OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 7 January 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 7 January 2025

CONTENTS

DELEGATED POWERS AND LAW REFORM COMMITTEE

1st Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Diggory Bailey (Office of the Parliamentary Counsel)
Jessica de Mounteney (Office of the Parliamentary Counsel)
Dr Ruth Fox (Hansard Society)
Dr Dexter Govan (Constitution Society)
Dr Pablo Grez Hidalgo (University of Strathclyde)
Professor Colin T Reid (University of Dundee)
Dr Andrew Tickell (Glasgow Caledonian University)
Professor Richard Whitaker (University of Leicester)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

Committee Room 5

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 7 January 2025

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the first meeting in 2025 of the Delegated Powers and Law Reform Committee. I wish everyone a happy new year and all the best for 2025.

I remind everyone to switch off or turn to silent their mobile phones and other electronic devices.

The first item of business is a decision on taking items 6, 7 and 8 in private. Does the committee agree to take the items in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

09:31

The Convener: Under agenda item 2, we are considering three instruments, on which no points have been raised.

Moveable Transactions (Scotland) Act 2023 Amendment Regulations 2025 [Draft]

Registers of Scotland (Fees and Plain Copies) Miscellaneous Amendments Order 2025 [Draft]

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2025 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: In relation to the draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2025, does the committee wish to welcome the fact that the instrument fulfils a commitment by the Scottish Government to correct an error in the International Organisations (Immunities and Privileges) (Scotland) Order 2009 that arose from a drafting error in the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2024?

Members *indicated agreement.*

Instruments subject to Negative Procedure

09:32

The Convener: Under agenda item 3, we are considering six instruments, on which no points have been raised.

Financial Assistance for Environmental Purposes (Variation) (Scotland) Order 2024 (SSI 2024/371)

Local Government Pension Scheme (Remediable Service) (Scotland) (Miscellaneous Amendment) Regulations 2024 (SSI 2024/374)

Building (Procedure) (Scotland) Amendment Regulations 2024 (SSI 2024/376)

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment (No 2) Regulations 2024 (SSI 2024/377)

Moveable Transactions (Forms) (Scotland) Regulations 2024 (SSI 2024/379)

Moveable Transactions (Register of Assignations and Register of Statutory Pledges Rules) (Scotland) Regulations 2024 (SSI 2024/381)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

09:32

The Convener: Under agenda item 4, we are considering three instruments, on which no points have been raised.

Bankruptcy and Diligence (Scotland) Act 2024 (Commencement No 1, Transitional and Saving Provisions) Regulations 2024 (SSI 2024/373 (C 25))

Transport (Scotland) Act 2019 (Commencement No 8) Regulations 2024 (SSI 2024/375 (C 26))

Moveable Transactions (Scotland) Act 2023 (Commencement) Regulations 2024 (SSI 2024/378 (C 27))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: I will briefly suspend to allow witnesses to join the meeting.

09:32

Meeting suspended.

09:33

On resuming—

Framework Legislation and Henry VIII Powers

The Convener: Under agenda item 5, we are taking evidence on the committee's inquiry into framework legislation and Henry VIII powers.

The witnesses on our first panel are Dr Ruth Fox, joining us online, who is the director of the Hansard Society; Dr Dexter Govan, who is the director of research at the Constitution Society; Dr Pablo Grez, who is a lecturer in public law at the University of Strathclyde; Professor Colin Reid, who is emeritus professor of environmental law at the University of Dundee; Dr Andrew Tickell, who is the head of department for economics and law at Glasgow Caledonian University; and Professor Richard Whitaker, who is parliamentary academic fellow at the University of Leicester. I welcome you all.

I remind all witnesses not to worry about the microphones, because they will be dealt with automatically. If you would like to come in on a question, please raise your hand or indicate to the clerks. There is no need to answer every question—just indicate if it is not for you. If, after the meeting, there is anything that you feel that you have not said on the record that you would like to contact the committee about, please feel free to do so.

We have received a number of submissions from today's witnesses and others. It is fair to say that it has been quite interesting to read about a subject that most folk would probably think is quite dry. However, as you will be aware, it is a subject that comes up from time to time in the work of this committee.

Among those who have submitted evidence to the committee, there appears to be a broad consensus on what framework legislation is. Do you think that there should be a definition of framework legislation agreed by the Scottish Government and the Scottish Parliament?

Dr Pablo Grez Hidalgo (University of Strathclyde): Thank you for the invitation to the committee. I welcome the opportunity to contribute to the committee's work; it is extremely important that the committee is conducting this inquiry.

As I argued in my written evidence, the proliferation of different concepts is not helpful and might lead to some confusion. My preference would be to stick to the term "skeleton" rather than "framework" legislation—or "headline" legislation, as is used in Wales.

As far as the concept of skeleton legislation is concerned, two main considerations are relevant. The first one is to distinguish between skeleton legislation—whereby the bill as a whole is skeleton in form—and skeleton provisions. That is an important distinction for the purposes of the committee's scrutiny work.

Secondly, we should consider the idea of skeleton legislation or skeleton provisions as a spectrum: at one extreme, there will be examples where there will be only a statement of policy intent or policy aims and no flesh whatsoever in the bill or the provision, while all the way down at the other end of the spectrum there will be instances where the legislation or provision contains more policy decisions. Since there is a spectrum of different possibilities, it would be rather difficult to have a single definition. If there is something that characterises every instance, it is the fact that key policy decisions are left for ministers to decide at a different time through delegated legislation.

The Convener: Thank you.

Professor Whitaker, in your submission, you touched on the terms "framework" and "skeleton" bills, and also "headline" bills, as used in the Welsh Senedd. How do you think that the things that you highlighted in your submission deal with the points raised by Dr Grez?

Professor Richard Whitaker (University of Leicester): In my work, I have tried to measure the prevalence of such bills and having all the different terms makes that more difficult to do. Maybe that is just a problem for people who are trying to measure it, rather than necessarily a fundamental problem.

It is difficult to pin down when something crosses over the line from being a bill that has some delegated powers in it—and maybe some of those are a bit contentious—to being one where the essential substance of its policy is decided through delegated legislation. If there were a reduction in the range of terminology used, it would make it easier to follow the progress of such bills and then to follow the delegated legislation that comes from the parent act.

Clearly, however, there is a spectrum, and different terminology is being used. In some cases, the Scottish Government has used the term "framework" bill in its policy memoranda—that is interesting. I have seen the same term used in the Australian Senate as well.

There is debate about whether that is the right term, and I think, convener, that you were introducing the question of whether it puts a more positive light on things compared to the term "skeleton" bill. However, if fewer terms were used and a clear definition was agreed by Government

and Parliament in all cases, that would be really helpful for tracking such bills.

Dr Andrew Tickell (Glasgow Caledonian University): The language that we use to describe such bills is not a question of objective description. “Skeleton” is a term of abuse and is designed to be a critical framing of powers of this kind as an inappropriate transfer of power from the legislature to the executive, whereas “framework” sounds nice and friendly and sensible and is about planning and administration. “Headline” sounds more press-orientated than anything else and probably tells you something about how Governments approach policy making—it is about the headline that they have passed legislation on an issue.

Therefore, you will not find an objective account of the issue. We come back to the core point, which is about the appropriate use of delegated powers. The challenge for you and for Parliaments everywhere is that delegated powers are sometimes very appropriate, helpful and instrumentally useful, but increasingly we are seeing evidence of more and more powers being centralised in the executive’s hands, leaving members being invited to pass legislation without any real idea of what it will mean in practice. For me, that is implicit in any definition or title that we give such provisions.

Dr Dexter Govan (Constitution Society): I am happy to echo the calls of my colleagues. Whether we call such legislation framework, skeletal, hyper-skeletal or jellyfish—as I have seen it termed elsewhere—we should not lose sight of the key problem, which is the inappropriate extension of such legislation, which seems to be becoming more prevalent. It is worth saying that this is not a uniquely Scottish problem by any stretch of the imagination—we are seeing it at Westminster, in Wales and elsewhere. It would be useful if the committee could come up with a great definition, but I share some of the scepticism of my colleagues in that identifying a definition that covers everything is likely to prove very challenging.

Professor Colin T Reid (University of Dundee): I echo the same points. There is a question of why you want to have a definition. Is it simply to help us to discuss these issues, or will it actually make a difference in procedural terms? If it is to make a difference in procedural terms, there is a huge challenge, because of what my colleagues have said about the spectrum and the mixture of broad provisions, narrower provisions and very precise ones that there can be within one bill. Thinking about why you want a definition is part of the thinking on the issue.

Dr Ruth Fox (Hansard Society): I will echo Professor Reid’s point and say that, if you want to badge a piece of legislation as “framework”, “skeleton” or any other term, the question is: what is the purpose of doing so in procedural terms? It is nice to make it easier for us as researchers—that would be great—but the purpose in procedural terms for the legislature is important. Who will be asked to make the judgment as to whether a bill is of that type? One route would be for the Speaker or Presiding Officer to certify a bill as a framework bill, because certain procedural results would follow from that. You would need to think about who makes the judgment and how they do so, bearing in mind the issues that colleagues have highlighted.

The Convener: Thank you.

Jeremy Balfour (Lothian) (Con): Good morning, and happy new year to everybody. I want to follow up on Professor Whitaker’s opening remarks. Do we now have more skeleton or framework bills—or however we want to describe them—than we had historically or in previous generations, both here and in Westminster, but also in other jurisdictions across the world? If so, why is that? Is it because people do not want to make difficult decisions and want to leave it to others? Alternatively, is there some more philosophical view as to why such bills have become more prevalent?

Professor Whitaker: I would not want to claim with total certainty that there has been an increase, because it has not been measured brilliantly well over time. When you look into this, you discover that the approach is not new. There is a report from the 1930s that talks about the issue being a problem in the UK Parliament. However, I have tried to measure the use of such bills in the period since 1991, and the data that I have submitted shows that there seems to be an increase, at least in Westminster. I do not have over-time data for the Scottish and Welsh Parliaments—I have only more recent data for them.

09:45

There was a big increase around the time of Brexit. If you are asking us for examples of where this sort of thing has been deemed acceptable, I point out that, in some cases and in some situations, the Opposition at Westminster was saying, “Okay, we understand that you need some kind of framework in place. You don’t know the details of this or that policy yet, but you want to be able to implement it quickly, so you might need secondary legislation powers for that.”

That said, even when you split the period that I looked at in half—which means that it is not quite a pre and post-Brexit thing—you will still see an increase. Of course, the Covid-19 pandemic led to

a lot of discussion about making legislation quickly, and that came on the back of Brexit. I would also highlight that, since the new Government came into power, we have had the Product Regulation and Metrology Bill, which has been described as a skeleton bill by the Delegated Powers and Regulatory Reform Select Committee in the House of Lords.

Therefore, it is fair to say that, broadly speaking, there has been an increase. It does not look like a simple increase where we get more and more every year, one after another, but in broad terms, there has been an increase, and it seems to be quite prevalent. It seems to be increasing here as much as it is at Westminster, and more so in the Welsh Parliament—the Senedd.

As for why that is, I think that Brexit is part of the explanation. However, it has been suggested in other research, particularly by the Hansard Society—and I cede to Dr Fox on this—that there is more pressure on Governments to get legislation through quickly, particularly at the start of a legislative term, because they need to be seen to be acting fast. As a result, bills will sometimes end up making it into the process without the detail having been fully worked out. That seems to be part of the explanation. There is also some sense that, particularly since Brexit and Covid, there is increased pressure on civil servants to generate and draft bills more quickly than they might have done before.

Those seem to be some of the reasons for the situation. I am not sure that they fully explain the differences that I found between the Parliaments that I looked at, but we have detected a general increase.

Roz McCall (Mid Scotland and Fife) (Con): I will just say happy new year and get that out of the way. Thank you very much for attending today.

I want to follow up what has been a really interesting line of questioning. I am sorry, Professor Whitaker, but I am going to come back to you—I know that you have been doing a lot of talking. In your initial comments, you talked about the difficulty of knowing when this sort of thing crosses the line. Is that basically because there is no line? Do we have this problem because we do not know when a line is crossed? If so, should there be a threshold? Should we state, "No, this is when we have a framework or skeleton bill"—whatever you want to call it—"and this is where we need primary legislation"? Would it be sensible to create a threshold?

