do your annual lessons-to-be-learned stock-take, would you consider writing to Members of Parliament to ask whether they have a contribution they could make?

Adam Pile: There is no reason in theory why we could not do so, but this is not a public exercise. It holds its value because we can talk about those lessons openly within Government and share them in the Civil Service.

Chair: You do not have to read the letters we send back in reply. Some argue that does not happen very often—

Adam Pile: There is no reason why, in principle, that could not happen.

Chair: Just to give Members the opportunity.

Andrew Lansley: The Office of the Parliamentary Counsel—Adam will correct me if I do not get this quite right—also have an exercise underway, do they not, the purpose of which is to look at how legislation impacts. Who does legislation impact upon?

Adam Pile: Better law.

Andrew Lansley: Do you want to say a word about better law?

Adam Pile: I think that Richard Heaton may have spoken a bit about this when he came before you, but it is more or less reaching out to the different stakeholders within Parliament, within the industry and in the third sector, and working out, "Is legislation clear? Could it be drafted in a slightly different way?" That is another exercise of looking at how we do things within Government.

Chair: I appreciate your commitment to consult Members of Parliament on this.

Mrs Laing: What did you call it? I could not hear what you said. Better—

Adam Pile: Better law.

Mrs Laing: Just "better law"? Right—that is exactly what we are talking about.

Chair: It is. We are all trying to do the same thing.

Q287 Mr Chope: Can I come back to your answer in the initial exchanges about the House business committee? Is it still the policy of the Government to set up a House business committee by the third year of the Parliament, as set out in the Coalition Agreement?

Andrew Lansley: Yes.

Mr Chope: That is great. I welcome that commitment.

Andrew Lansley: I will just make this clear—which I think I have done to the House, when asked this question. I will not disguise from you my view that I do not think that it would be on the model recommended by the Wright Committee. It is right, rather—I will avoid the pun—we need to look at what is workable and adds value, and we need to look constructively at how the Backbench Business Committee has already changed the character of the allocation of time in the House and the access that the House enjoys to time for debates not necessarily of the Government's choosing. That has substantially changed since the Wright Committee produced their report. Being clear about how value is added in relation to where we are now is something that we need to think about, that I need to think about—and, as I understand it, your Committee is going to help us in thinking about it.

Q288 Mr Chope: Looking at the specifics, you identified some current Bills that you say did not really merit pre-legislative scrutiny—the Mental Health (Approval Functions) Bill and the Welfare Benefits Up-rating Bill. I think everybody would understand that a Bill that is solely concerned with policy is a Bill on which the case for pre-legislative scrutiny is weaker.

On the Bill that is shortly to come before the House on equalising marriage, there is obviously a strong policy element of that, where there are strong views, but there is also quite a lot of deep concern about the detail and the practical effects of the legislation and the wording of the legislation. We heard at business questions this morning from the Church Commissioner that there are already discussions taking place between the Government and the churches on some draft regulations. Surely what is already happening on this Bill makes the case for pre-legislative scrutiny, does it not?

Andrew Lansley: You know that there has been a very substantial consultation in relation to this Bill, even before the point at which we introduce it. To that extent, the policy has been subject to a substantial amount. Clearly there is an issue of trying to make sure that the policy is given clear effect in the Bill itself. When we come to introduce the Bill, hopefully we will have engaged with people to make sure that that is the case. Given the desire for there not to be extended delay in relation to this Bill, it may be that we do not have the formal opportunity for pre-legislative scrutiny that we apply to some other legislation. That may be the case. Nonetheless, we will make sure that we give the Bill proper scrutiny in this House and in another place.

Q289 Mr Chope: You talk about extended delay. It was not even in anybody's manifesto. The only commitment in the Coalition Agreement was to ensure that there were reciprocal arrangements for the recognition of civil partnerships with other countries. It is right, is it not, that if you went for pre-legislative scrutiny this Session, you could bring forward a Bill at the beginning of the next Session, which would not

have to be carried over, and which could be dealt with during the next Session, taking account of the results of that pre-legislative scrutiny exercise?

Andrew Lansley: These are issues, as I said in reply to your Chair's question, that we consider for every Bill. We consider whether there are opportunities for pre-legislative scrutiny, but we always do it in the context of the management of the legislative programme as a whole. To that extent, sometimes, in order for Bills to make progress and for us to achieve the policy objective of a Bill, we have to proceed on a timetable that does not permit formal pre-legislative scrutiny. However, we are achieving PLS more often now than ever used to be the case in the past.

Q290 Mr Chope: Is there any particular Minister who is responsible for ensuring legislative standards?

Andrew Lansley: I see that as my primary responsibility in Government, but throughout the Parliamentary Business and Legislation Committee, membership of which is in the public domain, there is a coming together of Ministers who have a degree of responsibility, for example the law officers in relation to issues relating to compliance with the Human Rights Act, and to retrospection and so on. The offences gateway is applied through the Ministry of Justice, so they are responsible for that. The Treasury are looking at it from the point of view of compliance with the rules relating to supply and so on. Business managers generally are looking at this. Each department and each Minister, as I know from my own experience, also has to be directly responsible for the quality of their legislation. Fundamentally, the clarity of policy will tend to drive the clarity of legislation.

Q291 Mr Chope: Do you effectively have a veto? If a Bill is coming forward to your committee that has drafting defects in it, which are brought to your attention or which you see for yourself, would you effectively be able to say, "Hold on, this Bill cannot go forward in its present form because it is—"

Andrew Lansley: My objective is that Bills should not be presented to the Parliamentary Business and Legislation Committee that are not fit for purpose. We do not operate independently in Government—we are part of Government. We operate collectively. Our job is not to sit there and say no. It is to work with the secretariat and, collectively with our colleagues, to arrive at a point where we can say yes to those Bills that can then properly be introduced. It is an iterative process, and it is part of collective responsibility, so I do not treat it as if we can say yes or no. It is a collective responsibility, and we are fundamentally a committee of Cabinet, so the responsibility is a collective responsibility, which, technically, belongs to Cabinet, not to the Committee itself.

Q292 Mr Chope: So it would be possible, because of the doctrine of collective responsibility, for a Bill to go forward that you, personally and privately, regarded as not being properly drafted?

Andrew Lansley: Of course, Government speaks with one voice, and we all share the same view, technically speaking.

Q293 Mr Chope: If it is the desire of the Government and the Prime Minister to improve the quality of legislation, one thing that the Prime Minister could do—perhaps it is something that we could recommend as a Committee—it would be to give you, as the Leader of the House, the ultimate authority, so that if a pushy colleague of yours said that he was keen to push this Bill forward for political reasons, you would be able to say, "Hang on, mate, this Bill is not in sufficiently good form, and I've effectively got a veto on it."

