Inquiry into framework legislation and Henry VIII powers

Note of Committee fact-finding visit to London, Friday 6 December 2024

Meeting with Members of the House of Lords Delegated Powers and Regulatory Reform Committee

1. The Committee met with Lord McLoughlin, chair of DPRRC, Lord Carlile of Berriew, Baroness Finlay of Llandaff and Lord Goodman of Wycombe.

2. The discussions initially focused on framework legislation, which the DPRRC felt strongly should be referred to as skeleton legislation.

3. It was noted that terminology such as “framework” could more easily have positive connotations, which DPRRC Members felt it did not merit. As such, “skeleton” was the preferred term.

4. It was suggested that, by and large, opposition parties / Members are against use of skeleton legislation, and government favoured it – whichever political party was in charge, and these changes of heart were akin to Damascene conversions following a change in position between government and opposition.

5. Ideas mooted for why governments may favour use of skeleton legislation included: a pressure for legislative ‘slots’ in Parliament meaning it was attractive to civil servants and governments to either give themselves a power to “fill in” policy details not yet concluded at a later point, and to make quicker changes in the future (without needing further primary legislation).

6. It was also stated that the DPRRC members believed there had been a “considerable increase” over the last 40 years in the number of bills its members thought has skeletal aspects. Yet DPRRC felt that allowing Ministers to have options for events which are not foreseen is not always best for democracy.

7. The Committee also suggested that there were some “reasonable” examples of skeleton provisions, and it could see justifiable contexts in areas of fast moving technological change (including online safety). However, it was also pointed out that Parliament can adapt, move fast, and legislate quickly if there is a pressing need – including recalls. It also was able to “deal with” coronavirus changes, and so skeleton legislation is not always appropriate.

8. In terms of subordinate legislation, the DPRRC Members felt very reliant on stakeholder organisations being equipped to spot and raise issues of concern with the legislature, and there is a chance something could ‘slip through’ unnoticed. This was considered neither reliable or a good way to legislate. And inventing processes to (e.g.) amend subordinate legislation would be very difficult, and need to have safeguards built in to any system to avoid mischief making.

9. The Lords felt that having provisions on the face of Bills is ultimately safer. The example was given of the Tobacco Advertising and Promotion Act 2002. This legislation did not foresee vapes – an example of society changing and technology moving quickly. While secondary legislation may have been faster and the policy preference of some groups to 'tackle' the growing prevalence of vaping, had it been available, it was accepted it is "safer" for the country and democracy to use primary legislation to debate and regulate vapes.

10. Finally, there was some concerns raised about other "quasi legislation" – including disguised legislation and tertiary legislation – which can take the form of codes of practice or guidance, and which can make it harder to effectively scrutinise the law.

Meeting with Lord Lisvane, former clerk to the House of Commons

11. Lord Lisvane reminded the Committee of the principle of good law: that it should be necessary, effective, clear, coherent and accessible.

12. He argued that by their very nature, framework provisions are not accessible, as it cannot be foreseen how the law will end up. This is left in the hands of Ministers who, it was put, are regularly given powers that are incredibly wide.

13. Lord Lisvane also believed that there has been a "steady upward trend" in the number of framework bills over the last 20 years.

14. Of the c. 169,000 SIs considered by both Houses since the Second World War, just 16 have been rejected.

15. Lord Lisvane echoed previous points about the difference between opposition and government – the views in relation to framework legislation of an opposition do not normally survive the transition into Government.

16. Lord Lisvane also suggested that framework legislation may be attractive to governments because of the pressure to be seen to legislate – particularly in the immediate aftermath of an election with a manifesto to implement.

17. If we do have to 'live with' framework bills, the government must explain how it wants to use a power at the time a Bill is introduced – as the legislature cannot scrutinise something that isn't there.

18. It is imperative to remember that bills are to change the law to the extent (and precise extent only) stated – they are not a vehicle to send a message. This downgrades the nature of legislation and creates bad law.

19. It was put that being overly reliant on seeking solutions for democratic / scrutiny issues resulting from framework legislation, such as trying to create processes which, in some cases, might allow secondary legislation to be amended is akin to thinking of better ways to mop the floor rather than seeking to turn off the tap.

20. Similarly, having demanding procedures, such as that associated with Deregulation orders, may mean that processes are rarely used.

21. The Civil Contingencies Act 2004 was discussed as a reasonable piece of framework legislation.

22. Finally, the Committee should also consider "sunsetting" powers in relation to delegated powers, as well as seeking to keep the scope as narrow as possible. In particular, Henry VIII powers, and delegated powers that are not used (these could even be thought of as "unexploded ordnance", waiting to be used by a future government) could be subject to sunset clauses.

Meeting with Andrew Scott, Second Parliamentary Counsel, and Diggory Bailey, Legislative Drafter, Office of the Parliamentary Counsel

23. OPC noted that whether a delegated power is appropriate in any given case involves the making of a complex value judgment. It requires a proper understanding of the context (including the state of the law before the proposed change), why the power is being taken and any safeguards in relation to its exercise, the extent of oversight by Parliament and a range of other matters. In the light of that, seeking to define what is meant by framework legislation might tend to distract from the key consideration, namely whether a power is appropriate in the particular case concerned.

24. OPC noted that, in areas which previously didn't have a legal framework, it could be said that, even if Parliament chose to regulate those areas partly by the taking of powers, the net result would be that Parliament would end up having a greater say in relation to those areas than it had before. This was also the case in relation to some legislation for areas that were previously EU responsibilities following the UK's departure from the EU. A comparison could be made between post-Brexit laws (containing a mix of primary and secondary legislation) and the direct effect of EU legislation in UK law as a result of section 2 of the European Communities Act 1972 and the wide power conferred by that section 2 to give effect to EU obligations.

25. OPC explained their processes when working with departments to draft a law. They interrogate instructions and work closely with departmental officials and Ministers but it is Ministers who determine the policy.

26. In response to questions about increasing the role of Parliament in scrutinising subordinate legislation, OPC suggested there may be practical and political challenges to some of the proposed changes.

27. OPC noted that it was not unusual for the (UK) government to seek the greater certainty that comes with primary legislation rather than regulations. Subordinate legislation can be challenged in court whereas (with few exceptions) primary legislation cannot.

28. There were also discussions of how there are cases where Henry VIII powers can be used to keep the law more accessible – so that an end user can find all the law in one place, rather than having to find (for example) some of the story in an Act, with further details in separate regulations (for example a list of acceptable ID documents contained in an Act, with a power to change the list via secondary legislation).

29. OPC also had some observations in relation to consultation on legislative proposals. In essence, the consultation has to fit the circumstances. A consultation can be quite focused and detailed (for example, where stakeholders are commenting on a new regulatory regime applicable to them) but consultation on a bill can sometimes be less an exercise in considering its detailed provisions and more an opportunity to consider the policy to which the bill gives effect.