Professor Whitaker: You could try to do that. Political scientists have measured this in the past by creating what is called a delegation ratio, which looks at the proportion of clauses in a bill that are delegating powers. The problem is that that sort of depends on how bills are divided into clauses, as that affects the denominator in the equation when you calculate these things. Such an approach does not necessarily work brilliantly; if people start dividing bills into shorter clauses, the proportions for the same number of delegated powers will be lower or something like that, so the issue can be tricky.

The Delegated Powers and Regulatory Reform Select Committee in the House of Lords has taken such an approach, I suppose, case by case. It defines bills as skeletal

> "where the provision on the face of the bill is so insubstantial that the real operation of the Act, or sections of an Act, would be entirely by the regulations or orders made under it."

Therefore, the crucial factor is the substantive importance of the policy that is being made in delegated legislation, but that might need to be taken case by case.

Roz McCall: Absolutely. I ask the question of the other panel members: is this a sensible way to go? I see nodding heads.

Dr Govan: I think that it is the only way to go. Another problem with doing some kind of ratio is that it does not actually measure consequences. A bill might have only one delegated power, but it might be so important, consequential or significant in its own right as to make it a problem or an issue.

Dr Tickell: The question is about the quality of the power, not the number of powers. One piece of legislation might have, say, six, seven, eight, nine or 10 quite well-bounded, clearly focused powers around agriculture, whereas another could have one nice little provision that gives the minister vast amounts of power.

Again, you are almost externalising the question, as if there were some objective measure out there against which you could put legislation and say, "A-ha, this is framework, this is skeletal, this is jellyfish-like," or however we are describing it, but that is not how it works. Ultimately, the question is about values; it is not objective. It is about this Parliament and Parliaments everywhere saying how far and when they are prepared to give ministers, or the people to whom ministers delegate powers, the power to shape public policy. Fundamentally, the question that is in play is about how much of a blank cheque the Scottish Parliament is prepared to give the Scottish Government. It is not even about volume or numbers; it is, ultimately, about that judgment.

Daniel Johnson (Edinburgh Southern) (Lab): I was going to ask whether it is helpful to think about the question in terms of being about framework legislation, or whether it is about how

powers are framed, but you have answered that, in a sense. There may be a follow-on question.

I think that we can all frame a spectrum where, on the one hand, legislation provides the power to set a rate or value, which can change over time, and at the other end, there are powers that could give ministers the ability to criminalise certain actions, which we can see would be problematic. Are there particular features of powers—they might be in the one delegated power in a bill—that we should look at? That could be about the type of power or about whether something is framework legislation.

I am also concerned that powers to make secondary legislation should have guardrails. Is the issue the type of power or the way in which it is framed? Should we have a taxonomy for identifying potentially problematic clauses? Andrew Tickell seems to be nodding most, so I ask him to respond.

Dr Tickell: I am naturally obliging that way. There are a few things that one could say. First, what is the nature of the delegated power? That will depend on the issue and the context. You might analyse emergency powers in the context of a public health pandemic differently from a power that gives ministers the ability to set a given level of benefit, for example. Secondly, there are a couple of guardrails that are particularly important. You have highlighted one, which concerns the creation of criminal offences. We should be concerned about executive fiat in effect making things criminal that have not been put before the Parliament. The parliamentary process is critical not simply for you as MSPs to have the chance to test the evidence but because it is how everyone else in civil society finds out what is going on, and it frequently raises issues that it has not occurred to the Government or parliamentarians to consider.

A third element that is also important, and which is not always highlighted, is the human rights framework. A range of forms of secondary legislation can impinge on rights under the European convention on human rights. Just like the Parliament, the Scottish Government is obliged to pass measures that are consistent with ECHR norms. One of the key, but often overlooked, parts of the ECHR is the requirement that any restrictions on rights that are qualified should be according to law, which means that they need to be sufficiently legally accessible and clear to the people who are affected by them. That is one area where secondary legislation can be problematic.

During the Covid pandemic, the law changed and no one knew about it, except through an announcement that the Government made that had never been put before the Parliament. That may have been justified in the context of an emergency during a pandemic, but it illustrates some of the core fundamental issues of democratic accountability, legal certainty and—frankly—due process that apply when the law is created.

Professor Reid: You need to appreciate that there are problems, even with something that seems as simple as creating a criminal offence. What does that actually mean? Slightly changing the boundaries of a criminal offence would make things criminal that were not criminal before. In things such as construction and use of vehicles, for example—I know that that is a Westminster matter, but I am referring to that sort of thing—there may be a criminal offence, but you would want it to be easy to change and update the legislation at all times for technical reasons. However, narrow changes in the boundary would bring people into criminal law who were previously outside it. There may be difficulties even with something that sounds as clear and neat as creating a criminal offence.

Daniel Johnson: It would be interesting to hear from Professor Whitaker. We will not be able to come up with a hard and fast test that would allow us to feed legislation into a computer to provide a green light for legislation that is fine or a red light for framework legislation, but is there at least a set of principles, as Dr Tickell has pointed out, that we could use to make that judgment?

Professor Whitaker: Yes, I think so. I should say that I have come at this as a political scientist rather than as a legal scholar, so I take a slightly different approach from others. In some ways, I am perhaps too interested in trying to measure things. It is important to say that measuring things with numbers will not tell you about the quality of the legislation, which is the heart of the issue. I totally agree with what has been said on that point.

To determine the significance of the policy that is being delegated, legislation needs to be looked at in the context of other legislation in that area and in terms of its effects on things such as human rights and whether it is constitutionally important. That is why, as others have said, committees in the Parliament and elsewhere that have looked at such bills have sometimes pointed to parts of a bill—rather than the whole thing—being skeletal. I should say that the measures that I have looked at include bills that were deemed to be skeletal only in part. If you had a skeletal part of a bill, you would say, “The whole bill is not a skeleton but parts of it are,” which would focus attention on quality rather than quantity.

Roz McCall: Thank you—that is interesting. We have highlighted the fast pace of legislation and the increased use of skeletal framework bills. Dr Fox, I will go to you first. I will ask a simplistic

question first. The world is moving faster than it ever has before, in that we have modern technology and advancements. Could that be part of the reason for the need to be seen to be focusing and adapting quickly in legislation? Is it just the case that everything is moving exponentially faster?

Dr Fox: I think that that is part of it. We can look at examples of bills at Westminster, where a bill to regulate automated cars was judged to be a concern in relation to framework legislation, but it was accepted that, without knowledge of how the technology is going to develop, it is difficult to pin down the detail of the policy. Another example that has been cited is the development in England of the devolution model for mayoral authorities. Because those authorities were being negotiated separately, a bill could not set a framework for everyone, so a particular legislative framework was needed to allow for deviation and difference.

One of the concerns of our delegated legislation review is how we look ahead. For example, we can see that artificial intelligence and other technology, as you said, even in areas such as science and medicine, are moving incredibly fast. It is difficult for Parliaments to stay ahead of that curve. Governments are finding it more difficult to do the legislative planning for that and to build in the necessary time in electoral cycles.

Given the difficulties of drawing the line—the boundary between what should be in primary legislation or delegated legislation—and the concern about speed, we think that if, rather than focusing so much upstream on the creation of bills and on powers, you focused more on the scrutiny of regulations once they came forward and got that aspect of the process right, we would have a better opportunity to scrutinise and to influence legislation than we do by trying to prevent Government from bringing forward framework bills. At the end of the day, that process is creating a ratchet effect.

One of the possible reasons why there is more framework legislation is that it creates a precedent. The ratchet effect means that Governments and ministers think, “So-and-so brought forward that bill, so why can’t I do the same?” The problem is going to continue unless a Parliament has a procedure—a gateway, if you like—to prevent a Government from bringing forward a bill when Parliament does not like the form in which the Government brings that forward. That procedure could be something like a legislative standards committee that would say, at first reading, “This is framework legislation. We don’t think those powers should be in the bill in that form. We want more policy detail. Go away and do more work.” Focusing more on the procedures at the later stage rather than at the beginning would address that problem.

Roz McCall: You are highlighting that one of the consequences is lack of scrutiny and the ratchet effect. Are there other consequences that we are missing, or is it just the ability to scrutinise properly?

10:00

Dr Fox: The inability to scrutinise properly undermines parliamentarians’ ability to know how powers will be used when members are being asked to grant authority for the Government to have those powers. We have made the point that powers do not just sit on the statute book for a year or two; they sit there for decades, unless they are repealed, and a politician or a minister of a different political stripe will be able to exercise those powers in a way that the minister who sought and introduced them did not intend. There are examples of that, and it is certainly a problem. However, again, if you can better frame the procedures at the end point of the process of regulation, you can address that.

Roz McCall: Thank you. I apologise for using the word “just”—my language diminished the role of scrutiny.

Dr Govan: I echo what Dr Fox said, and the Hansard Society report is important in that regard. At the Constitution Society, we speak a lot about how scrutiny improves the quality of legislation, and the consequences of framework legislation going through would be poorer legislation, by and large. We should be mindful of that.

Roz McCall: Does anyone else want to come in?

Dr Grez Hidalgo: Yes, but I have more of a footnote to what Dr Fox just said. The current procedures for the scrutiny of secondary legislation were designed—if my memory serves me—in 1946 in the context of a different world, where there were different challenges. Those procedures have continued to be used, and the negative and affirmative procedures that we are operating here in Scotland are pretty much the same as the procedures that were originally set up for the mid-20th century. Those structures might not be suited to the challenges of artificial intelligence and technology that you referred to.

There have been improvements along the way. For instance, there are super-affirmative procedures that have introduced additional safeguards, and there are sifting procedures when there are concerns about whether the negative procedure might be appropriate. Perhaps, as Dr Fox said, there is room for broader reflection on how procedures downstream might work, so that

they enable this committee, which is tasked with such work, to perform proper scrutiny of secondary legislation.

Jeremy Balfour: We are trying to work out how we, as a Parliament, hold the Government accountable when we have these framework bills. I think that everyone recognises the issue, but we are struggling slightly to find a solution to it. Given the expertise around this table, how would you suggest that we, as parliamentarians, hold the Government to account when a framework bill is introduced? I am afraid that I am going to start with you again, Andrew, because you are smiling and nodding.

Dr Tickell: Well, that is a straightforward question. The first thing to say is that framework bills are problematic because they do not allow you to hold the Government to account. That is at the heart of why they are problematic. The point that Dr Fox just made is that when you give the executive power and the executive changes, a new executive can use existing powers in ways that were never discussed or mooted at committee.

You are probably quite used to that. In the primary legislative process, in the area of criminal law, for example, where I have given evidence previously, it is quite common for MSPs to be told by police officers, prosecutors and, indeed, the Scottish Government that legislation will be used in particular ways and for you to be reassured that certain things would never fall within the contemplation of Police Scotland or prosecutors. In general, I am extremely suspicious about that, because the law is what the law is. The law says what the law says, and it empowers the people that it empowers. That is the fundamental problem with framework bills.

I was very struck by one of the comments from Lord Lisvane during the committee's trip to London in which he effectively said that the committee was asking about how to mop up better instead of turning off the tap and stopping the room being flooded. That may be an impossibility.

As Dr Fox said, there is a reason why we have framework bills and it relates to the modern state. The reason is not necessarily that the executive is malicious or intends to cause difficulties but that the administrative state is vast, the demands are huge, and the parliamentary process is slow and difficult and can sometimes leave us stuck with legislation that does not capture emerging forms of modernity, such as social media, other types of changing technologies, changing medicine and so forth. It is important for us not to confuse efficiency and arguments for efficiency with effectiveness, but oftentimes that is how such things are framed by the Government.

Jeremy Balfour: Would sunset clauses help with these types of legislation? Have we looked at saying "we will grant this but for a limited period of time" to force the executive—whether a new Government or the same Government—to at least justify their use? Would that be a possibility or would it simply add more administration to a busy timescale?