Andrew Lansley: To be honest, I would not ask for that. That would, in itself, seek to create artificial demarcations within what should properly be a collective decision, because it is collective responsibility. I do not think that Ministers would be at all comfortable with the idea. Let us say that a Cabinet Committee Chair or the Committee was to say no. Ministers have responsibility for that policy. They want to know that it has been weighed by Ministers collectively both for its policy implications and for its legislative programme implications. Fundamentally, we exercise a challenge, but we do not do it by standing back and saying no; we exercise the challenge by getting involved.

Q294 Mr Chope: On the role of the Office of the Parliamentary Counsel, are they helping you, or are they helping the individual departments?

Andrew Lansley: Both.

Q295 Mr Chope: So, the person in charge of that, would their advice be shared across the Government, so that you would see the advice that is being given to the other Ministers in bringing forward legislation?

Andrew Lansley: Absolutely. The Office of the Parliamentary Counsel works very closely with departments in the preparation of legislation, and of course in advising me and my colleagues on the PBL about the progress of legislation and its fitness for purpose.

Q296 Mr Chope: You have said already that you think that one role for Parliament might be to improve post-legislative scrutiny. Can you see any other roles for Parliament to help in improving standards?

Andrew Lansley: Yes. I have mentioned some of them. For example, it seems to me that the way in which pre-legislative scrutiny is done is making a big impact. It is not just that it happens, it is the way in which it is done. The Joint Committees, for example, have enabled us to make quite substantial progress in getting Bills into a form that both Houses feel confident about.

As I said, some of the other things, such as the willingness to work with the Opposition on bringing forward explanatory statements on amendments, will make the scrutiny of legislation more effective.

Just to give you an indication of the scale of how Select Committees can get involved, since the election we have published 51 post-legislative memoranda on previous Bills—now Acts. Eight of those projects have been carried through by parliamentary committees or are in progress. There is a big gap. I am not demanding that every post-legislative

memorandum should be taken up by a select committee, and I am not suggesting that, if they are not, they are not of some value to us—they are. However, when you look, for example, at the way in which the Justice Committee has taken up the post-legislative memorandum on the Freedom of Information Act—we will have a chance to discuss that, as the House will debate that shortly, on 24 January—that gives you an indication of the value here, which I suspect is not being realised.

Q297 Mr Chope: What about giving Parliament more time to look at these particular Bills, and not being so tight with the timetabling and the guillotining?

Andrew Lansley: Compared with years past, an increased proportion of programme motions—you[1] are going have a look at programming, of course—are not being divided against and, to that extent, are proceeding by consensus. In the last couple of Sessions we have had quite a number of Bills—Adam may have the figures to hand—that have clearly been fully scrutinised in committee, even to the extent of committees finishing their proceedings early. Particularly in the last Session, we had a number of major programme Bills to which more than one day was given at Report stage—on eight[2] occasions, I think, in the last Session. We are always looking to ensure that we give the appropriate time for scrutiny. Overall, there is a balance to be struck. One of the things that the House is very keen to do, and which we have been keen to facilitate, has been to provide opportunities not only for the Opposition to choose debates in their time but for the Backbench Business Committee to do so. We have reached a good point now, where the Backbench Business Committee would fairly say that demand for debates of substance can pretty much now be met by that committee in a reasonable time. That is a good place to have arrived at. To go further would of course impact on the legislative time available, which is treated as though it is Government time. People say, "You control that," but we do not control all the time of the House. Government has perhaps half the time of the House. When you have taken in Queen's Speech debates, Budget debates and other necessary requirements of legislation, the time over which there is really discretion for Government to allocate to debates that are not necessary for legislative purposes is very slim. If we were going to allocate a lot more time to legislation on the floor of the House, something would have to give, and it might be in places other than Government's time.

Q298 Andrew Griffiths: Andrew, I think you are the perfect person to have before the Committee, having been a civil servant and an adviser in opposition and in Government. You are sort of poacher turned gamekeeper. If I could quickly drag you back to something you said earlier in response to Chris, in relation to the same-sex marriage Bill, you said that there was not time for pre-legislative scrutiny because of the urgency of that Bill. Could you tell us where that urgency is coming from? Is it coming from Government, from Parliament or from the public? Where do you think that urgency is coming from?

Andrew Lansley: I do not think that I used the word "urgency"—I cannot remember whether I did or not. The point is that sometimes it is important to make progress, and we have policy objectives on which we wish to make progress. That does not always enable us to engage in pre-legislative scrutiny on every Bill. We look at them on their merits, of course. A lot of effort has been put in in response to the consultation to ensure that the legislation is clear, simple and straightforward. The extent to which we achieve that on the legislation when it is published will, I hope, demonstrate that the demand or the requirement for pre-legislative scrutiny has, to that extent, been mitigated by the fact that we have got the legislation right as it is brought before the House.

Q299 Andrew Griffiths: Moving back to the purpose of the Committee today and this idea of good law, you said that one of the jobs is to make sure that legislation is fit for purpose. In your long experience, can you think of some examples of legislation that has come before the House that you thought was not fit for purpose? Could you give us the worst case that you have seen?

Andrew Lansley: To be honest, that is pretty invidious. To be blunt with you, I am not going to reach back into the recent past, for reasons that will be obvious to you, and reaching back before the last election would be invidious. Your inquiry started with the Better Government Initiative and other evidence that was compiled before the last election, so we are not talking about something that is a product of something since the election and, if anything, we are making steady progress, perhaps accelerated progress. That is not the point. The point is that we can make more progress.

Q300 Andrew Griffiths: Do you agree that part of the process of improving legislation is to have a list of what good legislation should look like—a list or tick-box of what good legislation should look like?

Andrew Lansley: Being clear about what constitutes the kind of legislative standards that we are looking for is certainly helpful. In a way, tick-boxes are the last thing you need. Many of these are qualitative judgments. You cannot just put a tick in a box—you have to measure it qualitatively. Your inquiry will doubtless draw on the evidence to be clear about the sort of legislative standards we are looking for. I have seen in the evidence that you have had quite a lot of good material relating to that. I think there is pretty much a consensus about that. That is not the point. The point is how we best achieve it. I would urge you to recognise the extent to which we are taking that on board and seeking to achieve it inside Government, admittedly understanding that, by its very nature, that is not as transparent as what happens in public and

[1] Note by witness: my evidence may imply that Political and Constitutional Reform Committee are looking at programming, but this is of course the Procedure Committee.

[2] Note by witness: in the last Session of this Parliament, seven Bills had two days on Report stage and two Bills had three days.

before the House. We are also doing so with the House.