Professor Reid: I am personally very sceptical of sunset clauses. We have just had the example of the infrastructure levy. The Planning (Scotland) Act 2019 includes a sunset clause on introducing the infrastructure levy. Progress has not been made on its introduction, and that leaves everybody uncertain. I think that we are now less than a year from the deadline. Since nothing has happened, does that mean nothing will happen, or will there be a terrible rush with things happening at the end, before the deadline? I am not sure that the artificial pressure created by that situation is conducive to good governance when, whether for good or bad reasons, the expected progress has not been made and a strict deadline is in place.

Professor Whitaker: On whether to deal with this issue at the point of Government designing framework legislation or whether to deal with it further downstream, part of the solution may be about getting Governments to be a bit more honest and up front about what they are doing, even if we cannot stop them from introducing framework legislation for the reasons that have been given.

To be fair, Governments are up front about that in some cases. Sometimes they say, "This is a framework bill, which will set out some ideas but has no detail in it." Perhaps Governments do not do that more frequently because they think that they should not be introducing framework legislation, but if we could help them get over that and say, "Okay, it's going to happen in some circumstances," they could then label legislation in that way. It might then be possible, as the Hansard Society has suggested, to design procedures further downstream that would then give you a chance to say, "By the way, this statutory instrument came from a framework bill and a different procedure applies to it."

Dr Fox: One example of how the committee might scrutinise or constrain the Government in its introduction of framework bills—and it has been briefly mentioned—is through enhanced and super-affirmative procedures. One of the byproducts of framework legislation and the increase in its use over time in Westminster bills is that, because of insufficient policy detail to scrutinise the policy, the House of Lords has sought to scrutinise the powers and look at ways to constrain ministers in the use of those powers at a later date through enhanced procedures.

However, we have ended up with a proliferation of different versions or models. There are now 16 procedures and 15 acts, and depending upon what characteristics you use to judge them, there are at least nine versions covering everything from more time for scrutiny to sifting, consideration by a specialist committee, and even, in one case, a committee veto on the regulations that emerge under some of the very broad powers. One issue with that is that it introduces extra complexity, which is problematic both for civil servants and for the legislature.

However, there is some evidence that it does constrain ministers in using those powers in future. For example, the Legislative and Regulatory Reform Act 2006, which was introduced under the Blair government, has the highest level of super-affirmative procedure, but it is rarely used, because the process is so time consuming that, frankly, it is better and as quick for ministers to put through primary legislation. That has been acknowledged in the review of the act and, indeed, there have been only 40-odd legislative and regulatory reform orders. Similarly, after the passing of the Public Bodies Act 2011 under the coalition Government, there were far fewer public bodies orders than had been anticipated when the bill was introduced, because the process was so onerous.

That is one example. You can constrain the Government's use of the powers by adding procedural thresholds and constraints into the process, but, from the Government's perspective, that hinders its policy making and it has to find alternative routes. That is one example where that sort of thing has happened, but it has made the procedural process more complicated.

Jeremy Balfour: That was helpful.

I have one further question. This particular Government's justification is that it wants to involve as many stakeholders and as much of the community as possible, so it says, "We'll get the framework bill passed and then we'll go and do the consultation so that everybody can be involved in it." As an Opposition politician, I suppose that my question is this: why not do the consultation first and then bring the bill forward? From a policy perspective, is it justifiable to say, "We want to get this right, so let's involve as many people as possible, and it's easier to do that once we've got the primary legislation passed"? I am just interested in hearing what you think of that from an academic perspective—and particularly from a social perspective, too.

Dr Fox: I think that it depends on the policy area. There might be very specific reasons for justifying it in that way, but I would, as a general principle, say no. You should do the consultation about the direction of policy, the options, the pros and cons and why the Government has chosen a particular course over another one first. There might then be a case for consulting on the specific operational detail of the regulations with the affected stakeholders at a later date when the regulations come forward.

We see this quite frequently at Westminster when legislation is brought forward. I would not say that the policy process has collapsed, but it is certainly not as recognisable as it was 20 or 30 years ago. The concept of a green paper followed by a white paper has largely gone out the window, and the policy-making process has become very concertinaed.

Consultation processes have deteriorated, too. Their timeframes have been reduced, and what we quite often see at Westminster is criticism that the information provided about consultations to inform a piece of legislation, an impact assessment and so on is relatively poor. Indeed, it is one of the regular complaints of the Delegated Powers and Regulatory Reform Select Committee in the House of Lords.

It is a common problem. In a very small number of examples, it might be justifiable, but I think that, in the main, it is an excuse.

Jeremy Balfour: Thank you.

The Convener: Daniel Johnson has a supplementary, and then we will move on to Bill Kidd.

Daniel Johnson: I can just weave it into my main body of questions, which follows on pretty closely from some of the things that have been discussed.

The Convener: I will take you first then, and then go to Bill Kidd.

10:15

Daniel Johnson: Following on from some of the things that have just been said, I think that Dr Tickell, in particular, made the interesting point that the justification that is often given for this approach is the pace of change and, critically, the length of time that it takes to get legislation through the Parliament. As a parliamentarian, certainly in the Scottish Parliament, I would gently question that premise. That might be the case if we were dealing with stage 3s every day, or even every week, but ultimately, without using emergency procedures, a short bill can be passed in three or four months. It is not unheard of for a bill to be introduced in September and passed by Christmas time, depending on the length of it. Would witnesses agree with that insight?

I have no experience at Westminster, I am also interested to hear from panel members about

whether the world is very different there. The ability have electronic voting here makes it easier to vote, for example. The more fundamental point is: should we be asking the Government to reconceive how it thinks about legislation? Should it be making shorter bills that are more focused? It might find that those are easier to get through. Essentially, the Government is seeking to avoid Parliament, but without necessarily having justification for doing so. Do you agree with those insights?

Dr Tickell: There are bumper bills—I am thinking of the Victims, Witnesses, and Justice Reform (Scotland) Bill, which I have been focusing on recently. That bill has so much in it that elements of it have been substantively underscrutinised, yet it has been scrutinised for months and months.

It is one of the areas where we often confront irregular verbs, by which I mean that an inefficiency to Government could be a useful process of slow deliberation to others. If the goal is simply to get to a conclusion and to get a policy enacted largely as it was introduced, then I am sure that parliamentary scrutiny feels like a terrible inefficiency. However, the is about consultation, who finds out about legislation and how it is improved.

I often find that the Government has not thought about certain issues because the officials that frame the policy have not considered them. Indeed, often academics have not considered an issue until they are confronted with a specific proposal, and they suddenly realise it is actually quite problematic. Although it can be a slow, iterative process, it can be quite productive to prevent bad forms of legislation being passed.

With Government consultation, if people are not asked to be involved and are not informed that the process is on-going, that can result in secondary legislation being created from a very stacked deck. An example of that, which is highlighted in the evidence that has been presented to the committee, was Suella Braverman's proposals to change definitions of thresholds for what counts as serious disorder. She held a consultation on her change of policy and simply asked law enforcement officers what they thought about it. The English High Court concluded that consultation process was unlawful as a consequence.

Unlike the public-facing processes that the Parliament has, in which anyone who finds out about its business can send it their thoughts and members can listen to them or not, the Government process is inherently much more opaque about who talks to who, who gets listened to and when consultation responses are published, which often happens many months after all views have been submitted. All of that is implicit in the perceived efficiencies or inefficiencies of parliamentary processes.

Daniel Johnson: The point that Dr Fox raised about the loss of the green paper to white paper procedure is important. Is the excuse that there is not the time valid in Westminster, or is that rationale just convenient for the party of government? Dr Govan, you are nodding.

Dr Govan: Yes, I am sympathetic. The burden on legislators is obviously very significant, and MPs have a stacked diary—perhaps more of a stacked diary than they had maybe 50 years ago—which forces them to deal with constituency issues rather than carry out their function as legislators. There is a degree of truth to that, but that is not an excuse for us to be witnessing the deterioration in the quality of legislation or an increase in the amount of framework legislation.

To go back to Dr Tickell's point, it is good for a Government or an executive to be able to pass legislation quickly, but it is not necessarily good for legislation for it to be passed quickly. That is a key distinction that should not be lost sight of.

I will also mention that, particularly at Westminster, we have seen an effort to obfuscate in skeleton legislation to say that something is a problem related technical detail, science or something else. That neatly shifts the onus away from what powers are being given to whether the technical detail is complex enough to merit it. That is a bit of a sleight of hand, and I think that we have seen more of it.

Daniel Johnson: That brings me neatly on to my substantive questions. I want to look at the practical changes that we could bring into parliamentary procedure around framework legislation as a whole. As the panel has observed, it is better to think about the provisions in legislation and the powers that could be conferred on the executive, rather than trying to decide whether the legislation as a whole is over the line or not.

I was very interested in one proposal in the written submissions that we got, which was about having some sort of written agreement or guidance between the legislature and the executive. I think that both Dr Grez Hidalgo and Dr Fox had similar proposals in their submissions. Dr Fox described it as being a "Concordat on Legislative Delegation". Will you explain what features that should have? Would that contain the principles that I alluded to in my earlier supplementary question? What did the Hansard Society have in mind when it made that proposal?

Dr Fox: That arose out of our review of delegated legislation and our cross-party advisory group at Westminster. The proposal was intended

to address a number of the problems with the delegation of powers, and specifically the concern about the perceived shifting boundary between what should go in primary legislation and what should go in delegated legislation. From our research over the past 15 years or so, there is really no consensus about where the line should be and what you should shift it back to. If you perceive that it has moved, what should you move it back to?

The idea was instead to establish some high-level principles to try and negotiate a consensus between Government and legislatures about what legislative delegation should look like going forward. We have alluded to some of those examples. Should the creation of new criminal offences be, as a matter of course, in primary or delegated legislation? If that were established in the concordat, for example, and the Government wanted to introduce legislation that for some reason had the creation of criminal offences delegated to ministers, that would then have to be badged. Much as they do when they introduce legislation in relation to human rights or environmental principles, ministers would have to acknowledge that it breached the concordat principles. What would follow from that would be additional scrutiny procedures in the Parliament to address that.

I have to say that it has been very difficult to get consensus about what would work and how it would be structured. The idea was to have some high-level principles about legislative preparation and where the boundary line should be—for example, not having the bulk of the information about the creation of a public body entirely delegated to powers but having it more on the face of the bill. We are looking at those kinds of principles.

Daniel Johnson: Dr Grez Hidalgo, was your proposal roughly along the same lines? Are there any other elements that you want to highlight?

Dr Grez Hidalgo: Yes, I can highlight some other elements, but my proposal is obviously along the same lines as Dr Fox's. My proposal starts from the firm belief that the committee has two ways of exerting influence and shaping legislation. The first one is by prompting anticipated reactions from Government, and the second one is in the formal stages of the legislative process by triggering compromises or formal amendments. On the pre-empted effect, the committee can, either through an inquiry such as this one or potentially by commissioning work to look at past individual instances of legislative scrutiny performed by the committee, reflect on its own principles of what is acceptable and what is not acceptable in terms of delineating the appropriate scope of primary and secondary legislation. It can then come up with a guideline or document that tells the Government in clear terms, and sends a clear message about, what the committee's expectations are.

Those guidelines might then be a point of call for legislative drafters. They might be widely disseminated among different Government departments so that the Government is clearly aware of the committee's expectations and might be able to stick to those expectations, especially at the level of civil servants and legislative drafters. That could be a very effective way of influencing legislation, and it could save a lot of time and energy in the formal stages of the legislative process.

There is a model for doing that, which is what the Delegated Powers and Regulatory Reform Committee in the House of Lords is currently doing. It has issued guidelines: it issued the first set in 1992, then updated them in 2014, 2016 and 2021. From time to time, it has held oral evidence sessions with the first parliamentary counsel—as this committee will be doing today. It has checked whether the guidelines are appropriately disseminated among Government departments, and whether the committee can contribute by offering training to civil servants so that they are aware of the expectations. All of that helps to pre-empt legislation that might be considered to go beyond the expectations of the committee. You have that power to reflect on what your expectations are and what the message is that you would like to send to Government.

Obviously, there are other opportunities in the legislative process to improve the procedure, but I will only expand on those if you are interested in them.

Daniel Johnson: I would like to know whether other witnesses think that guidance or a concordat is a practical solution. I also wonder whether the conclusion of the discussion that we have had this morning is that not just principles, but counterfactual tests, would be required. That is, is what will be done foreseeable and predictable? Are boundaries and parameters set?

Principally, do the other members of the panel agree that some sort of published document on how framework legislation or secondary powers will be used would be a helpful way forward, both at Holyrood and elsewhere?

Professor Whitaker: It would definitely be useful. The problem is that the Delegated Powers and Regulatory Reform Committee has tended to go back to the guidance that it has produced and say, "Oh, you're not following our guidance and this is part of the problem." This committee is at liberty to do a similar thing. I think that it would be a good thing in itself to have a document where

you say that, if something is a piece of framework legislation, you want the Government to be open about it and to explain exactly why it took that particular approach.

In itself, that is a good thing, but I would caution against thinking that it would solve all the problems. Governments will still do what they want to do, and there is evidence in the House of Lords committee reports that the committee frequently says, "We've moaned about this particular thing before and you're still doing it." So, yes, it would be a good thing, but it would not solve the problems.

Daniel Johnson: There are some interesting points about other procedures that could be applied, such as requiring the Government to make explicit statements.

There was also an interesting suggestion made by Dr Grez Hidalgo that the committee should have the power to delay a stage of a bill. I am interested in that because I think that committees in this Parliament have that power. In the previous session of Parliament, I sat on the Education and Skills Committee. The committee refused to publish a stage 1 report on the Children and Young People (Information Sharing) (Scotland) Bill, the purpose of which was to correct the issues around information sharing regarding the named person policy.

First, I would be interested to know whether it would be helpful for committees to have the ability to undertake greater stage 2 scrutiny. Secondly, I wonder whether some of these points are actually about parliamentarians' awareness of what we are seeking to do. That relates to Dr Tickell's earlier point about interrogating the legal consequences and the parameters of bills, not just the policy that is being presented in them.

Do the witnesses think that codifying that kind of greater stage 2 scrutiny would be helpful, and that parliamentarians need to alter how they view legislation—and therefore scrutinise it as it progresses—in order to deal with that?

10:30

Dr Tickell: While Pablo Grez Hidalgo was talking, I was struck by the fact that we are almost talking about culture—the culture of legislation, Government and parliamentary scrutiny. I am generally quite sceptical about the utility of drafting rules and guidelines if no one is following them. If the rules are not written on your heart, they are pretty much meaningless. I therefore worry that a general statement of policy that is not informing how you approach the work would be problematic.

A number of the examples that you have been given are about rules, processes and specific things, powers and scrutiny steps. All of that is fundamentally important but, ultimately, the Government will do what it feels politically able to get away with.

There are some important differences between Westminster and Holyrood that are worth highlighting in this context. Holyrood is a proportional representative assembly and therefore has a different balance from the House of Commons, which is utterly dominated by a party that won a relatively modest percentage of the overall vote due to first past the post. You are in a different context where, for example, the current Government does not have a majority. Whether there is a governing majority or not may have a big impact on the level of pushback that you can practically give.

Ultimately, regardless of whatever is written into law, procedure and parliamentary rules, it is about making those things politically salient, making them meaningful and reaching the wider public and wider media. I was a bit concerned about the idea that this is a dry topic. It is not. Giving the executive considerable powers to operate in a potentially arbitrary way is not a dry topic at all, and it should be something that we are all concerned about.

Daniel Johnson: Are there any other views on that?

Dr Fox: Yes. I am not with you in the room today because I was in Cardiff yesterday afternoon giving evidence to the Senedd on some of the same issues. I said to members there that, ultimately, the greatest pushback that you can give is to reject a regulation or to reject a provision in a bill. That is the thing that will make ministers sit up and listen and make departments take notice.

Parliamentary time is probably one of the most important resources in a member's armoury. Taking up parliamentary time and making demands of ministers in terms of appearing more at the dispatch box or at committees to answer and explain why they are in breach of Cabinet Office guidance on legislation or a concordat on legislative principles will all have some effect over time.

The cultural problem is certainly a live one. Ultimately, we can design the perfect architectural and procedural system but, if the people operating it are minded to give the powers to the executive anyway, no scrutiny procedures are going to constrain that.

Daniel Johnson: That is a really helpful insight. Just to—

The Convener: Daniel, I am conscious of parliamentary time on this aspect as well, because

we have other areas to go into. You have one final question.

Daniel Johnson: I was just going to collapse into the next area about dealing with the specific powers—-

The Convener: We will deal with that later.

Daniel Johnson: Okay.

The Convener: Does anyone else want to come in on the final question?

Dr Grez Hidalgo: I have a small point. It seems to me that the committee is more effective when it engages in dialogue with the Government.

As far as Daniel Johnson's point is concerned, I can see that the committee intervenes in stage 1 and sometimes, when it has reported, it already knows by stage 2 that the Government has made some commitments through a letter in which it says, "We are conscious of the points that you are making and we will introduce some amendments in order to respond to some of your concerns." When the committee makes its stage 1 report, there might be recommendations that are not taken on board. That is the moment when the Government has to respond formally to your report.

My point is that, when you move on to stage 2, it might be worth waiting to ensure that the formal response of the Government is available for all MSPs to see, so that it can inform debate and give a clear sense of how your concerns are being taken into account by the Government. That will lead to better scrutiny by the Parliament.

The Convener: Thank you. I have another question before we move on to Bill Kidd.

Notwithstanding what has been discussed so far in this area and the various suggestions and proposals that could be considered, in some of the written evidence that we have received, there were other suggestions, including the provision of draft SSIs when a bill is produced. The Public Bodies (Joint Working) (Scotland) Act 2014 is an example of that approach. Consulting on delegated powers before publication has also been suggested, as well as carrying out more detailed scrutiny of SSIs before they are taken out of the draft context. There are other suggestions, too.

The point was raised a few moments ago that we should try to get to a point at which we have a framework—forgive the use of that word—for better or improved scrutiny. With all the various suggestions, would it be difficult to get into that space in the first instance? If the process was too onerous at the beginning, before anything is taken out of the draft context, could that just slow down any activity by the Government? We should bear in mind Dr Tickell's point that this is a Parliament of minorities—the Welsh Senedd and the Northern Ireland Assembly are the same, but the House of Commons is different. The political context is clearly important, but is slowing down potential legislation, albeit for additional scrutiny, always the right thing to do? The point was raised about how much more Governments and politicians are being asked to look at today in contrast to, say, 40, 50, 60 or 70 years ago.

Professor Reid: The idea of having draft SSIs when a bill is being discussed is not practical, because the whole point, as we have often talked about with framework legislation, is that it is meant to provide for an uncertain and changing future. If you are at the stage where you have the SSIs already drafted, you do not need the framework bill—you could be producing a more solid bill.

There is the question of scheduling and timing around how Government policy evolves and at what stage the Government decides, for whatever reason, that it needs a bill. I question whether that is partly because, if you wait until all the bills are ready, you would have a terrible logjam at the end. You would have nothing to do during the first three years of the parliamentary session, and then you would have to try to do everything and deal with all the details in the last two years.

It is important to look at the process as a whole. At the framework stage, you cannot have detailed financial information and a regulatory impact statement, because you do not have the details. At the SSI stage, you are too late. You only have a number of days in which to deal with the formal policy documents. Either you need to have more of the information on finance and the regulatory impact available at the final SSI stage, or you need to think about where parliamentary input is best deployed. There is an argument that that is at the in-between stage. Many policies—not all, as we have heard—evolve in the sense that an act is passed, and then you have extensive consultation on the regulations. It is at that stage, perhaps, that Parliament could think about getting involved, because there is time to influence the final state of the regulations.

At that stage, the Government, with a bit of luck, has already done a lot of the work for you, because in the consultation responses that it has gathered, you have a lot of the evidence that you need about what the stakeholders are thinking and what the key issues are. That might help to inform the committees in their work. However, that relies on there being a consultation and on the Government asking the right questions, which sometimes it does not do. A lot of my consultation responses include a general introduction in which I talk about the questions that I think that the

Government should have asked, as opposed to the ones that it actually asked.

There is a question about thinking radically about the Parliament maybe getting involved at that consultation stage—that draft stage—rather than only at the very beginning and the very end.

The Convener: As no one else wants to comment on that, we will move on to questions from Bill Kidd.

Bill Kidd (Glasgow Anniesland) (SNP): As it is still the new year, I wish everyone a happy 2025. I think that Dr Govan might have some background information that he can give in response to my question. We all know, and it has been widely stated by the witnesses, that the Scottish Parliament is not unique in its scrutiny work. Are there lessons that we can learn or ideas that we can gather from elsewhere that we can take forward in developing our work on scrutiny of framework legislation?

Dr Govan: No man is an island. To take Ireland as an example, there are constitutional limits to what can be applied through delegated legislation. It is worth saying that we are inhibited by the lack of a codified constitution. However, a plethora of options is available if there is political will for the Parliament to implement stringent limits on what is and what is not acceptable in skeleton legislation, or whatever you want to call it. Portugal has limits on the kind of material that is appropriate for delegated legislation—the specifics are in my written submission and elsewhere. The issue that you would then face is the question of political will. Fundamentally, you would need the Government to act, rather than the committee. Governments are reluctant to inhibit their powers to use delegated legislation on matters, and that is not unique to Scotland. There are examples elsewhere, but the difficult question is how you get Governments to bind themselves with such limits.

Bill Kidd: Would it be possible for the committee to look into areas that other Parliaments and assemblies have powers over in order to address items such as statutory instruments? Could the committee suggest areas to the Scottish Government and say, “This works here and that works there”? Could we ask that the matter is looked into in future scrutiny?

Dr Govan: We have done a bit of work on that at the Constitution Society, and my colleague Tasneem Ghazi has written to the committee with additional evidence. Commissioning future work on that certainly would not be harmful. However, I defer to my colleagues on that.

Dr Tickell: I am not sure that you should ask the Government about that. After all, it is parliamentary issue, which is about the level of scrutiny that you decide to extend on provisions. There are definitions of negative and affirmative instruments in the Interpretation Act 1978, so there is some legislative underpinning. Again, it goes back to the culture: ultimately, it is about what the Parliament decides to do formally and informally to hold the Government to account for the decisions that it has taken and the legislation that has been passed.

I am struck by the fact that another key theme that the Parliament has been thinking about recently is post-legislative scrutiny, which involves working out whether the promises and claims for how legislation would work when it was passed have been borne out in practice. The answer is frequently that they have to some extent, but in some areas it is that they have not. That speaks to the same issues about whether you make the time. Is there scope in the parliamentary thinking and the frameworks that you have given yourselves or adopted to change how you are operating, in the way that Professor Reid described, to give you a meaningful chance to influence policy? Ultimately, that is what it is about.

The problem is the path dependency of the current process. It is a fait accompli, and you are invited to say yea or nay. The record shows that, even at Westminster, despite all the House of Lords reports, they say yea on more or less all the proposals on secondary legislation. Ultimately, it is not about an off-the-peg solution; it is about the democratic culture of the Parliament, which is within your powers and not the powers of the Government.

Bill Kidd: Dr Grez Hidalgo looks as though he is keen to say something.

10:45

Dr Grez Hidalgo: To the extent that you have a view about what amounts to good practice, communicating it to the Government certainly will not do any harm, and it could help those who are in charge of drafting legislation or supporting ministers in developing policies to have a clear idea of the right ways of preparing legislation.

I guess that there is another way of thinking about this, which involves the question of whether there is room to be more assertive. That will depend on your views about whether you are deferential to the Government. It seems to me that, since 2021, the Delegated Powers and Regulatory Reform Committee at Westminster has been sharpening its teeth and becoming more assertive in its scrutiny of the Government because, as colleagues have said, the view is that, despite the fact that guidance is available, it is not being followed.

There is then the difficult question of where you go once you have sent a clear message but you are not getting the response that you expected. One possibility is to be more assertive, but that comes with some risks because it means that, every time the committee asks for amendments, its political capital will be at stake. That would require careful adjusting, but it is a possibility that could be thought about.

Bill Kidd: I will come to Professor Whitaker in a wee second, but I note that the committee's name is "Delegated Powers and Law Reform Committee", so we have a duty, as much as anything else, to ensure that we propose whatever role we have.