I know that you have had representations about a legislative standards committee. I urge caution. We have a lot of pre-legislative scrutiny mechanisms available. They can look at policy and drafting alongside one another. Separating the policy of a Bill from the drafting of a Bill is an inherently difficult and potentially dangerous thing to do. The drafting of a Bill is to deliver the policy, and the policy can change. You have to see the two together. That is what scrutiny does. A legislative standards committee, by its nature, could not conceivably do that. Therefore, if you added it in, what would you add in? You would add an additional process. We have quite a lot of processes. We have processes inside Government, and we have processes before introduction and after introduction. I really worry about the thought that we would have yet a further delay occasioned simply by what would effectively be a bureaucratic process divorced from the policy of the Bill.

Q301 Andrew Griffiths: A code of standards, if you like, has been suggested for good legislation. How would you feel about that? What would be your thoughts about implementing a code of standards within Government?

Andrew Lansley: It is the language that drives you to the tick-box approach. If you treat it as a code, you say that somebody must be the enforcers of the code, and so on. Let us be clear. I do not think there is a difficulty or dispute about what the character of these standards looks like—but, by all means, bring them forward. From my point of view, I hope that we are working to it, and if, in any respect, we were not working towards the kinds of standards to which the evidence points, I would certainly want to look at that and make sure that we treat that. I will be blunt about it: my job is to make sure that the Parliamentary Business and Legislation Committee of the Cabinet ensures that we meet those legislative standards and continuously try to improve on meeting them in the legislation that we present to Parliament.

Q302 Andrew Griffiths: Could you perhaps give us a window into Government? What guidance or advice is available for Ministers and civil servants on ensuring good legislation? What support do you get?

Andrew Lansley: Some of it is publicly available. For example, the *Guide to Making Legislation*, which I see is here, is publicly available, and it is obviously used. Adam may want to say a word about that. The secretariat works directly with departments, not only looking at individual measures that might be brought forward, but working with departments more generically about the character of legislation. Where departments construct Bill teams, whose job it is to prepare Bills and take them through, the secretariat work directly with those Bill teams.

Adam Pile: A lot of the evidence to the Committee that I have seen has criticised the fact that there are certain things not in the formal remit of the PBL committee or that are not in the *Guide to Making Legislation*. The way I see it, the *Guide* is a starting point for us with Bill teams, and the final clearance from the PBL committee to introduce a Bill is the last piece in the jigsaw before a Bill goes in. As the Leader of the House said, there is a whole lot of work that goes on within Government to do that. Some of the suggestions are that the *Guide to Making Legislation* should make it clear that legislation should be of a good standard. Of course—that is something that we take as a given. I refer to the lessons learned exercise and the better law exercise. We have a House of Commons clerk on secondment, who works with departments and Bill teams to help explain how we can work and engage with Parliament. Before Bills go in, we make sure that they are having the right conversation with the right people so, for example, that they are engaging with the devolved administrations and they are working with the law officers on drafting and constitutionality. A lot of this work goes on within Government. When Bills are being drafted, there is a real stress-testing process, with iterative drafting, going to and from Parliamentary Counsel—"Did you mean this? Did you want this? Have you thought about that?" That does go on but, as the Leader of the House said, it is almost behind closed doors.

Q303 Mrs Laing: Following on immediately from that last point—and I appreciate that this might not be a question that can be answered right now—but do you know how many people are employed as parliamentary draftsmen now, and how that compares with 10 years ago and 20 years ago?

Andrew Lansley: I think that was discussed in the evidence that you had from Richard Heaton, the First Parliamentary Counsel. From memory, it was something like 60 Parliamentary Counsel. The numbers are relatively good now. I will not try to repeat everything that he said, but he was clear that the staffing complement of the Office of the Parliamentary Counsel now was, in his view, better than it was at one point in the past and sufficient for their purposes.

Q304 Mrs Laing: That is a comforting answer. It is not right to use anecdotal evidence, but I recall being told, some five or six years ago—

Andrew Lansley: The change has not all been between the last election and now. Some of it—the increase in drafting capability and the number of Parliamentary Counsel—was before the last election but, from memory, if we went back six years or so, there would have been more difficulties.

Q305 Mrs Laing: That is a very comforting answer. I recall being told that we could not get a Bill right, and that was why there were so many amendments coming in at a late stage—because we simply did not have the people to do the drafting work. It is seriously comforting to know that the position has improved. I am not trying to make a party-political point about before or after the election.

Andrew Lansley: No—and, as I say, I think it was improved before the election as well as maintained since. Part of my job is to make sure, with my colleagues, that we do not ask more of Parliamentary Counsel than they are able to do. There is not a

limitless demand, but it is pretty near an insatiable demand for the drafting of legislation, so we exercise a degree of control over access to Parliamentary Counsel.

Q306 Mrs Laing: Going back to the more substantial issue of a legislative standards committee, you have indicated that you have seen the evidence given to this Committee by, among others, the Constitution Society and the Better Government Initiative, led by Lord Butler—Robin Butler—who has a lifetime's experience in these matters. This Committee had some sympathy with the idea of a legislative standards committee. Is your caution—I think that was the word that you used, Andrew, so I am not putting words in your mouth—about the possibility of introducing such a committee based on concern about how it would be used as far as tinkering with policy is concerned?

Andrew Lansley: My caution is based on two basic propositions. First, it must inevitably intrude additional delay. As you have gathered, when we are discussing Bills there is often a drive to achieve legislation by given timetables. We do everything we possibly can to make sure that those timetables accommodate the fullest possible scrutiny, but if you put in an additional whole section of activity or time, which, in itself, is not instrumental to the process, that would really imperil the whole process and create a degree of uncertainty about legislation.

Turning to the other proposition, the most important one, I do not understand how you scrutinise a piece of legislation without understanding the policy as well as the drafting. The idea that you can divorce legislative standards from the scrutiny of the policy seems to me to be misplaced. When I engage with my colleagues, not just on the PBL but well before—way upstream—I do it on the basis that my first job is to understand the policy. I do not try to have a discussion with them about the quality of legislation without knowing what it is that they are trying to achieve, and I do not see how a legislative standards committee could possibly embrace the expertise and give the time in order to understand the policy on this volume of legislation coming through.

Q307 Mrs Laing: In fact, contrary to that view, when Lord Butler and others gave evidence to us on this point, I recall asking them exactly that question. It immediately occurred to me that such a committee could be used for blatantly simple party-political purposes. There were some pretty good answers from Lord Butler, the Constitutional Society and others about how that obstacle could be overcome. Would it not be worth looking at the possibility of overcoming that obstacle to try to facilitate the better making of legislation? You have rightly said that pre-legislative scrutiny does not occur in every case. Sometimes there is pre-legislative scrutiny and sometimes there is not. If we really are striving to have the best possible production of legislation, should there not be a mechanism such as a legislative standards committee, which would ensure that there is always some kind of pre-legislative scrutiny?