Professor Whitaker: On practical solutions, I mention in my submission the SL1 letter procedure in the Northern Ireland Assembly. We talked about minority Governments earlier. A minority Government needs to reach agreements with other parties that differ on areas of legislation, so it has an incentive to talk to and work with them in a way that might not happen where there is a single-party majority, which allows a lot of power. That procedure builds on a bit of what Professor Reid said. It means that, before a statutory instrument is officially laid, there will be some discussion about it in the relevant policy committee.

Although, under that procedure, the Government does not have to act on what the committee says, we need to bear in mind the anticipated reactions point that we talked about earlier. If the Government knows that its statutory instrument will have to go before a committee and there will be some discussion there, it might build that consideration into what it does in advance. It might also save the Government's time if it thinks about the matter in advance and proposes statutory instruments that are likely to get broad support. You would not necessarily see lots of things being rejected if you implemented such a procedure, as the anticipated reactions might make a difference to the content of the statutory instruments.

Bill Kidd: Dr Fox has been nodding away enthusiastically.

Dr Fox: Fundamental to our delegated legislation review is our view that we should abolish the distinction between negatives and affirmatives and the established procedures, some of which date back to the Statutory Instruments Act 1946, as was mentioned earlier. Procedures at Westminster have built on that. We propose the abolition of that distinction partly because we believe that it is no longer helpful due to the shifting boundary between what should be in primary legislation and what should be in secondary legislation. Something might have been deemed appropriate for the negative procedure in 1980, but when a regulation is brought in in 2025 under a power in a 1980 act, it will be brought in in a different political context and the scrutiny procedure might not be deemed appropriate today.

We have a situation at Westminster—the same is true of the devolved legislatures to an extent—where MPs are spending time scrutinising affirmative instruments on which there is no concern and little interest. They are having to spend that time in delegated legislation committees and in the chamber, yet they cannot get debates on instruments that are ascribed to the negative procedure that they do want to debate. We therefore propose a much more radical change that would see all instruments laid in draft without a procedure being attached to them. They would go to a sifting committee, which would determine what the scrutiny procedure should be based on the legal text that the Government has presented to Parliament, rather than on an assumption that was made in a bill—whether it was a framework bill or not—five, 10, 15 or 20 years ago. The procedure would involve varying levels of scrutiny—different routes—depending on the nature and importance of what was in the legal text.

Daniel Johnson: Dr Fox, it sounds as though you are saying that secondary legislation instruments that come before Parliament should be treated as mini-bills, almost by default. Are you saying that they should be scrutinised and deliberated on in much the same way as primary legislation? If so, is that because, in essence, there is no clear distinction between primary and secondary legislation now?

Dr Fox: Some statutory instruments are like mini-bills in the sense that they can be 150 to 200 pages long and have very substantive content. However, our procedures would not be as onerous as the multistage process for primary legislation at Westminster. Instruments would go through a sifting process, as European Union withdrawal instruments do, and the process would allow 10 or 15 days for determination of whether the instrument should go to a regulatory scrutiny committee.

At Westminster, we do not have dedicated, standing scrutiny committees in the House of Commons. We have ad hoc committees that are created for 90 minutes to look at an instrument on which the members may have no knowledge or expertise. We would have something that was more akin to a select committee to look at the instruments. It might be that the sifting committee would determine that no further scrutiny of an instrument was needed—that it was a pretty anodyne, straightforward and short instrument and

that it could go forward to be made. It might be that there were legal, drafting or policy merit queries that the committee wanted to put to the minister or the department. Those could be dealt with by correspondence in much the same way as the delegated powers and secondary legislation scrutiny committees do today. That would be one route.

There would be another route for more contentious instruments when there were real concerns about the text, and the committee might want to call the minister in to deal with those questions. At the moment, the delegated legislation committees in the House of Commons will have a 90-minute debate, and most of the time the minister cannot really answer the questions, so they will say, "I will write back to you at a later date" and go away.

We are proposing a more structured approach that would be more akin to a minister appearing before a select committee. The Parliament would have an office of statutory instruments that would bring together, across both chambers, the necessary resource, with clerks and support and research staff. It would also have the ability to bring in additional support so that it could get the technical and policy expertise that it needed in areas such as artificial intelligence or science. At the moment, that expertise is completely missing from the scrutiny of such legislation.

I cannot speak to the position in the devolved Parliaments, but at Westminster there has been investment in select committee financial scrutiny in terms of research capacity and expertise, but there has not been the same investment in legislative scrutiny. That is largely left to the parties.

Daniel Johnson: In summary, the broad set of recommendations about looking at specific powers propose that we sift the instruments and that we consider taking more evidence on secondary legislation and scrutinising it in more detail. In the Scottish Parliament, we have the advantage that we do not have a distinction between bill committees and select committees so, in a sense, we have already addressed that bit. However, if you look at how we scrutinise secondary legislation, you will see that, by and large, the minister will come to a committee to present the instrument and the process is pretty much done at that point.

The suggestion seems to be that there should be a sift and that the length of time for which an instrument has to be laid should be elongated so that committees have the option to take evidence. There has been a bit of scepticism about whether procedure will cut it in this area, but is that roughly the consensus view on what Parliament should do to improve the scrutiny of statutory instruments?

Dr Fox: I add that there is another factor that would make that approach more effective. At the moment, the difficulty that you all have is that you can only accept an instrument or reject it. Those are the only options. One of the problems is the inability to amend.

Daniel Johnson: I was going to come to that.

Dr Fox: That affects the motivation of legislators to do anything about this kind of legislation and to engage with it. What is the point of doing that if you can only accept it in full or not? You might only have a concern about a particular provision within it and you might not reject the whole instrument. However, legislators are often finding that they have to accept the whole instrument even if they have a concern about an aspect of it.

We have proposed a system that would allow, for want of a better phrase, conditional amendment—not of the legal text of the instrument, but of the approval motion. You would be able to say to the Government, "We're not happy with this instrument for X reason—go away and think about it." The Government could then say, "We disagree with you and we're still going to put the instrument to an approval vote", but it would have to expend political capital to marshal a majority in the chamber and, in effect, whip against what the chamber had already agreed it would like a change on.

Daniel Johnson: I was planning to address that issue separately because I know that there are witnesses at this meeting who disagree with the power to amend because of the consequential effects that it might have. I am interested in hearing witnesses' views on whether sifting, more evidence taking and the possibility of amending would be sensible procedural changes to the way that secondary legislation is examined.

Professor Whitaker: Those measures are sensible, but I wish that there was a better way to solve the problem at source. It feels like we are dealing with the symptoms rather than the cause, which is the use of framework legislation in the first place. We have discussed the difficulties of trying to get Governments to change on that front, but that would be a better solution if it could be achieved in some way.

Daniel Johnson: I suppose that my response is that the Pandora's box has already been opened and there is a lot of legislation out there, so we need to deal with how Governments use it.

Professor Reid: The Scottish experience is different from the Westminster one, with the more experienced committee. I am an adviser to the Scottish Parliament's Net Zero, Energy and Transport Committee, which has sought evidence from stakeholders on a big set of regulations, and it may want to speak to people before the

regulations are approved. However, the time constraints and the quality of the information that is provided on the finances and the regulatory impact are issues.

Sifting and then choosing the appropriate procedure is a lovely idea, but I worry about its acceptability from the Government's point of view because of what it would do to timetables. The Government would not know when things would happen, and scheduling and co-ordinating things could become difficult, although that is not an insuperable problem.

I am one of the people who have worries about allowing amendment of the text. Dr Fox's suggestion would allow people to say, "We're not happy with the instrument as it stands, but if you make this change, there will be no problem." That is fine, but the suggestion needs some refinement. You definitely do not want the text to be adjusted at a late stage, when people might not realise the consequential impact, although that is not what Dr Fox is proposing.

Daniel Johnson: That is also true of primary legislation. That is the argument that we constantly get from the Government when we lodge amendments to legislation. It says, "You don't realise what you have done." However, I take the broader point.

Dr Govan: I just want to issue a disclaimer. Although I would personally be fine with that consensus, the Constitution Society as an organisation does not support particular principles in that regard.

Daniel Johnson: That is noted.

Dr Tickell: Something occurs to me in relation to how the Government presents information when bills are introduced. I am not sure whether it is an advantage or a downside—it is possibly both simultaneously—but the fact that bills have a policy memorandum and a delegated powers memorandum could be taken to imply that delegated powers do not speak fundamentally to matters of policy, which is obviously untrue. I wonder whether the potentially helpful approach of saying, "This is where we want to delegate powers to ministers", and then putting it somewhere distinct could almost mean that it is not part of the same policy discourse.

I am conscious that, when the Coronavirus (Recovery and Reform) (Scotland) Bill was progressing through the COVID-19 Committee, it gave ministers an unprecedented Henry VIII power to change legislation, but there was no discussion of that whatsoever in the policy memorandum and there was only a rather unclear discussion of it in the delegated powers memorandum. I wonder whether that bifurcation causes some of the problems by not lining up delegated powers with big policy questions.

11:00

Daniel Johnson: I agree. I will finish with this point, which was alluded to earlier. One of the interesting tests for a minister who is presenting legislation is whether, if a Government with a very different viewpoint was elected at the next election, it could use the legislation to do something that was very different from or even contrary to what was intended. Is that a relevant consideration here? Yes or no answers would be instructive.

I take it from the nods round the table that there is agreement on that, so I will hand back to the convener.

The Convener: That takes us on nicely to Henry VIII powers.

Jeremy Balfour: We could spend a lot of time discussing this, and I am sure that there is a lot that we would like to hear from you, but, fundamentally, how appropriate are Henry VIII powers? Should we be pushing back on them, or is it that, like 21st century social media, it just has to happen that way now?

Dr Govan, you are shaking your head and not smiling, so I come to you first.

Dr Govan: That is just my natural demeanour, I am afraid. I take a maximalist view of the issue. It is very difficult to envisage situations where Henry VIII powers are appropriate. At Westminster, we have the argument that, if you have a knock-back on Human Rights Act 1998 grounds, there should be Henry VIII powers to deal with that, but even in that case, we have not seen that to be very effective. If you show me a good use of a Henry VIII power, I will step back, but I have yet to see really great uses.

Jeremy Balfour: Are we in agreement on that, or is anyone a Henry VIII fan?

Dr Tickell: It is a "Wolf Hall"-related question. To stress what I said at the beginning of the evidence session, to describe it as a Henry VIII power is a term of abuse; it is not a compliment. It is a reference back to his proclamation that royal authority had the same rank and force as Parliament and was expected to be obeyed. It is about the fundamental question of whether it is appropriate for a member of the executive to be able to change the substantive law of the land. It is about the prerogatives that Parliament, as opposed to the executive, should be able to exercise.

I am not sure whether I am a maximalist on the issue exactly, but I think that there can be

scenarios where it makes sense for having minor amendments in keeping with the core purpose of a bill to be made by powers advanced by ministers, such as where you are expanding a definition and the parliamentary reach of a policy. To take the social media example, the current reporting restrictions framework, which is set out in primary legislation with no ability to amend who counts as a publisher, means that it is a crime for newspapers to identify a child who is on trial. It is a crime to do so on the radio or on television, but it is not a crime for me to do that on social media. That seems like the obvious example where, yes, primary legislation would be preferable and would be a possibility, but a Henry VIII power might be appropriate, given that these technological developments would not have been anticipated.

However, fundamentally, in the context of the coronavirus, it was controversial because it gave ministers the power, in the context of a public health emergency, to change any piece of legislation, including the emergency legislation itself, without reference to Parliament. At its core, that is why this is controversial.

Professor Reid: If I remember correctly, the Moveable Transactions (Scotland) Act 2023 Amendment Regulations 2025 that you approved earlier in the meeting is a set of regulations amending an act of Parliament, and that did not seem to cause that much concern. That is an example of where having the power can be useful for technical issues. As with all things in the area, one of the bedevilling problems is that there is a spectrum of uses. Within that spectrum, people will argue on political grounds on different measures.

Dr Grez Hidalgo: I fully agree with that point. There may be instances where Henry VIII powers can be helpful and can streamline parliamentary procedures. As Professor Reid says, there is a significant spectrum of different examples of Henry VIII powers. Dr Ruth Fox mentioned legislative reform orders, which are a significant Henry VIII power that perhaps should not have been granted by Parliament in Westminster.

There is also an opportunity to compare, for instance, the Henry VIII powers that were given in the European Union (Withdrawal) Act 2018, which are constrained to be only corrective. There is a significant difference in scope between those corrective powers to domesticate EU law and the Henry VIII delegated powers that were granted by the recently enacted Retained EU Law (Revocation and Reform) Act 2023. There can, therefore, be ways in which narrowly constrained Henry VIII powers can be helpful and contribute, as Professor Reid said, and not be controversial.

The Convener: I will add to the example that Professor Reid provided. Before we broke for Christmas, the committee looked at the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill, in which there were also Henry VIII powers, and we agreed to what was proposed at that point. That highlights the range of Henry VIII powers when it comes to more technical and minor provisions, as well as the potentially more controversial aspects.

Dr Fox: From the Hansard Society's perspective, I have sometimes ended up in quite difficult arguments about this topic with members of the House of Lords, including some very eminent judges who wanted to consign Henry VIII powers to the dustbin of history. We have always argued that we should concentrate on the function—the purpose—of the power, not its form, because, as has been highlighted, there is a spectrum.

For example, for the Domestic Abuse Bill at Westminster in 2020, the Government brought forward a proposal to have a list of specified offences that it would deal with in regulations. It was actually the Delegated Powers and Regulatory Reform Committee in the House of Lords that suggested that, no, to put a list of offences as a schedule to the bill would be better, with a Henry VIII power to amend that list by regulation at a later date.

On a more worrying level, we are also seeing the routine inclusion of a Henry VIII power for ministers to amend an act itself, in effect, through supplementary provisions that place the onus on ministers; what appears to be a tidying-up measure grants ministers quite wide powers to determine what changes are necessary in order to implement the legislation—including changes to the act itself.

Those are just two examples of the spectrum of views on the topic and how the powers are used. Our approach is to treat Henry VIII powers much as you would treat any other powers: to determine the process, the procedure and the scrutiny—whether to accept them then depends on their purpose and the impact that they would have, rather than their simply being badged "Henry VIII".

Daniel Johnson: I have seen tidying-up clauses that enable Government ministers to alter any enactment. I really object to that.

Just to play devil's advocate on the point that both Dr Tickell and Dr Grez Hidalgo raised about potentially legitimate Henry VIII powers, what stops those things from being done through one-line bills or, indeed, through more regular tidying-up bills, whereby there is a list of little tidying-up measures that should, in theory—if they are just tidying up—sail through Parliament but would at least have parliamentary scrutiny? Surely that is an alternative way of dealing with those points.

Dr Tickell: Absolutely. Certainly, during the Covid scrutiny, for example, the focus was very much on issues of emergency and urgency. A range of your colleagues articulated the fact that emergency bills would be an alternative way of achieving the same goal. I suppose that you then get into questions of the efficiency of a series of tiny one-line amendments—it is a lucky minister who gets responsibility for such things, and a lucky committee that gets to scrutinise them. It is certainly a way of doing it.

However, there is often a logic to it. For example, there is a long list of qualifying offences, and you want to add one, or one has been repealed. The argument from efficiency seems more persuasive to me in that context, in which it is literally a technical change, albeit with substantive implications, as compared with a wholesale revisiting of a policy issue or a whole stretch of parliamentary legislation that uses such an executive power.

The Convener: I have a question for Professor Reid on the Henry VIII powers. I chuckled when I read this part of your submission, which was in response to question 7 of our consultation. You wrote:

> "There is a paradox here. The more that the use of framework legislation is avoided, the more specific details will have to be included in primary legislation and therefore the greater the need to allow Henry VIII powers to avoid Parliament being clogged up with primary legislation to achieve non-controversial legislative maintenance."

I will come back to you on that in a moment, Professor Reid. First, it would be interesting to hear from others round the table whether they agree with what Professor Reid has suggested, or whether they think that he is potentially overstepping in his considerations in this area?

Dr Tickell: This feels invidious. [*Laughter*.]

One of the core aspects—one of the core tragedies—of the human experience is that multiple things that are mutually incompatible are all important. Often, we are looking in black-and-white terms, when, in fact, our public life is dominated by the idea that it is important to have parliamentary scrutiny but efficiency is also important. In politics, people often want to say that it is all white or all dark, with nothing in between, but these trade-offs are implicit in terms of privileging some values over others.

Professor Reid is probably correct, and his comment highlights some of the tragedies of public administration in that people are forced to prioritise some issues over others and there will be consequences for doing that. Things might take longer and there might be more bills, but maybe it is better to do it in that way than by giving the executive power to act, albeit quickly, but in the shadows.

Dr Govan: I think that I was the devil in Mr Johnson's devil's advocate.

As I said, I do not think that we necessarily need to start an argument here. I would take a firmer line on the use of Henry VIII powers. If there is inefficiency, that needs to be worked out on that basis and then primary legislation should be brought in, rather than using Henry VIII powers as a way round that. However, I appreciate that there are different views on that.

Dr Fox: I broadly agree with Dr Reid's view. I gave an example in our written evidence of the Welfare Reform Act 2012, which introduced universal credit and resulted in a Henry VIII power being used to amend 18 previous acts of Parliament. Those were technical changes to something that had already been approved in the 2012 act by Parliament. Therefore, the question is, do you want to expend Government and parliamentary time for a separate bill to make such technical changes, which, in principle, the Parliament has already approved? I would suggest that you do not. That is the kind of area where the power is useful. It is the other end of the spectrum where its use is of concern.

Professor Whitaker: I know less about this issue than I do about some of the other things that we have talked about. There is an argument about efficiency, but Governments with big majorities can still do things quite fast. You can get through bills quite quickly if you need to, particularly in the Westminster system. I note that one complaint about the way in which primary legislation is dealt with is that it is dealt with too fast.

There are ways of doing it. I agree that there are cases, which have been laid out by colleagues, where there are technical changes to be made and it makes sense from an efficiency perspective to use Henry VIII powers. However, the part of me that thinks in terms of democratic principles does not want to do it that way but wants to do it via primary legislation, perhaps using procedure to get things through quickly.

Dr Grez Hidalgo: I agree with the paradox that Professor Reid is raising. It seems to me that the accountability gap that arises from skeletal legislation is of such a serious nature that it might be a good trade-off to incorporate some narrowly constrained and conceived Henry VIII powers that enable the Parliament to at least have further information about what the Government's policy thinking is and to properly scrutinise those bills. Having Henry VIII powers as a compromise seems to me to be more or less acceptable under those circumstances.

This is a very abstract conversation. Therefore, I add that it will always be context dependent; it is difficult to say in the abstract.

11:15

The Convener: Is there anything that you would like to add, Professor Reid?

Professor Reid: I think that I was right. [*Laughter.*]

The point was made that it is all about trade-offs. The more you have in primary legislation, the less scope there is for regulations. Why do we have regulations in the first place? Nowadays, we are expecting Governments to do a great deal and to produce so much legislation, with extra areas of activity added post-Brexit that Governments and Parliaments must deal with. There is only a limited number of MPs and MSPs, and limited time. How will you divide up all those scarce resources? What is the balance, which impacts on political accountability, political debate, public participation and so on? There are trade-offs when trying to find a way through all that.

If I was going to recommend one thing that would have an impact—this picks up on what was said about the importance of political culture—I would suggest that perhaps the Parliament should say no occasionally to provisions in bills and SSIs. That might mean that some of those concerns are taken a bit more seriously.

The Convener: Before we close, do members have any final questions for the panel?

Bill Kidd: No, I just want to thank the witnesses. It has been wide-ranging discussion. There has been a lot of agreement, which has been useful for the committee to hear.

Jeremy Balfour: One area that we have not discussed—I do not want to open a can of worms—is that, in the Welsh Parliament, the minister who has laid secondary legislation comes to the committee and is more involved in the scrutiny of that. I do not know about the other legislatures. Is that a good thing or a bad thing? I am conscious of time, so maybe anyone with a view on that could write to the committee. It would be interesting to see whether the Government and the committee working collectively leads to better secondary legislation.

Daniel Johnson: This has been an excellent discussion. The observation was made that making a hard distinction between things that are framework bills and things that are not is not as helpful as thinking about how powers are framed. Also, this is as much about practice and culture as it is about drafting. Those are my takeaways. I am really grateful to the witnesses for their contributions.

Roz McCall: The joy of going last is that either you are saying what everybody else has already said or nobody wants to hear what you have got to say. I thank the witnesses for all their input. It was very interesting and informative. As others said, we know what the problems are; finding solutions will be harder.

The Convener: I thank all the witnesses for their contributions. As colleagues have said, it has been a fascinating discussion. I am in no doubt that we could have gone on for many more hours, but parliamentary time does not allow for that.

In addition to answering Jeremy Balfour's question about the Senedd, if there is anything else that you did not put on the record that you wanted to, please put it in writing and send it to the committee.

I suspend briefly for a comfort break.

11:18

Meeting suspended.

11:24

On resuming—

The Convener: For our second panel, we are joined by Jessica de Mounteney, who is first parliamentary counsel, and Diggory Bailey, who is a legislative drafter, both from the office of the parliamentary counsel. Before we start, I remind you not to worry about switching on microphones—that will be done for you. Do not feel that you need to answer every question, but please indicate when you want to come in with something.

Welcome to the Scottish Parliament and thank you for coming to this session. I know that you are aware of the work that the committee is doing in relation to framework legislation and use of Henry VIII powers.

I will open with a question, before passing on to colleagues. Does the OPC consider that the categorising of certain primary legislation as a framework is helpful or necessary, or do you think otherwise?

Jessica de Mounteney (Office of the Parliamentary Counsel): To kick off, it is worth saying that everything that Diggory Bailey and I will say will come from a slightly different perspective from those of your previous witnesses, because we are here as civil servants and drafters. I will try quite hard not to express too many opinions that are personal seeming, rather than professionally based on my objective civil-servant duty.

From a drafting perspective, it is not terrifically helpful to have rigid views about what bills are. Fundamentally, if the goal of a Parliament is to produce legislation that is effective, clear and properly scrutinised, the way in which it does so is dependent as much on context as it is on anything else. Different subjects give rise to very different considerations.

I am not sure that a bill's being a framework would make much difference to what we do as drafters, in terms of how a bill would be characterised. Ultimately, as you will be aware, the policy decisions about what goes into primary and secondary legislation are for ministers. From our perspective as drafters, we would not find it particularly helpful.

I see that Diggory does not have anything to add to that.

The Convener: We have heard from the first parliamentary counsel, and in some other evidence that we have received, that it is considered that there was more use of Henry VIII powers and framework legislation throughout the Covid period and in the Brexit legislation and that, as a consequence, they have become more normalised. Do you think that there has been a change in the directions that drafters receive, or in drafting practices, that makes framework legislation more likely?

Jessica de Mounteney: Undoubtedly, the speed with which it was necessary to enact legislation through Covid and Brexit has led to something of a culture change. My reflection is that that is also due partly to the way that the world works. When Governments are operating with a 24-hour news cycle, it is much harder to persuade people politically of the value of slowing down and producing clearly thought through policy provisions at the point at which a bill is introduced.

On the instructions that we get for drafting, I would not observe that that comes from a desire on the part of ministers to take power for the sake of taking power. When I have read about the issue and talked to parliamentarians in Westminster, I have noticed that there tends to be an assumption that Governments set out to produce what are commonly referred to as framework or skeleton bills. However, my perception is that that is not how it works—it is much more the case that there is a constant pressure to do something, and that that "something" tends to be legislation.

11:30

In complex policy areas, producing good legislation takes time. It is very well documented that the current UK Government has expressed a strong desire to slow down the pace at which legislation is produced in order to produce bills that have more clearly thought through policy at the point at which they are introduced. A side effect of that is that it is likely that there might be fewer of the delegated powers that exist to fill in policy gaps that have not been thought through at the outset. However, that absolutely will not mean that there will not be times when ministers make policy choices to have delegated powers for other reasons.

The Convener: To clarify, is the need to do something, which you touched on, because of political pressure?

Jessica de Mounteney: I think that there is a combination. My reflection is that there is also a societal pressure.