Andrew Lansley: In short, I am not persuaded of that. The House will scrutinise legislation. We are seeking to do so through pre-legislative scrutiny. Setting up a legislative standards committee—by its nature, it would end up trying to look at every piece of legislation. I am not sure how it could possibly do so. I have not seen any explanation of how it could import the expertise or have sufficient time to be able to apply itself to the policy of a Bill in order to understand whether the drafting and other characteristics were there. It is my job to make sure that we meet those kinds of standards that you are looking for.

It feels like I am asking you to take it on trust that we try continuously to improve standards. Let me put it like this. At the moment, together with the House authorities, we are looking at how we can make explanatory notes accompany the Bill in a way that adds value to the drafting of the legislation itself, so that people understand the purposes and the structure of the Bill, what each clause is intended to achieve and so on. Alongside that, we do things like looking at the overall impact, at finances, at staffing and so on. What we could do is put in those explanatory notes an introduction—effectively, a recitation of how we have sought to meet the kind of legislative standards that I would anticipate you would see as instrumental to achieving better lawmaking. That would be a way in which we could at least put before Parliament compliance with the kind of checklist that you are thinking about.

Chair: If I can interrupt, Eleanor, I hope, Andrew, that the Committee has a reputation of working closely to try to put forward practical proposals that Government can feel comfortable with. On our track record on electoral registration, local Government and the reports that we have done, we bear in mind strongly—the psyche of this Committee is that we do not want Government to say, "Thanks, but no thanks," to the report. We want to engage so that we are doing something of practical help. I hope you will find that that is the case. If we were to go for some sort of legislative committee, it would have to meet the test that you quite rightly put forward as being practical and helpful, rather than being yet one more bit of process—I do not think anybody wants that, and you can take that on trust from the Committee.

Q308 Mrs Laing: Absolutely. In the spirit of being helpful, let me try to push you a little further along the road. I think I have got this right. You said a few moments ago that clarity of policy drives clarity of legislation. Is there not a *quid pro quo* there, where clarity of legislation could assist in achieving clarity of policy? Therefore, if the legislation was better and more easily understood and, simply, more clear—why am I looking for other words?—the policy would then be more clear, and that would be politically advantageous.

Andrew Lansley: It is very much an iteration. I remember from my own experience on Bill preparation in the past that the interaction with Parliamentary Counsel is not simply a technical one of trying to turn the instructions to counsel into a text. The nature of the interaction with Parliamentary Counsel often causes policy officials to recognise that they have not necessarily reconciled all the potential policy issues, and you need to achieve that. That is

often a substantial part of the process of preparation of a Bill.

What I was saying about explanatory notes is also helpful. We have all sometimes been frustrated in the past, thinking, "I don't understand what this clause is intended to do." We look up the explanatory notes and find that they tell you nothing more than you can read in the clause itself.

Mrs Laing: Absolutely.

Andrew Lansley: That is not what we are trying to do. We are quite clear: explanatory notes should be factual, and courts should be able to look at them as part of the process, so they should not be argumentative and they should not be extraneous. They have got to be very focused on making absolutely clear what the Bill does. My colleagues in the Office of the Parliamentary Counsel are working with the House authorities to see what we can do where that is concerned. That will also be a process. Explanatory notes are the responsibility of Parliamentary Counsel, making sure those are right alongside the Bill itself—it is what we call the Bill product. They have a responsibility for that, and that will help us to be clear, at introduction, that the policy is equally clear as the drafting.

Mrs Laing: That is very encouraging, thank you, and I understand the point that you—

Andrew Lansley: Sorry—I should have mentioned something in an earlier point. We started yesterday—the Office of the Parliamentary Counsel started publishing some of their internal guidance material. They published three of these. In the process of enabling people to understand the way in which departments work and the guidance that is given to them in thinking about legislation—what the Bill team have to understand—there is a lot of existing material that Parliamentary Counsel have that Bill teams and departments have access to. We have now started a process of publishing those. The ones that we have published—I remember reading them. We started with the guidance relating to carry-over Bills, the guidance relating to the application of legislation to the Crown, and the guidance relating to the Queen's and the Prince of Wales's consent. We published those yesterday.

Mrs Laing: Ah, yes—the Speaker referred to that yesterday.

Andrew Lansley: There will be more in the weeks and months ahead.

Q309 Mrs Laing: That is very helpful. I understand the points you make, having seen the emergence of Bills from just about every angle over many years. You start off thinking that it is merely a question of translating an idea or practical intention into legislative language, but then discover that it is actually more difficult.

Andrew Lansley: What people do not always fully appreciate is that, as a policy official—and I have been a policy official—you must be very clear about what you want to achieve, and you can think that you know the legislative framework within which it happens but, until you have done the job of Parliamentary Counsel, you do not really understand the legislative framework within which you are working. That business of knowing the whole statute book—from our point of view, we want to make that statute book as uncomplicated as we can get it, which is why the Ministry of Justice lead on the Statute Law (Repeals) Bill and we have quite a substantial Bill going through this Session. That is why we are continuously looking at deregulatory measures, a principal part of which is clearing away all the things that are getting in the way of that.

It is still true—Parliamentary Counsel do an absolutely fantastic job, and I do not envy them how difficult it is to make sure that, when they draft legislation, they do so knowing how it interacts with every existing piece of legislation on the statute book.

Mrs Laing: Which is extremely difficult. I remember discovering that as a first-year law student—which was a long time ago.

Chair: Let us not go there.

Q310 Mrs Laing: No—we are not going there.

Can I have one final shot at seeing if there is a chance that you might consider the idea of a legislative standards committee, or some form of legislative standards committee, as part of what is clearly a drive by you and your colleagues to improve the making of legislation? This Committee has to be fair. We are not just here to criticise and ask awkward questions; we are trying to be constructive. We appreciate that things have improved considerably, and what you talked about in your last answer is terribly important, but will you give it some thought?

Andrew Lansley: Of course I am looking forward to your report, which will no doubt give us a real opportunity to consider all the issues and what you recommend. Referring to the point that you made, Chair, if you are going about it, there are many questions that would need to be satisfactorily answered before you began. Perhaps take this away and think—let us take one or two pieces of legislation that have come through the House recently and ask, at what point would the legislative standards committee have looked at it: at introduction or after introduction? How much time would they have taken? How would that have interacted with the scrutiny that took place? Would it not have been duplicatory? Would it not have added delay? Where would the time have come from? Who would have sat on the Committee looking at it? How would the Members have interacted with the Bill? Who would have been their advisers, and how would that have worked? Probably, the more you looked at it, the more you would have ended up saying that, in order to do that job properly, you would have imported into the legislative standards committee exactly the kind of people, expertise and time that is the stuff of pre-legislative scrutiny now anyway.

Chair: I think this is an extremely valuable exchange. Frankly, it is better to have heard that from the Leader of the House now, rather than in a couple of months' time, in response to our report. Colleagues who feel strongly about this matter will need to ensure that whatever we do passes the tests that the Leader of the House has helpfully put on the record today. If they do not, those things will not be in the report.

Q311 Fabian Hamilton: Andrew, do you agree that the Government should publish the reasons why a Bill is not to be published in draft?
Andrew Lansley: Pursuant to the point that I made previously about explanatory notes—and I am volunteering this as a further step that we can take—at the point of introduction, one of the things that we could sensibly do within the explanatory notes is look at the kind of legislative standards that we are talking about and demonstrate how they have been met. For Bills, that will include how they have been scrutinised, by what processes and why. If there is a reason why they have been subject to consultation but do not require formal pre-legislative scrutiny, that will be the kind of point that would be made in those explanatory notes. On one or two occasions, I have encouraged a written ministerial statement to be made at the point of introduction. For example, that was done—I thought rather helpfully—with the HGV Road User Levy Bill in order to explain to the House the processes that the Bill would follow. We will look carefully at whether, from time to time, the House should have that kind of formal statement that accompanies a Bill's introduction.

Q312 Andrew Griffiths: There has been lots of discussion about constitutional Bills, and what is and is not a constitutional Bill. Could you explain to us what procedures there are in Government to identify what is a constitutional Bill?
Adam Pile: It is difficult to say exactly what a constitutional Bill is. There is no one set idea. I notice that some of the evidence has suggested that there should be special procedures for constitutional Bills. To a certain extent, that already happens. They are generally taken on the floor of the House in a Committee of the whole House in the House of Commons.

Q313 Andrew Griffiths: Sorry—you are saying that that is what happens when something is a constitutional Bill—but how do you identify what is a constitutional Bill? Surely there has to be something—if it looks like a duck and quacks like a duck—
Andrew Lansley: If it directly impacts on the relationship, for example, between the Crown and Parliament, and if it relates directly to things like the relationship between ourselves and the devolved Administrations, it tends to form a constitutional Bill.
Adam Pile: There is the capacity within Government to deal with constitutional issues in the form of Parliamentary Counsel, with their great expertise in dealing with constitutional legislation. There are the law officers and the territorial offices who provide advice on the devolution settlements.

Q314 Andrew Griffiths: But there is no guidance that says, "This is what constitutes a constitutional Bill."
Adam Pile: To a certain extent, you do not treat constitutional legislation differently; you stress-test all legislation and put it through the wringer. It may be looked at by different people within Government if it has a constitutional flavour.
Chair: I do not know if it is just me, but I can smell burning.
Andrew Griffiths: That is my brain, Mr Chairman.
Chair: If we were all to burst into flames, it would be very appropriate that Mrs Laing asks the final question ever at the Political and Constitutional Reform Committee.
Mrs Laing: Before we spontaneously combust? Something like that; it was not going to be that bad.
Andrew Lansley: Speaking as a member of the House of Commons Commission, I hope it isn't.
Chair: We need a new building. Anyway—go ahead, Eleanor.

Q315 Mrs Laing: There is a distinction now, however, between constitutional Bills and other Bills, because all stages of constitutional Bills are taken on the floor of the House. That happens, and has happened for a very long time, so there must be—
Andrew Lansley: Because a judgment is reached. It is on the face of it—

Q316 Mrs Laing: Yes, and we have sometimes had arguments in Parliament about whether something is or is not a constitutional Bill. Given that it is possible to make a distinction between a constitutional Bill and a non-constitutional Bill—because it happens—is there a case for treating constitutional measures differently, for example requiring more than a simple majority vote to pass a constitutional Bill?
Andrew Lansley: I had not considered that. I am sure, from the point of view of Government, that we have no plans to think in those terms. It seems to me, on the face of it, that that would be looking for something that sought to prejudice the future ability of a Parliament to make a decision. There may be a majority in a future Parliament. One of the principles that we work to is that a Parliament shall not bind its successors. To that extent, you would be seeking significantly to extend the reach of any given Parliament on constitutional measures into future Parliaments. Personally, I am not advocating that.
Mrs Laing: I take that point.
Chair: On that stratospheric note, I would like to bring proceedings to a conclusion. Above all, I thank Andrew Lansley and Adam Pile for giving us their time this morning. We hear loud and clear the message, which I think we practise already, but we will be renewed in our vigour in making sure that the stuff that we produce is something that Government Bills at least can work with if not wholly accept, so that we can make progress on making sure that this House and the other House pass ever better legislation.
Thank you, colleagues.
Andrew Lansley: Chair, thank you very much. Thank you, colleagues.

Written evidence

Supplementary written evidence submitted by Daniel Greenberg, Berwin Leighton Paisner LLP

1. There were two questions outstanding from my oral evidence to the Committee on 10 May.

2. In Question 4 I was asked whether other legislatures have "a better way of doing things than we do".

   2.1 I have considered this at some length since the evidence session and discussed it with others, as a result of which I have concluded that there is no other legislature that I would wish to present as a paradigm. It is of course true that there are many from which individual lessons could be learned, but a survey of those would require an analysis of a breadth and depth which are probably beyond the scope of the Committee's present exercise.

   2.2 I would, however, invite the Committee's attention to certain aspects of the way in which legislation is handled at the equivalent of the committee stage in the devolved legislatures within the United Kingdom. Although each of the devolved legislatures has its own distinct procedures, a strong characteristic shared by all is a willingness to engage directly during the committee consideration both with outside experts and with departmental officials.

   2.3 Oral briefings during formal committee sessions with opportunities for direct exchanges, are much better designed to elicit accurate and helpful answers than where the conversation has to be carried out by rapid scribbling of notes while the questioner is speaking, for the minister to read out.

   2.4 Both politicians and officials frequently become exasperated at what can sometimes descend into farce, as an official scrambles to write down what he or she hopes the minister can turn into a reasonable answer to the question that the opposition Member is probably asking! Whatever Parliamentary propriety may once have been thought to be served by this has hopefully become outdated.

   2.5 The result of the present situation is not without potential importance. In particular, ministerial answers in committee may be considered by the courts in accordance with the rule in *Pepper v Halt.* But, as I say in *Laying Down the Law* (Sweet & Maxwell, 2011, pp.6263), "the courts should at least permit themselves to remember that 'the Minister said' may mean anything from (a) a considered statement by an expert civil servant who really knew what they were writing about, to (b) a hopeless guess made up by the Minister on the hoof because the questioner sat down before the note from the Officials' Box could reach him or her, or (c) a statement misread by way of frantic garble from a crushed handful of last minute scribble".

   2.6 The devolved legislatures also benefit greatly from their greater involvement in the committee process of standing departmental committees, who therefore approach the subject-matter of the bill with a pre-existing interest and (to some extent) expertise.

3. In Question 23 you asked me to suggest stages in the ideal process of scrutinising legislation.

   3.1 Again, this is something on which I could easily write at greater length than you would thank me for. For the present, I confine myself to a few key comments, on which I would be very happy to expand if you wanted.

   3.2 The first point is, as I said in my oral evidence, that the whole process should be considered as beginning much earlier than at present. I attach an illustrative chart of some possible components of the overall legislative consideration process, in which I demonstrate that it should be seen as beginning with the earliest moments of policy birth and development. Pre-legislative scrutiny nowadays, when it happens at all, concentrates on a draft bill, by which time the legislative solution is necessarily far advanced. In order to exert effective control Parliament needs to be able to influence the process long before a particular legislative solution has been determined.

   3.3 Apart from the reach of the process, it needs to be understood that however the stages of consideration of legislation are divided, they cannot do their job effectively unless there is consistent application of them to all provisions of the legislation. One frequently hears the Westminster system praised for including "line by line" scrutiny of the bill in each House; as we discussed at my oral evidence session, however, politicians know well that the reality falls far short of this. Even without guillotine motions and their routine equivalents, programme motions, that seem to have become accepted on all sides, committees in either House rarely have the appetite for a genuinely line-by-line, or even clause-by-clause, scrutiny of the entire bill, at least in the case of a bill of any length or complexity. The result, as I mentioned in the case of the new offence of residential squatting, is that scrutiny that is assumed to have been given, has not really been given at all.

   3.4 This of course links back to my earlier observations on the committee stages in the devolved legislatures. With some exceptions, the committee stages have a less party political feel than is the norm for the Westminster process, with the result that there is less pressure to stick to points of political contention, and both the will and the ability to give as much scrutiny to a bill as it

needs; and the presence of experts and officials allows for a more accurate and helpful exposition of details of the bill to form part of the record of its enactment.

4. I hope these observations and the accompanying chart go some way towards expanding my earlier oral evidence. As I say above, if further expansion would be helpful please let me know.

August 2012

PASSAGE OF LEGISLATION

IDEAL PROCESS

	PRIMARY	SECONDARY
Policy Confirmation	Announcement - Press release/Green Paper ↓ Expert advice ↓ Departmental Select Committee Inquiry ↓ White Paper	
Consultation	Publication ↓ "Open-day" sessions ↓ Responses collated ↓ Government reaction published	Necessary powers identified
Pre-Legislative Scrutiny	Draft Bill to Joint Committee ↓ Expert evidence - written ↓ Expert evidence - oral ↓ Joint Committee Report	Early draft orders/regulations
Passage	Introduction ↓ Committee	Final draft orders/regulations
Post-legislative Scrutiny	Commencement reports - every 3 months ↓ Effectiveness Inquiry - Dept/Select Committee - every year	SI report - every 3 months

Supplementary written evidence submitted by Richard Heaton CB, Permanent Secretary and First Parliamentary Counsel, Cabinet Office

1. Thank you for your letter of 10 July.

2. David Cook and I were pleased to be given the opportunity to discuss with the Committee a range of issues relating to the quality of legislation. Your letter helpfully collates the areas where we said we would provide further information and a number of questions that have arisen in the light of evidence provided by subsequent witnesses.

(i) *Q48, 49, 50—Paul Flynn MP suggested to you that a particularly incomprehensible piece of legislation was the Regulatory Reform Act 2001. In your answer, you suggested that the nature of the Bill and the broad powers it created meant that the powers in the Bill had to be "hedged around", and in addition that by the nature of the subject-matter, complexity is reflected in a draft.*

— *Would you like to add anything further to your comments?*

3. I would like to add a little more. In this case, the main provision of the Regulatory Reform Act 2001 was to remove some of the barriers to wider application of the deregulation order-making power under sections 1–4 of the Deregulation and Contracting Act 1994. The new order-making power was intended to be wide enough, but no wider than necessary, to deal with regulatory reform measures which the then Government wished to achieve. In parallel with the widening of the power, the Act therefore added to the tests and safeguards governing its use. It can be difficult in policy (and thus legislative) terms to get the balance right, as Parliamentary scrutiny of the Bill (and also of the Legislative and Regulatory Reform Bill in 2006) was to show.

4. It is worth noting that the impetus for the Legislative and Regulatory Reform Bill came from a number of sources. These included a review of the first four years of the operation of the 2001 Act, published by the Cabinet Office in July 2005; the findings of the Better Regulation Task Force in its report *Less is More: Reducing Burdens, Improving Outcomes* published in March 2005; the review entitled *Reducing administrative burdens: effective inspection and enforcement* led by Philip Hampton which reported in March 2005; and the wish to establish statutory principles of good regulation based on the Better Regulation Commission's Principles of Good Regulation (the Commission had replaced the Better Regulation Task Force in January 2006).

5. I have taken the opportunity to look at the review of the 2001 Act. Among the findings were the following:

— "The RRA lacks a clear, overarching purpose. The current objects of the RRO power are essentially technical. The RRA provides powers for the purposes of removing, reducing, re-enacting or imposing burdens and for the removal of inconsistencies and anomalies. This skews the preparation and scrutiny of proposals towards the identification and analysis of specific legal restrictions than to the overall benefits of the reform.

— The concept of burdens, which is central to the Act, is complex and burdensome to apply; it also limits the scope of reforms which can be delivered by RRO.

— Specific restrictions on the current powers also complicate the preparation of RROs and limit the scope of proposals...

— Whilst the safeguards are broadly *effective*, the way in which their application differs depending upon whether a burden is removed, re-enacted or imposed is overly complex.

— There is agreement that the RRO process is not suitable for highly controversial reforms, but the uncertain scope of the test of appropriateness and the fact that options for amendment are not as flexible as those for a Bill ... have led departments to think of RROs as inflexibly and potentially risky."

6. Better regulation was a developing area of government policy during the early 2000s. It is clear that the 2001 Act was not delivering what had been hoped of it, but I would not say that the Act was a particularly incomprehensible piece of legislation in terms of its drafting. The Legislative and Regulatory Reform Bill was introduced to address the issues discussed in the Cabinet Office review of the 2001 Act and to give a legislative basis for the implementation of recommendations in the other independent reports that the Government had commissioned.

(ii) Q63—*The Chair asked whether there were advantages to the creation of parliamentary counsel for Parliament as opposed to the current Parliamentary Counsel as part of the Government. In your answer you mentioned that you thought that this was the system adopted in South Africa.*

— *Do you consider that the provision of exclusive parliamentary drafting capability would assist Parliament in its scrutiny of government designed bills and/or the creation of Private Members Bills?*

7. I wasn't quite right in my recollection that South Africa currently has parliamentary counsel rather than government counsel; they have both, but the balance lies with government counsel. The State Law Adviser's Office, which is part of the Department of Justice, drafts all government sponsored legislation, and in that respect its role is akin to that of the Office of Parliamentary Counsel here. The Legal Services Office, which

is part of Parliament, is responsible for advising the committees in each chamber that consider government bills. Their role includes drafting amendments and more substantial redrafts if the parliamentary committee requires that. In both instances they will work with the States Law Adviser's Office to make sure they get the drafting right. Under the constitution, parliamentary committees have the right to initiate legislation themselves. I understand that this does not happen much currently, but if Parliament were to decide to make more use of its powers, then potentially there would be a larger role for the Legal Services Office as it took on the role of drafting Parliamentary legislation. It is likely that the State Law Adviser's Office would retain the major role in drafting legislation, but comparatively the Legal Services Office would have a bigger role than it has now.

8. The United States does have parliamentary counsel (though of course they don't use that term). Each House has its own drafting office, with the drafters providing services for any member who asks for them. One of my office who spent an eight months secondment to the drafting office in the Senate in 2009–10 has described the position as follows: sometimes Counsel act on instructions to draft, on other occasions they are asked to comment on drafts prepared by the member or by one of his or her team, often on the day that the bill or amendment is going to be introduced. Counsel can provide drafting support for several members (who may be of different political persuasions) on the same bill and at the same time, and can find themselves working on contradictory amendments, which they do under an umbrella of confidentiality. They attend committee meetings and often offer drafting advice to the member on the spot. The volume of work is high and the quality can vary according to the time they are given to produce a piece of work or the purpose of the bill—as I mentioned to the committee, legislation is often designed to achieve a short-term, rhetorical effect rather than having any real prospect of changing the law, and the drafting reflects that.

9. This reflects the constitutional position: the Executive does not control the work of Congress and any member can introduce legislation. Whether a particular piece of legislation is taken up and makes any progress will depend in large part on the chair of the relevant committee. The Executive has to persuade a member to introduce its legislation—using its own drafting expertise to prepare drafts—and the same considerations will apply. The position in the UK is of course very different; most legislation that is passed is introduced by government ministers and for that reason Parliamentary Counsel work for and are responsible to the Government. We are like any other civil servants in that respect, though I would say that the Government takes its responsibility for the quality of legislation to parliamentarians seriously because it is they who are ultimately responsible for passing the words we draft.

10. Whether Parliament chooses to appoint its own drafting resource is of course a matter for Parliament—though I would be happy to discuss how you might make that happen were a decision to be made to pursue the idea. Here are some thoughts of my own on the pros and cons:

(a) You would need to consider value for money quite carefully. Drafting resource is quite expensive, and (as I explain above) amendments and bills are prepared to a high level by this office already before they reach the statute book, there is a risk that the extra resource would be spent on drafting to a professional standard things which are not destined to become law. There is indeed an advantage in non-government amendments being drafted in non-technical and readily understandable terms, in that their purpose should be more readily accessible to Members of the House; and there is no barrier to any Member tabling an amendment. If the House accepts an amendment (or Private Member's Bill), the Government then instructs counsel to ensure that the amendment is effective. Current practice might thus be more proportionate than requiring every amendment tabled to be technically perfect. For my part, I try to discourage officials from briefing ministers to criticise amendments as badly drafted or technically defective.

(b) You would need to manage expectations of what a professional drafting office would deliver. Drafters cannot by themselves guarantee a high standard of amendments or bills: policy and legal analysis is also needed.

(c) On the other hand, a system of exchanges between my office and a parliamentary drafting office would certainly improve our understanding of the pressures and demands on parliamentarians (and vice versa). It might in time lead to a greater sense of ownership by Parliament of the legislative process.

11. Whatever the outcome, I do think that there is much to be gained on both sides from closer working between Parliamentary Counsel and Parliament. We have provided seminars to the House of Commons Public Bill Office in relation to Private Members' Bills to share some of our expertise, and would be happy to do so again and, indeed, to provide something similar for the House of Lords. The suggestion was made at the committee hearing that we might provide briefing sessions on the drafting process for new Members at the start of a Parliament, and we should be pleased to do that. Or, I should add, mid-way through a Parliament.

(iii) *The Office of the Parliamentary Counsel in New Zealand produced a report in 2011 titled "Review of methods for measuring the quality of legislation" (freely available online). The Report states that New Zealand and Australia have carried out comparative studies in order to improve the quality of legislation and procedures and practices within their Office of the Parliamentary Counsel:*

— *What contact does the Office of the Parliamentary Counsel UK have with its common law counterparts?*

— *Has the Office of the Parliamentary Counsel introduced or considered introducing the following measures which are used in Australia and New Zealand? If not, why not:*

(i) *Keeping a record of amendments and errors.*

(ii) *Producing an annual Statutes Law Revision Bill.*

(iii) *Producing an Annual Report.*

(iv) *Client surveys.*

12. We keep in contact with our common law counterparts in several ways. We are members of the Commonwealth Association of Legislative Counsel whose object is to promote cooperation in matters of professional interest among people in the Commonwealth engaged in legislative drafting or in training people in legislative drafting. CALC was established at the Commonwealth Law Conference in 1983 and now has members in most parts of the Commonwealth. It became an accredited organisation to the Commonwealth in 2011. It holds a conference every two years, to which we normally send 2 or 3 Counsel, publishes an occasional journal and a newsletter, and has recently introduced an online forum, to enable member to member communication and discussion. Its website is hosted by the Australian Office of Parliamentary Counsel.

13. We also have bi-lateral relationships with a number of countries, particularly Australia and New Zealand. In recent years we have seconded a member of staff to the Parliamentary Counsel Office in both countries for about a year and taken a member of their staff in return. It is also worth noting that the Chief Parliamentary Counsel in New Zealand between 2007 and 2011 was a British lawyer on secondment from the Treasury Solicitor's Office.

14. As well as maintaining good relationships within the Commonwealth, we are keen to establish links with other legislating authorities. As well as the secondment to the United States Senate mentioned above (Q63), we seconded a member of staff to the Legal Revisers Office in the European Commission for two months in 2009. And we attend international conferences. For example, a member of the Office recently presented a paper at a conference on improving the comprehensibility of legislation organised by the German Ministry of Justice.

15. In answer to the specific questions:

Keeping a Record of Amendments and Errors

16. Parliament keeps and publishes a record of the amendments tabled on a particular bill, and I see no reason to duplicate that work. I should say, though, that the number of amendments is not necessarily a reflection of how good the bill was in drafting terms at its introduction. For example, the decision to change the description "commissioning consortium" to "clinical commissioning group" in the Health and Social Care Bill required some 700 amendments. On keeping a record of errors, bills in the UK are subject to a number of procedures which, as our colleagues in New Zealand recognise, are not present there: the lessons learnt exercise and post-legislative scrutiny. We also provide an after-care service to departments through which we would become aware of any problems that have emerged. We take note of any court cases that raise points about a bill. As legislation is re-written over time, we also learn about the things that work, or do not work. We do not keep a register of errors as such.

17. Underlying the discussion in the review was the thought that keeping and publishing a record of the number of legislative amendments required to fix drafting errors, as the Office of Parliamentary Counsel in Canberra does, might be a measure of drafting quality. The review team did not recommend this for New Zealand and, similarly, did not think that court judgements which identified drafting errors were necessarily a reliable measure of drafting quality. Among the reasons given were: the error might be a "latent defect" which had existed for years but had only recently come to light; it can be difficult to attribute a particular defect described as a "drafting error" to drafting, to government policy or to some error or omission on the part of the department; and the identification of an error says nothing about its importance—it might be trivial or significant. Also in the case of the courts, judges may differ as to whether a particular situation actually involves an error—some might resolve the case by means of interpretation. The review team concluded that court judgements and remedial legislation did not provide reliable measures of quality. On balance I agree.

Producing an Annual Statutes Law Revision Bill

18. A recommendation of the New Zealand review was that they should follow the Australian practice whereby the Parliamentary Counsel Office would sponsor a Statute Law Revision Bill at least once a year as a means of directly improving the quality of the statute book by eliminating identified errors on an "as-you-go" basis. In the UK we tend to make corrections (or more usually to give effect to policy refinements) when the topic is next the subject of legislation—which, as you know, can be soon.

19. More broadly, a Statute Law Repeals Bill is introduced every two or three years to "promote the reform of the statute law by the repeal, in accordance with recommendations of the Law Commission and the Scottish Law Commission, of certain enactments which (except in so far as their effect is preserved) are no longer of practical utility" (Draft Statute Law (Repeals) Bill, April 2012).

20. The Law Commission also runs a consolidation programme, which gives access to a streamlined parliamentary procedure. Historically it has proved more difficult to take forward changes that need to be made that are greater than a consolidation exercise but less than a significant political change which would be the subject of a programme bill (although some minor political changes were made as part of the Tax Law Rewrite exercise).

Producing an Annual Report

21. We have not historically produced an annual report. But we are part of the Cabinet Office—and since we last spoke, I have become Permanent Secretary for the Cabinet Office as well as First Parliamentary Counsel. I should like to explore the structure of the Cabinet Office's annual report and see if there is scope for expanding our contribution to it. I would certainly like to publish more material about what we do, and about the approach we take to law-making.

Client Surveys

22. We ran our first customer survey in 2008. The survey has evolved: the first was directed at members of the bill teams in departments and our own staff; more recent ones have focussed on the views of the heads of legal teams in departments. The survey had become a bit cumbersome, and we are currently considering its role and scope, including the feasibility of seeking views of other partners as well as instructing departments.

23. I am also interested in more dynamic, real-time feedback. As I said at the evidence session, we have recently moved to a team based approach under which a team leader will work with the same departments for a number of years. As well as providing continuity and a degree of subject expertise, one of the other advantages of this approach is that the team leaders will develop very close relationships with their departments. This means that we should be getting the feedback one would normally receive in an annual client survey on a continuous basis. I also this year asked for client feedback for each of the senior two grades of counsel, as part of the annual performance management process.

24. I would of course be pleased to discuss any of these issues further with the Committee.

September 2012

Supplementary written evidence submitted by Rt Hon Mr Andrew Lansley CBE, MP, Leader of the House of Commons

1. Secondments (Q274)

You asked if Parliament should have a legal capability, and about the relationship between the Office of the Parliamentary Counsel (OPC) and Parliament.

Parliament already has a legal capacity and expertise in the technicalities of legislation, provided by the House Authorities. In addition some Committees appoint their own specialist legal advisers when necessary and this is notwithstanding the expertise that Parliamentarians of both Houses can contribute.

Secondments take place at Official level between the House Authorities and Departments, including the Cabinet Office. The Offices of the Leaders of both the House of Commons and the House of Lords are supported by Clerks on such secondments.

Parliamentary Counsel are regularly seconded to the Law Commission to assist in the drafting of Law Commission Bills, and have taken part in exchanges with other drafting offices in the UK and Commonwealth.

There are close working relationships between Parliamentary Counsel and the Clerks in the Public Bill Offices and in his evidence, Richard Heaton referenced this and also, the potential for a system of exchanges between OPC and Parliament, though no such exchanges have yet taken place.

2. OPC Staffing Levels (Q303-Q305)

You asked about how many Parliamentary Counsel are employed now and how that compares to 10 or 20 years ago.

In his evidence, the First Parliamentary Counsel, Richard Heaton, explained that understaffing had been a criticism as far back as Renton in the 1970s, but the office had increased in strength. Although, in terms of full-time equivalents the Office had come down from something like 60 to the low 50s, that is much higher than it was 20 years ago. He did not think there was a bottleneck at Parliamentary Counsel in terms of drafting resource.

I would like to supplement my answer with the following information. In 2012, the number of Parliamentary Counsel in full time equivalent form was 51, in 2002 it was 44 and in 1992 it was 30. You also asked how this compares to more recent years. The number of Parliamentary Counsel peaked in 2005 and 2007, and has fallen slightly since, although the staffing complement remains substantially higher now than it was either 10

or 20 years ago. I am advised by OPC that current staffing levels remain sufficient to meet the demands placed on them.

3. Legal Advice (Q275)

I said in my evidence that I do not see the OPC as in any sense being something that we reserve for Ministers...it is not privy advice to Ministers. As I explained, I do hope that the Government and Parliament can work in partnership in the exercise of making legislation. Of course, Parliamentary Counsel are Civil Servants and, as such, are answerable to Ministers and provide them with legally privileged advice on specific legislation on the basis of a lawyer-client relationship. But they do also have a close and productive working relationship with the Public Bill Office in each House and are keen to share more widely their understanding of the legislative process and what makes good law. It is this wider role that I do not see as being reserved for Ministers.

4. Explanatory Notes (Q308)

In my evidence I referred to Explanatory Notes as the responsibility of Parliamentary Counsel. Explanatory Notes are produced by Departments, although Parliamentary Counsel are also involved in the process and have the overall co-ordinating role in terms of guidance and suggestions for improvement for explanatory notes generally.

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