The Convener: Thank you.

Bill Kidd: I welcome the witnesses. Thank you for coming. I am going to read a wee bit here, because the matter is quite complicated.

Is there a conscious decision at any point to make framework legislation, or are framework legislation and framework clauses simply the result of drafters fulfilling direction that is given on the purpose of primary legislation?

Jessica de Mounteney: If the question is whether we, as a drafting office, ever decide to produce framework legislation, the answer is no. We receive policy instructions and do our best to give effect to that policy within the time constraints that we are given. I suppose that we might occasionally, as part of the iterative process of producing a bill, on analysing a proposal recognise that we might be in territory in which it could be helpful to have some flexibility, going forward.

I was struck by comments by the previous witness who talked about social media and publishing children's names. That might be an example of where we, bringing our professional drafting expertise to bear, might say, "If the goal of your policy is to make sure that you stop the publication of children's names, it might be helpful for you to have a power to amend this provision, going forward". It would never be in our remit to suggest from the outset that a bill should be a framework.

Diggory Bailey (Office of the Parliamentary Counsel): We have discussions with departments about the degree to which they want flexibility. Sometimes, they come forward with a policy proposal, thinking that it will be framed as a power, but we look at it and say, "Do you really need a power? If you're sure this is what you want, why can't we write it out?" Equally, it might be the other way round. That involves a necessary process in which they describe the policy to us and what they want to achieve now and in the future, and we test that and think through how it will be received by

Parliament. There is an iterative process to try to arrive at the best piece of legislation to give effect to ministers' decisions.

Bill Kidd: Procedurally, where does direction on drafting originate? Is direction given primarily by ministers, civil servants or special advisers, or does it come through Government departments?

Jessica de Mounteney: Do you mean the decision about what procedure would be attached to a statutory instrument?

Bill Kidd: Yes.

Jessica de Mounteney: Ultimately, it is a policy question that would be decided on by ministers. There would be a range of circumstances in which different people might be involved in advising a minister as to where that would end up, which might well include special advisers and other policy officials. However, ultimately, as with all decisions in relation to legislation, the decisions sit with ministers.

Bill Kidd: If it becomes framework legislation, would that be the result of a conscious decision? If so, at what level would that decision be taken, and at what point in the process and under what circumstances?

Jessica de Mounteney: The answer to that would very much depend on context and, again, on the outcome that was desired. An example that illustrates that is the Product Regulation and Metrology Bill that is currently in the UK Parliament, which is one of the bills that gives effect to what needs to be done following Brexit for regulatory purposes, and contains a lot of regulation-making powers. I was not responsible for drafting it, but I think that it will have come about because that is an incredibly complex area. It would be fair to say that it would, at a practical level, be impossible to use primary legislation to bring into the UK the power to make regulations over areas that used to be governed by the EU. The decision to take that route will have come from a starting point that involved consideration of the context and the desired outcome.

In other circumstances, it is possible that a particular power to make regulations might come about if it becomes apparent in the course of drafting that there is quite a lot of complexity around the policy or there is a greater need for flexibility than was originally imagined.

I always come back to this, but the truth is that drafting involves so many players and different considerations that it is quite difficult to give one answer to the question.

Bill Kidd: Is it the role of the OPC to put proposed legislation into a form that is understandable and logical?

Jessica de Mounteney: Our fundamental goal and purpose is to produce legislation that is clear, effective and comprehensible. Part of that will be to probe quite closely the policy intentions of a minister.

Diggory Bailey: It might be helpful if we were to describe the drafting process briefly. Normally, it starts with a minister's decision, and the policy will be worked up by policy officials in the relevant instructing department, who will then work with lawyers in the department who will prepare legal instructions, which will typically set out the aim to be achieved, what the existing law is and how they think that it might need to be changed. They will also deal with commencement and extent, and if powers are proposed, they will address the necessary procedure and so on.

The written instructions, which might be anywhere between five and 30 pages or so in length, will be sent to us and we then spend some time analysing them, trying to get on top of the policy and thinking about how best to give effect to the policy. Sometimes, that is the way that is suggested in the instructions, but we might sometimes think that we can see a different or better route by which the policy objective could be achieved.

We then go back to the department, sometimes with a draft, and often with a number of probing questions that enable us to get under the skin of the issue. Subsequently, there will be a process of discussion through meetings and correspondence to really dig into it. A lot of what we do in that process involves analysing, probing and exploring all the issues and things that might come up in the future. Following all that, the department will, as necessary, take the results of the process back to ministers for decisions.

Bill Kidd: Is there an average time for that process?

Jessica de Mounteney: Again, that depends on the context: there is no set time for the process. The process for the Coronavirus Act 2020 was fairly speedy, whereas the process for the National Security and Investment Act 2021 took two years, because the bill involved quite a lot of consultation and public discussion about what was the right thing to do. Obviously, we have small bills and large bills; that is similar to the situation in the Scottish Parliament.

Roz McCall: Good morning—it is still morning. There is much that I want to pick up on, so bear with me.

You have highlighted the drafting process. Thank you, Diggory, for doing that. I am picking up from you that it is not drafters who come up with whether something will be framework legislation or whether policy will be enacted through primary

legislation. Drafting is just about the morphosis of an idea as it starts to go through.

I asked this question before. Is there, in effect, a line? As you go through the process, do you say, "This has been the conceptual idea, this is what we are trying to do, and this is what the minister is trying to get to. We are building up the bill and moving it forward, and now we're drafting it. Now it has crossed the line that we have moved it towards. It will stay in framework or skeleton form", or do you say "We now can see that there is a definite line and we can move this forward"? Is there a process like that?

Jessica de Mounteney: No—absolutely not. Our starting point would always be to articulate as much of the policy in the bill as the minister is happy with. We do not really recognise the idea that there is a dividing line between a framework bill and a non-framework bill.

Diggory Bailey: Although I think that it is right that we try to articulate in a bill as much as possible what the policy is about, there are circumstances in which pushing stuff down to secondary legislation would mean that everything would be in the same place. If lots of the content is going to be in secondary legislation, pushing a bit more down into the secondary legislation, instead of leaving it in the primary legislation—or vice versa—means that the end-user of the legislation will have just one place to look. That might dictate the arrangement. That is one of the considerations that we bear in mind, because we think very much about clarity in the law and about the end-user.

Roz McCall: A factor that you might take into consideration is whether it makes more sense to move everything into secondary legislation.

Diggory Bailey: We also consider Henry VIII powers, which we will no doubt come on to.

Roz McCall: Absolutely.

Jessica highlighted earlier that

"producing good legislation takes time",

which I thought was very interesting. I infer from that that, if there is a speedy expedited process, the chances are that you are moving towards writing what is not necessarily bad legislation, but is certainly not good legislation. Then, there is the genie out of the bottle that is 24-hour news, and the desire of elected officials to expedite the process as much as possible so that they are seen to be doing something. When you are writing legislation, do you feel that there is a possibility that we are moving on a continual conveyor belt of producing what is not necessarily good legislation?

Jessica de Mounteney: I do not think so. The very existence of our office as a separate business unit within the civil service is meant to ensure that we do our absolute utmost to produce clear, usable and accessible legislation. That is what my answer to the question would be.

Roz McCall: I did not in any way want to intimate that the work that you produce is not top quality—that is not what I meant. It is about the idea that we are not really creating good law.

Jessica de Mounteney: We live in challenging times for producing clear and precise legislation, because the pressures are now different. I started drafting in 1997, and the world is a very different place now. That has led inevitably to changes in how we do things.

That said, I think that we are acutely aware of the pressures, and ministers want to produce good law. The reasons for changing the law and for having legislation are to change or to govern people's behaviour and to improve the world, and that is not done unless the legislation actually works.

There is a constant awareness of the need to make sure that legislation is good, but as witnesses said earlier, there is forever a balance to be struck, and I think that we sometimes end up having to navigate our way through that. Ultimately, we have to do what we are told, although we try quite hard to push back in order to ensure that what we produce works.

11:45

My approach is always that I am not just being an annoying civil servant and saying, "You've got to do this properly, because that's how it has to be done": it is much more about saying, "If we don't do this well enough, it won't have the impact that you want it to have."

Roz McCall: That was very helpful.

Diggory Bailey, you went through the process of what you do and how you do it. That was very helpful, but I heard nothing in there about a consultation or stakeholder engagement process. Would you get involved in that at all when drafting legislation?

Diggory Bailey: On the whole, no. That process would take place before the matter came to us; the relevant department would consult either publicly or with specialist stakeholders. Sometimes during the drafting process, the department would share our drafts with other stakeholders or people with the expertise to test it. We might be working towards a draft bill; when that was published, there would be an open consultation; and that would then be scrutinised by a select committee in Parliament. That is what would happen at that stage, and it would then go through. The whole parliamentary process is aimed at scrutiny.

Roz McCall: But you would not get involved in stakeholder engagement at the drafting stage.

Diggory Bailey: We would do no more than what I have just described. We have internal processes for looking at each other's work and setting up panels, but we are not involved in consultation.

Roz McCall: That was very helpful.

Jeremy Balfour: Good morning, and thank you for coming. I just want to pick up on a couple of points that have already been made.

We are told that one of the reasons for having framework bills in Scotland is that the Government wants to consult further once the primary legislation is in place. Does it help you as a drafter to have the information from a consultation when you draw up primary legislation, or is it more helpful to have it when you are working on secondary legislation—or does it make no difference?

Jessica de Mounteney: We in the parliamentary counsel office do not tend to draft secondary legislation. I am not sure that, in the UK context, I have come across the idea of producing primary legislation so that consultation can take place, so I am not sure that I have anything helpful to say on that.

Diggory Bailey: The consultation that takes place is normally about policy. From our perspective, as long as the policy has been clearly articulated to us and we can understand it, the process that comes before does not really matter. There might be a question whether it is good policy, but from a drafting perspective, we just need to know what we are trying to achieve, on the understanding that the policy has been fully worked out.

Jeremy Balfour: It is coming up to 40 years since I started working in the law, which is a bit frightening, but one of the things that I remember from my first year of jurisprudence is that the point is to make good law—which means, in other words, that it can be understood by as many people as possible and implemented by the courts, if required. From a drafting perspective and given your vast amounts of experience, do you think that secondary legislation gives good law and clarity so that people know what the Government of the day is trying to do?

Jessica de Mounteney: As long as the legislation is well drafted, it does not, from an accessibility point of view, matter whether it is primary or secondary legislation. It is now equally accessible to the public, and the UK statute book itself is kept up to date on a free website, www.legislation.gov.uk. I do not think that it makes much difference to accessibility.

Jeremy Balfour: Do you not think that, when we are dealing with an area of law—say, criminal law—if it is all in the statute, it is easier for people to find and interpret the information, instead of their having to look at the primary legislation and then X amount of secondary legislation?

Jessica de Mounteney: I do not think that it makes a difference, but I am speaking as a drafter who can wade through large amounts of material at top speed.

Generally speaking, the way in which people access legislation now is so heavily electronic that if you have good websites and good links, it probably makes no difference. If your mindset is to start at the beginning and go through to the end, which was definitely my mindset, it is obviously more challenging if you need 25 different books open on a desk.

Increasingly, though, that is not the way in which people access law. User testing by the National Archives, which runs www.legislation.gov.uk, suggests that the vast majority of people now access legislation electronically, so the considerations are different. However, that is very much a personal viewpoint, and I would be interested to know whether Diggory disagrees.

Diggory Bailey: If there is a problem with legislation being too diffuse because it is in lots of different places, the problem lies with its being diffuse, rather than with whether it is primary or secondary legislation. You might have a whole area of legislation governing the packaging and labelling of products, for example, that could be contained within a single set of regulations, set out in an act or split between the two. Naturally, I would assume that it might be easier to have it all in one place, but I am not sure whether that is a point about primary or secondary legislation or whether it is more about the law being too atomised across lots of different instruments.

Jeremy Balfour: That is a fair point. Perhaps I am just showing my age here.

Moving on slightly, I think that you have answered this already, but just for clarification, am I right in saying that policy development is not really your area and that you get sent instructions that say, "This is what we want. Turn it into legal language"? Is it correct to say that you are not really involved in what lies behind the policy?

Jessica de Mounteney: The academic theory behind the way in which we draft legislation is exactly as you say. In practice, of course, the process of drafting will often expose policy questions. I always say that if something is really difficult to draft, it is usually because the policy is bad.

That is a very simplistic way of saying that the answer to your question is not entirely yes or no. The very process of drafting will sometimes expose issues, which will then mean that our drafting input and analysis will have an impact on where things end up. However, it is fair to say that any decisions are not for us to make.

Jeremy Balfour: My final questions are about the comments made by the Delegated Powers and Regulatory Reform Select Committee in the House of Lords on how all of this works. Have those comments influenced or changed the way that you work in practice as drafters? If so, can you give us examples of how things have changed in the light of some of that committee's reports?

Jessica de Mounteney: We are always aware of the reports from the Delegated Powers and Regulatory Reform Select Committee. As this continues to be a very big and hot topic in the UK Government, we will always very carefully test the matter when departments ask us to do things by subordinate legislation. We will think about whether there is a way of doing it that does not involve such legislation—or, as Diggory Bailey has said, it might be the case that we see from a drafting point of view a good reason to do things by subordinate legislation. I would say that we are acutely aware of the likelihood of criticism from the delegated powers committee, and that it informs a lot of our discussions with the department.

Jeremy Balfour: Thank you.

The Convener: I call Daniel Johnson.

Daniel Johnson: Many of my questions have been touched on, so what I say might be a little repetitious. However, I will try to avoid that.

First of all, though, I would like to start almost from the beginning and understand your roles a bit more. You are both lawyers who sit in the Cabinet Office and work across Whitehall departments. Do you typically work directly with ministers and other civil servants? Can you describe the function of your office and how you interact with other parts of Government?

Jessica de Mounteney: Sure. Our unit sits within the Cabinet Office. There are about 55 full-time-equivalent drafters in the parliamentary counsel office, and we are a central resource that is available to every Government department. The way in which our resource is parcelled out is effectively decided by the Parliamentary Business and Legislation Committee, which is a Cabinet committee and is the gatekeeper or strategic overseer of the legislative programme and, thus, our drafting resources. If a department wants a bill, the first thing that it does is to get clearance from the PBL Committee for a slot in the parliamentary programme for a bill, and it will then instruct us. That is just an overview.

With regard to the actual drafting, we will, as Diggory Bailey has explained, get instructions from lawyers in particular Government departments. Most of our day-to-day interactions will be with those lawyers, and we will operate on a lawyer-to-lawyer basis; we interact sometimes with policy officials and occasionally with ministers, but not that often. We usually meet ministers if a particular issue is causing problems for the minister, if they are not clear about what we have done or if we really want to probe something. Day to day, however, we generally work with lawyers in Government departments.

As for your question whether we are all lawyers, all of our drafters are qualified England and Wales-qualified barristers or solicitors. Most of us have come to the drafting profession with a few years of professional experience elsewhere. I was a criminal barrister for a few years; we have some academics; and some people have joined us from solicitors firms.

Daniel Johnson: That certainly raises an interesting point for me, given that the Scottish Government and, I would imagine, the Welsh Government are former Government departments. Do you have interactions with lawyers from devolved Administrations or do you interact purely with Whitehall departments? I recognise that such interactions might be on a slightly different basis, but if you do have those contacts, in what circumstances do they arise?

Jessica de Mounteney: Most of what we draft is in reserved areas. To the extent that we draft in devolved areas, any interaction or consultation would generally happen at policy official level. We would not often have direct contact when drafting. However, there are certain exceptions to that, and we have a drafter seconded to us who deals with Scottish aspects of reserved areas, but not with devolved areas themselves.

Daniel Johnson: Have you noticed anything different in the approach to and practice in drafting, specifically with regard to secondary legislation and legislative powers?

Jessica de Mounteney: We do so little drafting for the Senedd and the Scottish Parliament. I am not quite sure what you are asking about in your question.

Daniel Johnson: What I am really interested in is whether there is any possibility of sharing best practice. Obviously the jurisdictions are different, but drafting is drafting and, in a sense, lots of different people are seeking to do the same job of translating policy intent into good law. Is there any possibility of sharing best practice, both generally and more specifically with regard to delegated and Henry VIII powers? I keep saying "Henry VIII" but that is, as the previous panel pointed out, a

pejorative term, so perhaps I should say "powers to amend primary legislation". To what extent does the possibility of sharing best practice exist, and to what extent is there a possibility of exploring that in the future?

Jessica de Mounteney: We talk a lot to the drafters in the other drafting offices. Every three to six months, I meet the heads of the other drafting offices in Northern Ireland, Wales and Scotland, and we discuss common issues and problems that we all face. We also spend quite a lot of time talking about the best way of managing things when legislatures have different goals—I was going to say "are in conflict", but that would be the wrong phrase—because I know that there are quite a lot of difficulties when UK acts amend Scottish acts in devolved areas. We talk about all those things and how to share best practice.

I am not sure that we talk that much about the principles around delegated legislation, because those remain a policy choice. Our mutual goal is to produce clear and accessible legislation.

12:00

Daniel Johnson: That is really helpful. On a side note, it is always interesting to look at how the machinery of the UK Government interacts with that of devolved Governments, so having people at that interface is useful.

You have both stated a number of times that the goal is to provide clear and understandable legislation. I have two specific questions on that. I note that the OPC has drafting guidance. First, how is that set out? Secondly, we heard from the previous witnesses that, when legislation sets out powers in secondary legislation, it is sometimes not at all clear what ministers will do with those powers. Are such scenarios caught in the guidance or your broader practice? Is there a point at which you say, "We cannot tell what this legislation is going to do. Is this the right thing to do in terms of setting it and framing it in secondary legislation?"

Jessica de Mounteney: I have to confess that I do not know whether our drafting guidance talks about that.

Diggory Bailey: I used to chair the group that produces our drafting guidance. Our drafting guidance is more at a technical level rather than being about the overall approach to policy. There is a chapter on delegated legislation, but it is about what words should be used to attract the affirmative procedure or the negative procedure across the different jurisdictions in the UK. The guidance is at that technical level of what words should be used.

Your question is about whether we have an overall policy approach. The answer to that is that, if we are asked for a power that we think has no colour to it and that we cannot really understand, we will have that discussion with the department. We will say that we need to know more in order to try to articulate the policy. We understand that the department might think that things will shift in the future, that a consultation is needed, that the legislation will need to adapt to future circumstances or that businesses might try to get around a regulatory regime, so lots of flexibility is needed, but we need to try to articulate the power in a way that gives people a sense of what it is really about and that conveys the policy idea. That will involve discussion—sometimes, robust discussion—between us, the department, the policy team and lawyers until, hopefully, we reach a consensus.

In relation to the breadth of powers, we keep going back to the point that we regard that very much as a policy question in the end.

Jessica de Mounteney: I have often reminded departments that, if you have too wide a delegated power, you run a much bigger risk of it being challenged. We have done a lot of work with departments on that. Although it is not part of our business unit, we have a lot of interaction with the statutory instrument drafting hub, which is based in the Cabinet Office, and some of the work that I have been doing with it in the past few months has been about helping departments to work out exactly what they want to do with a delegated power before we draft that power. One problem is that, in circumstances in which you do not know what you actually want to do with a delegated power, there is a much higher chance that you will end up with a power that will not allow you to do what, it turns out, you need to do. That is another example of when the practical consequences have a bearing on how legislation is drafted.

Daniel Johnson: That is a very useful clarification. My observation is that these things work much better if you have clear guard rails, even if you leave the operation to legislation.

I will ask essentially the same question about the so-called Henry VIII powers, which are powers to amend primary legislation. With those powers, do you take broadly the same approach, or are different approaches, principles or even practices set out in your guidance with regard to those sorts of powers?

Diggory Bailey: The starting point on Henry VIII powers is that we want to focus on the substance rather than the form. That dictates our approach to whether a power is appropriate as we test it with the department. Quite often, you can express something as a Henry VIII power or not express it as that, and the approach may be influenced by

what the policy is or by other factors such as clarity or usability.

Suppose that there is a policy that involves looking at an identity document. We could say that people have to look at an identity document as specified by regulations, and then leave the list of identity documents to regulations. Alternatively, we could put all the documents in the primary legislation. However, if we put it all on the face of the primary legislation, what if something emerges in future, such as a new form of digital ID, and we want to amend the list? To do that, we could take a power to amend the list—that would be a Henry VIII power. Alternatively, we could say that the documents are things such as passports, driving licences et cetera, or any other ID document that is specified in regulations. However, the legislation would then be split, as some stuff would be listed in the primary legislation and the rest of the list would be in secondary legislation.

My starting point would be that it is more helpful to have that list in one place. If we think that it can be done in such a way that a document can easily be slotted into the list, it would actually be better to have a Henry VIII power to put additional documents in the primary legislation. The substance is the same, whether we put the list in primary or secondary legislation or split it between the two but, for me, the overriding consideration should be what the end user—the lawyer or whoever is going to look at the resulting act—will find most useful.

Daniel Johnson: As an aside, I will say that that is an incredibly helpful insight for the member's bill that I am in the process of drafting, so thank you very much.

Do you have a view on the frequency of the use of Henry VIII powers and secondary powers? Is it going up, or is it about the same? Are there differences in the approach that you see, especially given your 25 years of experience?

Jessica de Mounteney: I am going to be really annoying and say that I will have to come back to you on that question, because anything that I say would be based on perception and a general feel rather than actual evidence. There are probably quite a lot of studies out there answering that question about the numbers.

Diggory Bailey: We need to be careful in expressing a view about numbers. In the Tobacco and Vapes Bill, which is before the UK Parliament, there is stuff about packaging and labelling. That power could be framed as a power to make provision about packaging and labelling of tobacco products, followed by a whole list of things that can be done in particular. Alternatively, that could be split up into 10 separate powers. It could be one power or 10 powers.

Therefore, if you just count absolute numbers, that can sometimes be a bit misleading. Actually, the broader power would be the single power, because that would have to have some overarching articulation of what it was, and then lots of things saying that, in particular, you can do this, that and the other. Therefore, it might actually be better to have more powers that are more focused and targeted to deliver the actual policy that is wanted, rather than a broad overarching power.

That does not answer your question. However, counting can be a bit dangerous.

Daniel Johnson: In essence, you are saying that it is more important to look at the scope and effect of what is being legislated for, rather than the number of particular instances or clauses, because then you are just counting—

Diggory Bailey: It can be a crude measure.

Daniel Johnson: Exactly.

Jessica de Mounteney: For what it is worth, my instinct is that we are in the same place as we always were in that we, and Governments, want to produce legislation that does what it is intended to do. Therefore, I am not convinced that there is a greater move towards pushing everything off the face of primary legislation. To the extent that that is happening, it is because the world that we live in, with the massive regulation that Governments are now expected to do, means that, as a matter of practice, there is more subordinate legislation. However, my instinct is that that is not to do with a desire to take power, although that is a very instinctive feeling from my 28 years of drafting, rather than something that is based on any evidence at all.

Daniel Johnson: Finally, I have one slightly cheeky question—well, it is not cheeky but it is slightly less formal. As two drafters speaking to a group of legislators, if you had one plea to legislators on what they should consider when they are thinking about turning policy into codified law, what might that be?

Jeremy Balfour: "Don't touch what we've done!" [*Laughter.*]

Jessica de Mounteney: I think that it would be to not be frightened of the words on the page. I sometimes worry that, because so much extraneous material is produced around bills, legislators' focus is taken away from the words on the page. My top ask would be to read what is there and, if you do not understand it, that means that we have probably got it wrong.

Daniel Johnson: That is one of my favourite lines, by the way. I use it all the time—if you do not understand it, it is probably wrong.

Diggory Bailey: I will sign up for that, although that is a cop-out.

Jessica de Mounteney: Chicken!

Daniel Johnson: Thank you.

The Convener: Unless there are any final questions, I thank our witnesses very much for their time. The session has been very helpful for us. If there are any further concerns or things that you have not said on the record that you would like to raise, please write to the committee. We will produce a report in due course, and we will send it to you.

That concludes the public part of the meeting.

12:11

Meeting continued in private until 12:39.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba