



Constitution Committee

Corrected oral evidence: The governance of the union: consultation, co-operation and legislative consent

Wednesday 15 May 2024

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Beith; Lord Burnett of Maldon; Lord Falconer of Thoroton; Baroness Finn; Lord Foulkes of Cumnock; Baroness Goldie; Lord Keen of Elie; Lord Strathclyde; Lord Thomas of Gresford.

Evidence Session No. 5

Heard in Public

Questions 72 - 95

Witnesses

I: The Rt Hon Mr Alister Jack MP, Secretary of State for Scotland; The Rt Hon David TC Davies MP, Secretary of State for Wales; Lord Caine, Parliamentary Under-Secretary of State, Northern Ireland Office.

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Examination of Witnesses

Mr Alister Jack, David TC Davies and Lord Caine.

Q72 **The Chair:** Good morning, everyone. This morning, the Constitution Committee is hearing evidence in its inquiry into the governance of the union: consultation, co-operation and legislative consent. We are hearing evidence from the right honourable Alister Jack MP, Secretary of State for Scotland, the right honourable David Davies MP, Secretary of State for Wales, and Lord Caine, Parliamentary Under-Secretary of State at the Northern Ireland Office. Good morning, gentlemen, and thank you for coming. I am particularly grateful for the co-ordination of your diaries so that you could all come. It is really helpful to us to get a cross-picture. Compliments to the diary secretaries for achieving that in response to our request.

I know that each of you would like to make a brief opening statement. We then have a series of questions; I hope you have had an indication of the areas that we are interested in. I invite you to make your opening comments.

Mr Alister Jack: We drew lots, and I am going first. Good morning to the committee, and good morning, Chair. Thank you for your invitation to all of us to give evidence. I wanted to start by saying that devolution is broadly working as intended, despite the very testing circumstance that we have experienced in Scotland over the last 17 years.

We cannot ignore the political realities. We have a UK Government supportive of devolution and an SNP-led Scottish Government who oppose devolution, as a nationalist Administration whose political interests are not served by devolution succeeding. Of course, there have been tensions between Scotland's two Governments, but that friction is not evidence of devolution failing. In fact, the evidence shows that the devolution settlement has proved sufficiently flexible to accommodate fundamental political differences. A good example of that is the operation of the Sewel convention, which I know is part of your inquiry.

Since the beginning of devolution, UK Governments have legislated in devolved policy areas with the consent of the Scottish Parliament more than 200 times. There have been only 10 occasions when the UK Government have legislated without the consent of the Scottish Parliament. On each occasion, that was critical for the whole of the United Kingdom. For example, it was to deliver Brexit or to implement the valuable trade deals that we have done with Australia and New Zealand. We have done so only after engaging with the Scottish Government, hearing their concerns and offering to make changes to the legislation.

Scottish Government Ministers have claimed that legislating without consent has undermined devolution, and this has prompted questions about whether the Sewel convention should be made legally binding. My own view, after five years of experience in this role, is that that would be a profound mistake. It would fundamentally alter the devolution settlement and gravely weaken the union by preventing the UK

Parliament from legislating on behalf of the whole country where necessary.

The Sewel convention was never intended to give devolved Administrations a veto over UK-wide legislation, and the consequences of allowing one are not difficult to imagine. Since the start of devolution, the UK Government have approved more than 200 Section 104 orders—for where laws are passed at Holyrood which then require changes to UK law. We have done so recently, even where we have disagreed with the basis of the Scottish Government's legislation.

Finally, in recent years we have strengthened devolution by transferring powers from Brussels to Edinburgh while agreeing new UK-wide approaches to regulation through our common frameworks programme. This has been underpinned by the United Kingdom Internal Market Act, which protects cross-border trade and has also allowed us to deliver real devolution. We have taken powers to spend money directly in Scotland, practising real devolution with local authorities, and we have also sought to protect the internal market. As 60% of Scotland's trade is with the rest of the UK, it is by far our biggest market.

Thank you for allowing me to say a few opening words. I look forward to answering the committee's questions.

The Chair: We are going to come to the Sewel convention. I do not want to open up a debate, but I note your point about there being only 10 occasions. One of the things that we are interested in is the extent to which delegated legislation is now also being used to intervene in devolved matters, but we can come to that when we get there. Would other colleagues like to make a statement?

David TC Davies: I agree with all of what my colleague, the Secretary of State for Scotland, has said. I would just add that the Welsh devolution settlement is different and, in some ways, more complex, which is a reflection of the history, geography and culture of Wales, and the fact that since 1536 there has been a single legal jurisdiction for England and Wales.

Devolution has meant that there is now an interaction between the reserved justice system and the devolved powers of the Senedd and Welsh Government. Devolved and reserved bodies should work collaboratively as partners. As Secretary of State, I am always keen to try to make sure that that happens. I am very pleased that the justice system continues to work well in Wales.

However, it is because of the porosity of the border that I have always been clear that we need to operate within the framework of a strong, stable United Kingdom. We need to ensure that we are respectful of devolved matters. We also hope and are sure that the Welsh Government will be respectful of reserved matters. Cross-border issues can be addressed by the United Kingdom Government working with the Welsh Government, where appropriate.

I meet regularly with Welsh Ministers outside and within formal structures, and I will always continue to encourage them to work constructively with us for the benefit of all in Wales. Of course, we do so on many issues, which I can elaborate on later in this session.

Discussions can be political in nature. It is no secret that there are tensions at times, due to the fact that we have a Conservative Government in Westminster and a Labour Government in Wales, but I like to think, and believe, that, on issues where we are all in agreement, such as the importance of encouraging investment, jobs, the growth deals and the work that is going on around Tata, there is a lot of collaborative working.

I disagree very strongly with the calls for more powers to be transferred to the Welsh Government. Ministers in Cardiff Bay should be completely focused on delivering for the people of Wales and not sidetracked by endless constitutional debates. The current arrangements broadly work well and benefit from the flexibility that a statutory system could not provide.

Lord Caine: Thank you to the committee for the invitation to attend today's session and to represent the Northern Ireland Office. I should start by saying that Northern Ireland remains a very highly valued part of the United Kingdom, and this Government is strongly committed to safeguarding and strengthening its place within our union, as set out in the recent Command Paper that led to the restoration of devolved government in February, after two years of not functioning.

It is important to highlight the uniqueness of the devolution settlement in Northern Ireland, where the context and, I would say, dynamic of how it works and, as a result, the relationship with the UK Government is often quite different to that of Scotland and Wales. As the committee is fully aware, the devolved institutions at Stormont are the product of many years of negotiation that culminated in the 1998 Belfast agreement, which helped to bring an end to a period that had claimed over 3,500 lives.

It is, therefore, not just about delivering good governance for the people of Northern Ireland but about delivering peace, stability and prosperity in which both major traditions are properly and fairly represented and have a stake in society, even though their aspirations are fundamentally different. As a result, unlike in Scotland and Wales, Northern Ireland has a mandatory coalition that depends on co-operation between the two largest parties representing majorities of unionism and nationalism, and with most important legislation having to be passed on a cross-community basis.

Also, as is evident from recent years, if one major party pulls out of the Executive, then the system ceases to function. That is, of course, unlike most systems anywhere else in the world, where, if the Government fall, another Government takes its place. A big preoccupation of the UK Government since 1998 has therefore been to support stability, to

prevent the institutions falling over and, in circumstances where they have, to put them back together. I speak as somebody who has been intimately involved in both trying to prevent them falling over and putting them back together.

It is our fervent hope that the latest restoration will be sustainable and durable. So far, the evidence is that the Executive is working well, with a very good relationship between the First and deputy First Ministers, which is crucial to the functioning of the whole system. It also requires a high level of regular engagement between the UK Government and the Northern Ireland Executive, and not just the First Minister and deputy First Minister but also the other Executive Ministers, if we are to deliver—to use the mantra that I have deployed for many years—a Northern Ireland where politics works, the economy grows and society is stronger and more united.

The Chair: Thank you for those statements. They slightly anticipate some of the questions that we have. One of the reasons why we were quite keen to see all of you together is to help us understand more the role of the territorial departments in both maintaining and improving the relationships between the UK Government and the Governments of the devolved nations. I do not think that we are terribly clear on the specific role of the territorial departments, so perhaps you could explain how you contribute through that role and what it is.

Mr Alister Jack: I would start by saying that it is not just Ministers, but officials. There are a lot of meetings and discourse. In 2022, 270 meetings took place. As Ministers, we have the structures, such as the interministerial group committees, which are important, and we also have, independently, direct contact with our devolved Administrations. In my case, things that are relevant there would include freeports. There has been a lot of work done on freeports. The city and region growth deals are an ongoing piece of work that has been very successful, and there are the levelling-up funds and how we do all that.

There has been a huge amount of work going on across government, which totals some £3 billion in investment from the UK Government directly into Scotland. We are dealing with not only the Scottish Government but local authorities as well. That is a good thing, because it means that we have the relevance of two Governments in Scotland, which we did not have for 40 years. I have been very keen to press Ministers from all Whitehall departments to go to Scotland. The Scotland Office provides the logistics support for that, and civil servants in our media department get the Ministers fit for dealing with the Scottish press, which is very different. They are able to do all of that in that role.

That takes me to officials, who, day in, day out, are having meetings behind the scenes as one GB Civil Service, if you like, with Scottish Government officials, as well as across Whitehall departments to make sure that upcoming legislation is carefully checked, that bad things do not happen, if I can put it that way, that we do not make mistakes and that Whitehall departments understand the devolution settlement. Our role is

twofold: dealing with the Scottish Government and local authorities, and dealing with Whitehall departments.

The last thing I would say on this is that I have a “Delivering for Scotland” board. Every quarter, I chair a meeting with the senior civil servants in every department across Whitehall and we talk about what they are doing to strengthen the union. We talk through the issues that they have coming up and the contact that they are having with the Scottish Government. Our lead non-exec director and the director of the Scotland Office attend it, and I chair it. As I said, every Whitehall department is represented. The meeting lasts for a number of hours. We drill down; we have an action list; we come back and we focus. We are co-ordinating that and can help them with problems that they have or with things that they may not understand around the devolution settlement, which I see myself as a protector of.

The Chair: Can you give us a hard evidence example of where the territorial department has brought its influence to bear on changing what may have been the initial cut on a government view on a policy, so that we can understand how you are exercising that influence?

Mr Alister Jack: Do you mean Scottish Government policy or UK Government policy?

The Chair: I mean when you are exercising this role of ensuring that the Scottish perspective on the impact of a UK policy is taken into account.

Mr Alister Jack: It is about ensuring that the devolution settlement is respected. That is critical. It is also about looking at specific areas where Scotland may do things differently. The most recent example is the postmasters Bill, where the Scottish Government were saying one thing but the Lord Advocate, who is a member of the Scottish Government—we will park that to one side—was saying a different thing. I worked with DBT to ensure that what the Lord Advocate wanted to deliver was delivered in that Bill. That was important, because there was no doubt that there was confusion among the Scottish Government on what they wanted.

The reality was that most but not all of the convictions of postmasters in England were made by the Post Office. In Scotland, they had been made by the Crown Office. It was not the Director of Public Prosecutions in England; it was done differently in Scotland by the Crown Office. To that end, the Lord Advocate wanted to unpick the convictions because some may have overlapped with prosecutions that had been done in England by DWP but, in Scotland, had been done by the Crown Office. It may have been money laundering overlaps and things like that, so she wanted to carefully unpick that. I worked hard to get DBT to the place where it understood that we should respect what the law officers in Scotland wanted to do, so that they could then deal with the justice issues correctly.

The Chair: That is a good example. Thank you.

David TC Davies: My colleague has given the high-level answer, but you are searching for examples. When asked what I do, I always say that, in a nutshell, our role is to represent Wales around the Cabinet table. I will give some examples of how we have done that and how it has worked out in practice.

One example that is very relevant at the moment is the development of the floating offshore wind industry in the Celtic Sea off the coast of south Wales. That has been far from straightforward. It is going along at pace at the moment but, to enable us to get to where we are, with an auction round currently taking place, I have had to hold numerous meetings with the Crown Estate and with a variety of government departments—Defra, DfT, DESNZ and at least one other, each of which has had problems or issues that require resolving. Some seemed fairly difficult, but have been resolved.

Frankly, because I am a Cabinet Minister and a member of government, I am able, rightly, to go and see Ministers in those departments whenever I need to. I am not suggesting for one minute that I have played anything other than a small role in helping us to get to where we are, but, with the support of many people in the Wales Office, we have encouraged those departments to deal swiftly with the problems that have been presented. That is, if you like, a live example of where the office has been very good for the development of an important industry in Wales.

I could also talk a lot about the Indian company Tata and its decision to close the blast furnace in Wales because of the losses. The Wales Office has had a role, first and foremost, in supporting the proposal to build an electric arc furnace, which will save 5,000 jobs, and, secondly, in fully acknowledging the enormous impact that 2,800 job losses will have in a town such as Port Talbot and working to make sure that other government departments are stepping up; that we support anyone who loses their job; that there is training available to get people into other jobs; that DLUHC and the Treasury are coming up with the money, £80 million so far, to support training and infrastructure improvements; and that Port Talbot can benefit from the towns fund. We are also chasing up other departments to make sure that freeport status is allocated quickly and smoothly to Port Talbot, so that it can look for other industries.

It has been a very important piece of work that is ongoing, and it requires me to be able to get through the door of numerous government departments around Whitehall and beyond to support the town and the community. Those are just two examples.

The Chair: Lord Caine, Northern Ireland is slightly different. We have some specific questions coming up on Northern Ireland, but is there anything that you particularly wanted to add at this point?

Lord Caine: Just very briefly, my mind goes back to 2010, shortly after the devolution of policing and justice. I think it's fair to say that was such a big part of what the Northern Ireland Office did at the time, in the

aftermath of that final piece of the devolution jigsaw, if you like, there was uncertainty as to what the precise role of the department was.

At the time, officials would say to us, as David alluded to in the example of Wales, that it is about supporting Northern Ireland's interests around the UK Cabinet table, et cetera. We very quickly came to the conclusion that that was not enough, and that a large part of what we had to do was to represent UK Government interests as well in Northern Ireland, so it is a two-way street. As part of that, a large element is ensuring that the various political agreements that have been made over the years, going back to 1998, the St Andrews agreement and subsequent, are properly and faithfully implemented and obviously most recently, the Command Paper commitments that were produced in February.

We also work very closely with the Executive on issues such as economic prosperity. As in Scotland, there are city and regional growth deals in which the UK Government and the NIE are very closely involved in partnership. We are also doing what we can jointly to encourage inward investment into Northern Ireland. The Executive have Invest Northern Ireland. We have DBT. We are not in competition. We try to complement each other in securing overseas investment.

To answer your question as to where we have influenced government policy in a devolved area, we also did so with the Post Office, but in a different direction to the one in which Alister's department went. The original proposal was that the legislation extended only to England and Wales. As a result of conversations between the Northern Ireland Office, the Northern Ireland Executive and DBT, amendments were passed last week or the week before to ensure that Northern Ireland was included. That is a good, concrete example of where the relationship between the UK Government, in particular the Northern Ireland Office, and the Northern Ireland Executive has resulted in UK Government policy changing.

The Chair: Staying with the role of the territorial departments, there are several supplementary questions that my colleagues would like to ask.

Q73 **Baroness Goldie:** Thank you for these comments. It is extremely helpful and illuminating for the committee. I was very struck by what was sewn into the fabric that you were describing—the relationships, which Mr Davies specifically mentioned. I am interested to understand what engagement with devolved Ministers looks like. Is there a diarised schedule or is it very much on an issue-by-issue basis?

David TC Davies: There are formal mechanisms for meeting with Ministers from devolved Administrations. There are the IMGs, for example. On a day-to-day basis, I meet with Ministers regularly. For example, I referred to Tata Steel. The UK Government have set up a transition board to support the people and community of Port Talbot. Although the UK Government have funded this with £80 million, and an additional promise of £20 million from Tata, I made it clear that it is

really important that we show a positive attitude towards working with the Welsh Government.

Therefore, I suggested that we would want a Welsh Government Minister to sit on that board as a deputy chair, so that is what has happened. The Economic Development Minister, who is now the First Minister, sat for the first four meetings, and then his position was taken by the new Economic Development Minister, Jeremy Miles. I will sit as closely with them as I am with Mr Jack at the moment, and I can assure you that the conversations, formal and informal, are very positive, because we are all on the same page in wanting to support the people and community of Port Talbot.

Baroness Goldie: That is very helpful. As the territorial Secretary of State, you will often be in Wales, dealing with reserved issues for which you have a Cabinet responsibility. When that happens, is there any attempt to engage with devolved Ministers who may be interested in or want to understand better what the impact of these reserved policies may be, or do you just do your own thing in Wales?

David TC Davies: To take an actual example, the Armed Forces are clearly a reserved matter. If I were visiting an Armed Forces base, I would not necessarily have any contact with anyone in Welsh Government. Having said that, as a matter of fact, the Welsh Government have appointed a Minister to have oversight of veterans. I recall that I met her the last time I visited Brecon Barracks, which is fine.

I would not necessarily expect a Welsh Government Minister to be present if I am conducting a visit relating completely to reserved matters, but I certainly would not have any objection if they were there. It is probably on a case-by-case basis. When we are dealing with matters that cross over, clearly we will be informing and hoping to work with Welsh Government Ministers.

Baroness Goldie: That is very helpful. Mr Jack, you have given a very full description of the extensive engagement that you have. Do you have a diarised schedule to meet Ministers in the devolved Government in Scotland, or is it that, as an issue demands, you will engage with the appropriate Minister?

Mr Alister Jack: It is both. There is a structure, and then there are issues that require conversations, whether in person, on Zoom or on the telephone. All of those things are done with the Civil Service present. We keep it formal, but it is informal in its need, depending on when issues arise. A recent example, not dissimilar to what the Secretary of State for Wales was referring to, has been the task force set up for Grangemouth. Following Brexit, we had a seafood task force that operated very well out of the Scotland Office, chaired by the Minister for Fisheries within our portfolio in the Scotland Office, David Duguid, MP for Banff and Buchan. There have been a number of examples where that has worked very well.

Baroness Goldie: That is very helpful. Lord Caine, I imagine that, with

the recency of the establishment of the Executive in Northern Ireland, you are now in a new level of engagement. Very briefly, could you explain how you set up relationships?

Lord Caine: Like Alister, it is driven by both diary scheduling and events as they come up. Our hope now is that, with a restored Executive, we can build a much more structured relationship than we have had over the past few years. The Secretary of State is engaging in regular meetings with the First and deputy First Minister.

I did a school opening with the First Minister and deputy First Minister, the Finance Minister and the Education Minister in February. That is an interesting example of where there is a crossover between the devolved side and the UK Government, because, education is devolved in Northern Ireland of course, but there are commitments in the fresh start agreement from 2015 for the UK Government to provide funding for integrated education, so we all have a stake and so I opened a shared education campus in Limavady only a few weeks ago, which was UK Government-funded, along with Northern Ireland Executive money. That is a good example of how we want to collaborate more closely.

I have meetings coming up with the Health Minister, the Communities Minister and the Education Minister. If there is a threat of a plant or factory closure, that will necessitate co-operation and consultation as and when things come up, but we are determined to try to get a much more structured relationship in place than has necessarily been the case over the past few years.

The Chair: Before I bring in Baroness Andrews, I am conscious that, if we have three answers to every question, we are not going to get through them. If someone answering a question captures the spirit of what you feel, maybe you can indicate that and I can steer us towards moving on.

Q74 **Baroness Andrews:** Could I just follow up on one point? Mr Jack and Mr Davies, when talking about your capacity to engage with policy as it is coming through, you spoke about the very positive aspects in which you can influence and make a difference.

You mentioned the internal market, which was not a happy ship in the sense that there was a lot of concern from Wales and Scotland about the lack of engagement in the beginning. The Bill itself did not go through the consent procedures. There was a relationship with the common frameworks, which looked at first as if it would have a very negative impact on the operation of frameworks and the resolution of disputes. In that mix, what role were you able to play to maybe interpret one side to the other, or take a position that made it easier to find a compromise, as was eventually found when the Bill went through this House?

Mr Alister Jack: We had regular meetings with the devolved Administrations. You are absolutely right that frameworks were dragging. I remember, quite near to the end of the Brexit process, that we had only three agreed and, from memory, were aiming for 32. The then Minister in

Scotland, Mike Russell, had said very clearly that there would be no co-operation over Brexit and no LCMs on Brexit. By the way, there was none.

This is a very important point. Had we not been the sovereign Parliament and able to legislate without LCMs, we would have had a hard Brexit. That is a fact. We had a timeline and a deadline, and we were very keen to get the legislation in place to ensure that we did not have a hard Brexit. That would have been the outcome, had we not taken the decisions that we took.

We put spending powers into the UKIM Bill, as you know, as well as protections that respected the single market within the United Kingdom. I said earlier that it is 60% of Scotland's trade. The Scottish Government talk about the EU being their biggest market. It is a big market, but it is not their biggest market by trade. Of Scotland's trade, 20% is with the EU, 20% is with the rest of the world and 60% is within the United Kingdom. It was critically important that we protected that.

We had to enforce the EU single market principles of non-discrimination and mutual recognition within the UKIM Bill so that they were respected. That then allowed the Scottish Government, in areas that were devolved, to differentiate where they wanted to, as Mike Russell said they would, and follow EU legislation rather than UK Government legislation. Respecting devolution, they can do that, but remembering that traders within the United Kingdom were protected by those principles, as they are within the EU, of mutual recognition and non-discrimination. The United Kingdom Internal Market Act upset them, but it did so because it solved the problems that got us over the finishing line.

Baroness Andrews: Did you play a key role in that?

Mr Alister Jack: I played a very significant role in that. I was not going to boast, but there were a number of things that I put in there to get us where we had to get to. I was being typically modest.

Baroness Andrews: I will move on to the resource question. We have had evidence—this is as long as a piece of string—to suggest that, if you had more resource and capacity, you would be taking this more seriously and have more civil servants able to do more things. Is that how you view it in general?

Mr Alister Jack: The Prime Minister's union advisor during the UKIM Bill was Luke Graham, whom I worked quite closely with. He was in Number 10 at the time, dealing with these things. We knew that there was a deadline coming. I remember calling out the lack of engagement and frameworks in one of these interministerial government meetings and saying, "Come on; let's get going with them". The next meeting, we had gone from three to eight. We were still a long way short.

The pressure had to be built. We delayed pushing the UKIM legislation too hard too early on. Knowing that civil servants speak to each other, we

hoped that the message might get through to Ministers in the Scottish Government that we meant business. It probably did towards the end.

An awful lot of what happens in government happens through officials telling officials what Ministers are thinking, without Ministers realising it. I have been around a long time now and know how it works. You feed your thinking to your officials, knowing quite clearly that they will then pass it to officials in the devolved Administration, who will then press Ministers to take decisions. That was part of an iterative process without us throwing our weight about.

Baroness Andrews: What I was planning to ask was a more general question.

Q75 **The Chair:** Given that there will be a lot of horizon-scanning across government departments in order to know when you need to input the Scottish or Welsh interests—Northern Ireland is probably slightly different—do you have the resources? With those resources, can you really do that horizon-scanning job and seize the moment?

Mr Alister Jack: I go back to my “Delivering for Scotland” board. As territorial departments, we punch above our weight in what we achieve. We have more relevance since we left the EU, because there is a lot of interaction with local authorities across the devolved Administrations, as well as with the devolved Administrations themselves.

The “Delivering for Scotland” board meets quarterly. We may make it every two months going forward. It has been very effective in dealing with Whitehall departments, holding them to account, advising them, directing them and putting things in or out of legislation. It is an ongoing process. As I say, that has been very effective because we bring knowledge of the issues, both legal and policy-wise, that those Whitehall departments would not necessarily have.

David TC Davies: Just to reply to Baroness Andrews on resources and money, I am sure that, if I were given more money, I would find ways to spend it, as no doubt most Ministers would. However, I feel that we have perfectly adequate resources to do the job that we need to do. I am also very pleased to say that we seem to have a very high quality of officials and civil servants working in the Wales Office, who clearly have the interests of Wales very much at heart.

On your other question—if I may just go back slightly, because I hope that we are not going to completely skirt over this—you mentioned the concerns about UKIM. In a more general way, it is important that the United Kingdom Government are able to legislate for the whole United Kingdom on all reserved matters. Brexit and its aftermath were a reserved matter. It would not be good for the union if one of the devolved Administrations could block things from being done that were clearly reserved.

For example, it would have been absolutely wrong if Wales or Scotland had decided to block trade deals or UKIM because they did not like Brexit.

I am sure that we are probably sat on slightly different sides of the Brexit argument, but Wales voted for Brexit. The United Kingdom voted for Brexit. I always found it very ironic that Welsh Government Ministers were trying to prevent a process that the people of Wales had voted for, just as people voted for the Senedd itself, which gave them their mandate to do that. I did not vote for devolution, but I fully respect the fact that the people of Wales have done so twice now. Therefore, I respect the process and the importance of working with the Senedd.

It is interesting that if, for example, we made Sewel mandatory, so that we had a statutory duty not to legislate if we could get LCMs, we could have a situation in years to come where, if people voted again in a referendum to rejoin the European Union but one of the devolved Administrations did not like the idea much, it could theoretically put a block on that happening. That would be completely wrong.

We have to be careful to respect the right of the DAs to legislate in devolved areas but not to give them a veto on the United Kingdom Government legislating in areas that are reserved.

The Chair: We are coming on to Sewel, but I want to pick up another point because I am conscious of what we need to cover. I want to bring in Lord Foulkes. I am not surprised that Mr Jack would expect a question from him.

Mr Alister Jack: I would be delighted.

Q76 **Lord Foulkes of Cumnock:** I have a follow-up to something that you said. As you know, I have not been uncritical of the Scottish Government. However, you said that you have meetings across Whitehall. I have come across a sense that there are civil servants in Whitehall who may be ignorant about devolution. There are some who are even hostile towards it, because they have lost some of their powers. Is there any way in which we could strengthen your role as a departmental office to help get rid of that ignorance and hostility?

Mr Alister Jack: As time goes on, that is changing. I recognise what you say, but I think the UKIM Act has changed things dramatically, because it has given powers back to Whitehall that were ceded to Brussels. There may have been some hostility around that for quite a long time as well, but it is one Civil Service within Great Britain.

What we should have more of is interaction between the Civil Service in Scotland and Westminster. That has slowed up a lot under the SNP Scottish Government, and it is something that I have been pressing very hard for. We now have some policies coming into place to move civil servants around more, to have more shadowing and to have a better experience both north and south of the border.

Lord Foulkes of Cumnock: I wonder, therefore, why Westminster or Whitehall did not come in earlier to say to the Scottish Government, "Your deposit return scheme does not fit in with the United Kingdom policy", and stop Lorna Slater and the Scottish Government wasting

hundreds of millions of pounds. You could have stepped in a lot earlier.

Mr Alister Jack: They are now being sued for that.

Lord Foulkes of Cumnock: Yes, but why did you not step in earlier?

Mr Alister Jack: That is a very fair challenge. If I take you back a step, I stepped in earlier on the UNCRC with advice from Lord Keen, who was Advocate-General for Scotland. We could see the problems with Clauses 6 and 19 to 21 from a distance out, from 2020 into March 2021, when I wrote the letter to the now First Minister, John Swinney. His response to receiving my letter, which solved his problems, if you like, on the advice that I had, was to hold it up and say that I had written a menacing letter. The First Minister at the time, Nicola Sturgeon, then put out on the airwaves that I was “morally repugnant”, only for us to end up in the Supreme Court after the Section 33 order and win hands down.

As for what happened with the deposit return scheme, I was very clear in interministerial government meetings from quite an early stage that they would require an exclusion from the United Kingdom Internal Market Act. Others thought differently. The Scottish Government clearly did. Over 1,000 Scottish businesses had written to me with their concerns. The Scotland Office has never had a campaign like that before.

I will not go through the five sticking points, but they remain today as they did then. The system has serious flaws. Knowing that 85% of the glass that they wanted to include in their scheme came from other parts of the UK or Europe, and knowing that there were labelling issues, I sat in the meeting and offered them an exclusion based on four of the five issues that needed to be addressed. Glass was excluded—that was the fifth one—but the other four issues were about the scheme working seamlessly across the UK, standardised labelling and pricing. The idea that you got on the train in Glasgow having bought six cans of lager and paid a 20 pence per can deposit, and got to London and got 10 pence back per can—or vice versa—was not going to go down too well.

All those things were in there and they did not like the terms. We offered an exclusion. They knew this from a long distance out, but they just thought that, if they kept going, I would back down. They never believed that I would do a Section 35 on gender recognition. They did not believe that I would take them to court on the UNCRC and Section 33. This whole idea that they would sail on and I would roll over and not stand my ground was their misjudgment.

Lord Foulkes of Cumnock: I support you in standing your ground, and you did well. David mentioned legislating for the whole of the United Kingdom on reserved areas. Energy is a reserved area. The Scottish Government have said, “We do not want any nuclear power stations in Scotland”, yet they are prepared to take electricity generated by nuclear power stations in England. Why can the United Kingdom Government not say, “We want a nuclear power station in Scotland”? I know for a fact that everyone around Torness, including local people, is keen to see a

new Torness, so why can you not step in? It is a reserved area.

Mr Alister Jack: On the small nuclear reactors, I have asked the Energy Minister to plan for one in Scotland, because I believe that, in 2026, we will see a unionist regime again in Holyrood and they will move forward on that matter. That is my view. With the timescale of what is in front of us, I do not see any point in having a great fight over it.

I think it was a mistake. As a committee, you may want to think about a review into 25 years of devolution. I do not think that everything was right. I do not think that the committee structure was right. Devolution is not a bad thing—where it has failed, it is due to bad governance. Over the last 17 years, we have had a poorer health service. We have failing education standards. We have a diabolical ferry service to the islands. We have higher numbers of drug deaths. These things are down to governance, not devolution. Let us be clear about that.

The Chair: Yes, exactly, and it is the efficiency of the governance structure around the devolution settlement that the Constitution Committee's interest is in.

Lord Foulkes of Cumnock: You have given a very helpful reply.

Mr Alister Jack: You could look further into the committee structure. The knowledge and wisdom in this place could be used to help review it. I have often thought that better review of legislation in Scotland is one of the things that we could improve on. Some sort of Grand Committee in this House helping to scrutinise and improve legislation would be a very good thing. I am not alone in saying that the committee structure in scrutinising legislation in Scotland has clearly been one of the failings.

Q77 **The Chair:** Lord Strathclyde might take us to that point later. Just to finish this off, in terms of your respective roles as Secretary of State for Wales and Secretary of State for Scotland—I am not posing this question to Northern Ireland at the moment—what one change would you particularly like to see in terms of your responsibility or access to improve Whitehall's consideration of the Welsh or Scottish dimension?

Mr Alister Jack: I have given this some thought in discussions that we have had, and I am very content with where we are. I am stepping down at the general election, but, if I was continuing in this role, the only thing that I would change in the new world that we live in post Brexit would be to make Wales and Scotland spending departments again. At the moment, we work with other departments on our spending, but the time has now come to go back to where we were prior to joining the EU—this is not a pre-devolution thing but a pre-EU thing—and for structural funds to be spent by the territorial offices.

Lord Caine: Can I just come in very briefly on the original question? Back in 2010, I used to think that on a bad day Whitehall would think about England; on a better day it would think about Great Britain; and on a good day, occasionally, it would think about the United Kingdom.

The Chair: That is a fair point.

Lord Caine: I think over the past number of years, it has got a lot better from a Northern Ireland perspective. This might be partly because of the number of political agreements that we have had to enter into, which have engaged other government departments and the rest of Whitehall. It has improved significantly and we are much more on the radar than we were 10 or 15 years ago. There are renewed commitments in the *Safeguarding the Union* Command Paper to increase co-operation between the Northern Ireland Civil Service and the Home Civil Service on things such as public service transformation, so it has improved.

David TC Davies: I echo entirely what the Secretary of State for Scotland said about making the TOs spending departments. We work very closely with DLUHC at the moment, but it would be a useful reform.

I wanted to answer one other question about the attitude of civil servants and officials beyond the TOs. I have encountered ignorance. I have never encountered hostility towards devolution, but I have occasionally had to, through officials, point out the realities of devolution. Things have got a lot better over the four years or so that I have been a Minister.

The Chair: I did have a question, but I am going to defer it until later, about the impact of repatriation of powers under Brexit on the relationships under the devolution settlement. Lord Beith, you had a question about government engagement.

Q78 **Lord Beith:** I just want to clear up the role of the territorial offices, which are relatively small. I presume that you are not arguing for a massive boost so that they contain the policy expertise necessary to cover the whole area in which there has to be interrelation between the UK and the devolved Administrations. Indeed, if I were a civil servant working for a devolved Administration on plant health, public health or something of that kind, I would want to talk to the people who knew about it. They would be much more likely to be located in the department that had UK or English responsibility for these matters.

How do you see your offices developing? They support you in your work at Cabinet level. They provide some co-ordination and deal with the kinds of things that you have just described, where there is ignorance in the Civil Service. They assist you in those areas where you choose to take a major United Kingdom initiative, of which one or two examples have been mentioned. You are not arguing, are you, that your departments should have the kind of expertise that is already there in other departments, which is the best route for day-to-day co-ordination between the devolved Administrations and London?

Mr Alister Jack: I am not arguing that.

David TC Davies: I will not try to set out an exact reform in full detail. At the moment, if an application is made for a project under levelling-up funds, it will be assessed by officials in DLUHC and go through the five case business model with the Treasury. That latter part with the Treasury

could stay, but I do not see why a few officials within DLUHC could not be working temporarily in the Wales Office or the Scottish Office in order to assess things coming in. I am not arguing for one minute that the Wales Office would need a huge increase in budget if it became a spending department. I would have thought that, across Whitehall, it could be achieved without taking on lots of extra people, simply by moving some around and changing where they work.

Within the Wales Office, we have a really good track record of seeing people coming in, working for a while and then going off and working in other Civil Service departments. I encourage that and am really pleased about it, because I always see those who have come through the Wales Office as friends of Wales wherever they go. I would like a few more to go to the Treasury, because that would be a good place to have a lot of friends.

There is no reason at all why it could not work in reverse, with some people in other departments coming in and temporarily working in the Wales Office. It is all part of the same UK Civil Service.

Lord Beith: Does that not, in a way, almost infantilise the UK Government departments where the expertise ought to be and which ought to be able to handle it? With some guidance from you on the co-ordination and proper respect for the devolution procedures, these matters could be better handled between the departments that know what they are talking about.

David TC Davies: I do not think so. If an application comes in for a growth deal project in north Wales, I do not see why that could not—

Lord Beith: Growth deals are a United Kingdom Government initiative. I am thinking much more of a situation where, let us say, on a policy level, the devolved Government want to go in a direction that might have complications in other parts of the union and needs to be discussed at a very technical level.

Mr Alister Jack: You are absolutely right. You mentioned health. For some time, the Department of Health was discussing with the Scottish Government health data being shared across the United Kingdom. I got involved in that, because I felt that the discussions were going in the wrong direction. They were going in the direction that the NHS in Scotland was getting to opt out of everything, and I felt that, for improving standards of healthcare in Scotland, where best practice happens and is being shared, and improving the NHS across the United Kingdom, there should not be an opt-out.

It was done through a variety of things, but there was this putting in of consent clauses rather than consult clauses. I felt that it should be consult clauses, because a consent clause salami slices. In other areas, it can salami slice the Scotland Act, which is not a good thing. In this case, I felt that it undermined the data that the NHS could harvest across the United Kingdom collectively. I am talking about the UK health authority.

It may be that, in any of the devolved Administrations, they are doing something better than is happening in the NHS in England. Therefore, it works both ways. It is a double-edged sword. These things are important, as officials may be persuaded by other officials, as they are planning out the legislation, to let the Scottish Government not be part of it. There are other examples. It is very important that we are one United Kingdom. We are really one NHS. The services cross the geographical borders that we have and it is important that, as far as possible, we improve our standards.

Lord Beith: That was an interesting response.

Q79 **Lord Keen of Elie:** Good morning, gentlemen. I just wanted to follow up on this question of territorial offices with Mr Davies. We all know that there is no novelty about devolution. Northern Ireland had a devolved Administration for 50 years up to 1972, and no territorial office in Westminster, but you obviously regard it as material that each of the constituent nations in the United Kingdom should have a territorial office.

David TC Davies: Each of the constituent nations of the UK should have a territorial office. You may be asking about England.

Lord Keen of Elie: That is what I was going to come on to. It has no territorial office, and yet matters seem to proceed without any great difficulty. Is there a case for replacing the territorial offices with a Secretary of State for constitutional affairs of the United Kingdom and a Minister for each of the constituent nations within that department, in order that we have a coherent policy about how the United Kingdom and reserved matters are dealt with?

David TC Davies: I can see the consistency that you are looking for there, but the issue is perhaps that England is far more powerful and far more populous than any of the other nations of the United Kingdom. The population of England is about 60 million, as opposed to 6 million in Scotland, 3 million in Wales and 1.5 million in Northern Ireland.

My concern would be whether the interests of Wales would really be being heard around the Cabinet table, which is where they should be, and whether that Minister would have the ability, as I do, to get into any government department at any time to talk to other Ministers about things such as Tata or whatever the issues are in a few years' time.

I take your point about England, but what about the fact that we now have very powerful metro mayors in England? Is there an argument for ensuring that mayors such as Sadiq Khan are included in IMGs in the same way that the First Ministers of Scotland, Wales and Northern Ireland would be? That might be a slightly better way to go.

Lord Keen of Elie: Might that not make the case for extending the concept of metropolitan mayors to Scotland and Wales, for example, so that we have devolution that goes beyond Edinburgh or Cardiff, which is what was intended in the first place?

David TC Davies: That is an interesting suggestion, which I am not sure that I want to opine on right now, but I do not for one minute say that it is a bad idea. Metro mayors in England have been a success. If I am trying to offer some thoughts as to how the constitution might be improved, we now need to start thinking about how we include metro mayors in the sorts of discussions that we currently have with First Ministers.

Mr Alister Jack: On that last point, I agree. Devolution has been undermined by the SNP Scottish Government. They have sucked powers to the centre and got rid of the local tourist boards, got rid of the local enterprise boards, and got rid of all the chief constables from the counties and created one constabulary across the whole country, with one chief constable. I could go on. The fire service has been centralised. The spirit of devolution should have been to keep devolving powers and to strengthen local authorities. That is terribly important.

On your point about Secretaries of State for the territorial offices, doing what you are proposing would weaken the United Kingdom. It is very good that there are Secretaries of State for Wales, for Northern Ireland and for Scotland. As the Secretary of State for Wales has said, they are arguing for their own area of office in Cabinet and across Whitehall, and that is very important.

It is also about having someone who is passionate about the country that they represent. That is terribly important in government, because there are a lot of voices around the Cabinet table. Every time I go back to a new Cabinet, it seems to have got bigger. You need someone shouting loudly for your policy, your chosen area or what you believe in, and it is very important that Scotland is strongly represented in that Cabinet room.

Lord Caine: Very quickly, you mentioned devolution in Northern Ireland from 1921 to 1972. There might be some who would argue that the experience of that period is an unanswerable case for having a territorial department, and that actually some of the issues that occurred during that period might have been prevented had there been more involvement from this place. It is a strong argument.

As for rolling them into three, I remind the committee that the Northern Ireland Secretary has responsibilities that are unique, not least in respect of national security, as Lord Anderson of Ipswich knows all too well from one of his previous roles. That makes their position very different from the other two territorial Ministers.

Peter Hain and Paul Murphy were combined Wales Secretary and Northern Ireland Secretary. I always used to wonder what would happen when Northern Ireland and Wales were going after the same US company to locate in a particular jurisdiction. Who would they back?

The Chair: In terms of engagement with the Government, is there, in your view, scope or is there an area where you would strengthen the role

of the Northern Ireland Office in facilitating that engagement?

Lord Caine: It generally works quite well. I go back to an earlier answer. After 2010, there was an attempt to put in place a more structured relationship with the Northern Ireland Executive and to work collaboratively with them. That kind of broke down when we got into all sorts of political crises in 2014, 2015, and then of course we had longer periods, five of the seven years after 2017 when there was no devolved Administration whatever. We now need to look forward and put in place a much more structured relationship, which we are trying to do.

The Chair: On the supplementary point that Lord Keen was developing, do government departments, given the particular situation in Northern Ireland, need to have someone who has responsibility for being alert to any Northern Ireland dimension that might come up, or is that catered for if an alarm bell goes off somewhere?

Lord Caine: To some extent, this goes back to Lord Beith's question about expertise in particular departments. The Northern Ireland Office does not have great expertise in the area of agriculture and rural affairs or indeed on the health service specifically, but Defra does not have great expertise in the politics of Northern Ireland, so we work collaboratively on matters. They can deal with the technical side of things. We generally act as the department that will alert other parts of Whitehall as to particular issues, particular nuances.

The Chair: I completely accept your point. What I was asking was whether you are confident that Defra or any other relevant department would be alert enough, quickly enough, to the Northern Ireland dimension.

Lord Caine: Yes, and they consult us regularly.

Q80 **Baroness Goldie:** I may have missed something. There was a very simple premise put forward, which is whether you are satisfied with the existing arrangements for the territorial offices in working with the DAs, or whether you want something else whereby all the DAs in relation to reserved issues would funnel things through the territorial offices.

Mr Alister Jack: That point was not brought up, so that is a fresh point. We think that it works better when officials in the Scottish Government deal with officials in the Scotland Office first. If they went to the Department of Health first, the Department of Health would get in touch with us and we would advise it on where there may be pitfalls or issues, and give it that expertise, which would, hopefully, solve the problem. That works 90% of the time.

Being political about this, for quite a while the Scottish Government have decided to go around the Scotland Office. It comes back to this question: do we tell them enough about the legislation that we are bringing forward? I think that, yes, we do. We engage with them very early on, particularly at official level. They do not engage with us very early on about their legislation—far from it.

I said at the Covid inquiry that Michael Gove and I, and other Secretaries of State, would have weekly meetings with the First Ministers and the deputy First Ministers during Covid. We gave them huge powers in the Coronavirus Act. We told them everything that the UK Government were doing: timings, changing rules and regulations, doing this and doing that. They never told us anything. It was one-way traffic, and that is the problem. That is for them to answer to, but it is a fact that the information flow tends to be all one way.

Baroness Goldie: You seem to be suggesting that there is a workable *modus operandi*.

Mr Alister Jack: Devolution works because, despite the fact that we have a Government in Scotland that want to destroy the United Kingdom and devolution, and do not believe in devolution, we have officials within a GB-wide Civil Service who are able to transact.

As Ministers, we go in and try to cut deals and get things done. That is what we always want to do. I want to defend the devolution settlement. I want to get business done, but not at any cost and not by throwing away the powers that this Parliament has. That is critically important, because, if we start setting those precedents, we will come back to regret it.

Q81 **Lord Thomas of Gresford:** The last point made by Mr Jack is very pertinent. He said there was no proper communication over the Covid issue with the Scottish Government. To what extent does the successful operation of the intergovernmental relationship depend on good will from all four Governments? In particular, how do you avoid the relationship between the territorial departments and the relevant devolved Governments becoming politicised?

Secretary of State for Wales, you have recently very publicly attacked the proposal to extend the number of Assembly Members to 96. I can understand you doing that as the Member of Parliament for Monmouth, but is it appropriate for the Secretary of State to take on something like that?

David TC Davies: We are all politicians and, at the end of the day, I do not agree that spending £120 million on creating extra Senedd Members is a good use of public funds. I feel that I have a duty to say that.

Lord Thomas of Gresford: Is that your duty as Secretary of State?

David TC Davies: I could say it in any capacity that I want. People can attach whatever label they want to it, but I disagree profoundly with that and it is right that it is called out. I am surprised that the Labour Party in Parliament is so keen to publicise this, because, as far as I can tell, it is not a measure that has gone down particularly well in Wales, any more than the 20 miles per hour speed limits have.

Lord Thomas of Gresford: You have spoken out about that too.

David TC Davies: Yes, I have, and about the failure to deliver healthcare to the standards that are expected now, rightly, in England; the fact that we have the lowest educational standards in the whole of the United Kingdom, according to PISA; and the decision to tell farmers that 10% of their land will need to be handed over to have trees planted and another 10% for other wildlife schemes. These are all policies that have been brought forward by the Welsh Labour Government, about which I feel I have the right to speak out.

Lord Thomas of Gresford: The tone of your attack is such as not to have good will between you and the Welsh Government at all, is it? It is to put you at odds.

David TC Davies: I disagree, because I have never made any personal attacks on people. I have expressed my view as to what the policy should be, and I have a duty and a right to do that. I am slightly concerned, to be honest, by the way in which, if you will forgive me for saying this, the Labour Party sometimes seems to want to shut down legitimate debate about its policies rather than go out and argue them. If Labour politicians think that spending £120 million on extra Senedd Members is a good idea, let them go out and say so rather than attacking me for criticising the policy.

Lord Thomas of Gresford: Lord Caine, in Northern Ireland, there has been conflict between the Secretary of State and all the political parties over the legacy issues and the Bill that was passed, which you conducted through the House of Lords. That really has not caused good will between the Northern Ireland Office and the Assembly, has it?

Lord Caine: Forgive me. I could probably speak for the rest of the session on this particular piece of legislation and its history, but I will try to avoid that. Suffice to say that every previous attempt to deal with that subject had foundered on lack of consensus. Eventually, the Government just had to make an assessment of what was deliverable in current circumstances.

To go back to the premise, though, I can speak only in a Northern Ireland context. We are slightly different from Scotland and Wales in that, while my party has a small presence in Northern Ireland, we are not in direct political competition with the two largest parties, the main political parties in Northern Ireland. As you know, it is mainly a separate party system there. We are all committed to upholding and implementing the Belfast Agreement, or, as the DUP would say, the Belfast Agreement as amended by St Andrews.

Ultimately, if this is going to work, we have to find a way of working together, even though many of us share very different political aspirations. Over a number of years, I found a way of working with Martin McGuinness, even though we did not agree on a great deal, frankly. If we are going to uphold stability in Northern Ireland, support the institutions and see them work, there has to be a degree of good will.

It is a slightly different context to the one that David spoke about and that Alister would speak about.

The Chair: If I could move us on a little on this, I am conscious that I want to get to a couple of key constitutional issues that we have not got to yet. Did you want to come in on the politicised point?

Q82 **Lord Strathclyde:** We have pretty much covered co-operation, collaboration and politicisation, particularly whether they have got worse in the last few years. I was struck by what Lord Thomas said, because there was gradually the impression that it was okay for the devolved Administrations to criticise central government, but not for central government to criticise the devolved assemblies. Is that a fair view?

Mr Alister Jack: I was getting that feeling as well, to be honest. All I would say to Lord Thomas is that politics is a reality. Of course, there will be strains when you have Governments of different backgrounds. Baroness Goldie will know this better than I do, because she was there at the time, but was it a different story when there was a Labour-led Administration in Scotland up until 2007, with a Labour Government in Westminster? Yes, it was. A number of Labour MPs of the time have said to me that Labour gave itself a soft pass—if I can put it that way—when it wrote the Scotland Act, because it thought that Labour would be in power in Scotland and that it would be dealing with a unionist Government in Westminster.

Politics is a reality. Strains are enormous between us and the Scottish Government being SNP-led and wanting to break up the United Kingdom. I do not pretend otherwise, but what is important is that, when we disagree, we do so respectfully. That is the best that we can hope for.

The Chair: We will move on now to the issue of delegated powers, Henry VIII powers and the preparation of legislation, which Mr Jack touched on in his opening statement, Lord Anderson will take us through this.

Q83 **Lord Anderson of Ipswich:** Bills placed before this Parliament often delegate powers to Ministers of the United Kingdom Government to make regulations in areas of devolved competence. Sometimes, they even give Ministers of the United Kingdom Government the power to alter Acts of devolved legislatures, so-called Henry VIII clauses, but particularly controversial, perhaps, in this context.

The Sewel convention does not apply to secondary legislation, but this committee has often expressed the view in the past that these powers should be exercised only after consultation with the devolved Administrations and, normally, only with their consent. Indeed, we have sometimes recommended that an obligation to consult be placed in the Bill.

What are your views on that? Can you tell us anything about the mechanisms that I assume already exist to ensure that devolved Administrations are consulted prior to the introduction of delegated powers in areas of devolved competence, particularly when those powers

extend to altering the Acts of devolved legislatures?

Mr Alister Jack: The first is the Parliamentary Business and Legislation Committee, which the Leader of the House of Lords sits on, along with the Chief Whip in the Lords and the three territorial offices. I attend those meetings. That is when Bills are brought forward and when the Office of the Parliamentary Counsel will point out areas that would be of concern. That is when we stress that communication has to take place with the devolved Administrations about those.

As you know, delegated powers cut both ways. To take Brexit, we had to do it in order to get the legislation through to avoid a no-deal Brexit. For Covid, we were putting in delegated powers to delegate the powers to the devolved Administrations. It was not delegating the powers to Westminster but delegating the powers so that the devolved Administrations could get on and do what they had to do with the emergency legislation that they needed during Covid, so it cuts both ways.

The mechanism for highlighting it is the PBL committee, which I just outlined. It is very important that we discuss with the devolved Administrations what we are going to do, but the reality is that it happens and that delegated powers have to be taken from time to time. It has always happened; it is not something new; and it is not always a bad thing. The Victims and Prisoners Bill is going through at the moment, and a delegated power has been taken in a devolved area to establish a compensation scheme for those affected by the infected blood scandal.

You have raised a consent mechanism there. I am not a fan of consent mechanisms. I prefer to consult, because consent mechanisms allow us to have our feet held to the fire on other things in the future, but we should always have a responsibility to consult. In that way, you can highlight issues in the future that are coming up, because you are consulting, or, as in the case of the infected blood, keep the devolved Administration informed of how that is proceeding and how the compensation has been played out.

David TC Davies: The figures will show that there have been only eight occasions when the Senedd has denied an LCM, and these have been in areas, as we have discussed before, around the EU and UKIM. On the vast majority of occasions, we have managed to secure LCMs, which we have done, as my colleague has said, through making sure that there is a great deal of discussion at an official level as legislation is passed. As soon as it gets to the PBL committee, we are both usually very keen to remind everyone present of the need to consult with, in my case, the Senedd.

The figures that we have would suggest that, on the vast majority of occasions, the system works well. On the rare occasions when it does not, there is usually some strong political motive on both sides.

Lord Caine: I concur with my colleagues. It is occasionally unavoidable. To give one very quick example, the Identity and Language (Northern Ireland) Act that I took through the House of Lords contains step-in powers for the Secretary of State for Northern Ireland to appoint three commissioners who should, in normal circumstances, be appointed by the First Minister and Deputy First Minister. In circumstances where they cannot agree, the Secretary of State has that power, because the commitments were contained in the *New Decade, New Approach* agreement from 2020. I remember discussing that with the Opposition, whose view at the time was that it was regrettable, but understandable.

Lord Strathclyde: I understand what you are all saying, which is that you cannot always require consent, but what I am not hearing from you is any situation in which you should not have to consult when a Minister proposes to, or is given the power to, act in an area of devolved responsibility.

Mr Alister Jack: We usually put consult clauses in. I have pressed for consult clauses over consent clauses on many occasions. In pretty much every PBL committee, I have pressed for consult clauses. On the point about the Scottish Government withholding consent, it is only 10 times out of literally hundreds of Bills. As you know, most of them are trade deals linked to Brexit or Brexit legislation. The norm is that we legislate with consent.

Q84 **Lord Falconer of Thoroton:** Just to press this a little, I completely understand what you are all saying about the fact that there will be occasions when you need to have the ability to override what the devolved Parliament or Assembly is saying, but I have not heard your answer to the question as to why there is a distinction in process between a primary piece of UK legislation that changes devolved legislation and a delegated piece of legislation.

From time to time, the UK Government take power in a piece of primary legislation to say, "The Minister can change devolved Acts of the devolved Parliament". Then the Minister produces a statutory instrument that then changes the powers of the devolved Parliament, for example. We all agree that the UK Government must consult and get the consent of the devolved Parliaments or Assemblies in relation to something that affects a devolved area.

I understand your point about needing to keep the power to do it, even if they do not consent, but I am not following why the same process should not be used before a Minister overrides legislation in a devolved area. If Parliament must at least try to get consent, why should a Minister not?

David TC Davies: I am aware of the major rows—I should say discussions—over UKIM, Brexit and the rest of it. I am sure that what you say, sir, is absolutely correct.

Mr Alister Jack: "My Lord".

David TC Davies: My Lord, I will be honest with you: can you give me an example of where that has happened in Wales, because I am not aware of one off the top of my head? The examples that I am aware of are the very big ones that have been all over the press. I am not aware that we have literally taken powers away. We may have theoretically given a Minister in the UK Government the power to change something in Wales that is devolved, but I am not aware of any Minister absolutely exercising it.

Lord Falconer of Thoroton: Do I take it from that, Secretary of State, that you are saying that, if that were to happen, you would, in effect, go through the same procedure as you would if it were a piece of primary legislation?

David TC Davies: I am not a legal expert, but unless I were aware of an actual situation, rather than the hypothetical—

The Chair: The Nationality and Borders Bill and an assurance that we got from the Government under the Trade (Australia and New Zealand) Bill are two that come to mind straight away, but there are others.

David TC Davies: The Trade Bill was one that I referenced. That is one occasion where there has been a fundamental difference of opinion between the UK Government and the Wales Government, and it would be wrong to give the Wales Government the power, effectively, to block any trade deal. I acknowledge that we have legislated trade deals, the Brexit stuff and UKIM across the UK. I have the list of eight occasions in front of me.

I am sure that there have been occasions, but I am not aware of any, where UK Government Ministers have been given a power to amend or override Senedd legislation in devolved areas, have used that right and have taken powers away. I am not aware of any instance where that has happened, although I am perfectly happy to accept it may have done. I would ask your noble Lord to give me an example.

Lord Falconer of Thoroton: The example we have is Section 80 of the Nationality and Borders Act 2022, which gives the power to change Scottish and Welsh legislation. The Sewel convention does not apply. If you are saying, Secretary of State, that if we were able to use those powers we would do the same as what we would in relation to a piece of primary legislation, the committee and the Secretaries of State would be on the same page in relation to that. We would need to think about what the right structure was. What we are struggling with in this committee is why there should be a difference. You have to go through the process for primary legislation. It must be a stronger case if it is a Minister doing it using delegated powers.

David TC Davies: My Lord, that would obviously be a reserved matter: nationalities and borders.

Lord Falconer of Thoroton: Not completely.

Q85 Lord Anderson of Ipswich: Let me give another example. When the retained EU law Bill was going through, it contained provision for United Kingdom Ministers to make regulations in areas of devolved competence. This committee recommended that the Bill be amended to require UK Ministers to consult the relevant devolved Administrations. From memory, that did not happen. I will be corrected if I am wrong about that. If there was reticence on that score, I am interested to understand why. We were not requiring consent; we were suggesting only a requirement of consultation.

David TC Davies: I have to delve back a little bit into the recess of my memory, because I do not have this here and I was not the Secretary of State at the time that that went through. My recollection is that this was in an area in which power to make that legislation had previously resided with the European Union. This was a power that was being taken away from Brussels and given to London but had not really been exercised within the devolved Administrations previously. Is that a fair response to that point?

Lord Anderson of Ipswich: I would be keen if you could just address the point.

David TC Davies: I know, genuinely, that noble Lords here know what they are talking about; I am happy to look at specific examples. I acknowledge that, in theory, this is a power that a United Kingdom Government Minister may get. I am not aware of any occasion where it has in practice been used, other than those that I have outlined and we have discussed: UKIM, Brexit and trade deals.

Lord Anderson of Ipswich: If in practice there is not a problem, it may be that we are on the same page, because there would seem to be no reason why a requirement to consult should not be written into legislation.

David TC Davies: Whatever some noble Lords might think, it is not our wish to deliberately wind up the Senedd Government by legislating in areas that are devolved.

May I throw something back? I sometimes feel that the Welsh Government want to push their luck as far as reserved matters are concerned. Their elections Bill is a case in point, particularly around the gender aspects of that, where they are acting in a way that the Llywydd, the Speaker of the Senedd, has said is clearly trying to legislate in a reserved field. Notwithstanding the implied criticism of what you are suggesting, it is certainly a criticism that could be levelled back at the Senedd.

Lord Anderson of Ipswich: No criticism is being implied. We are simply exploring the limits of the Sewel convention. It does not apply to secondary legislation, effectively. Why not? Would you object to there being an understanding that devolved Administrations would at least always be consulted, even if their consent could not always be obtained?

David TC Davies: In the spirit of the way that you are asking the question, I would be happy to look at specific examples of where you think this has been misused and write to noble Lords.

Mr Alister Jack: We have done the debate now but, just to be clear on the Government's view on that, the position is that the Sewel convention should not apply to secondary legislation. I have always said I prefer consult clauses over consent clauses. I have made my position very clear on that. The Government's position is that the Sewel convention should not apply to secondary legislation.

Lord Anderson of Ipswich: That is a little odd really, is it not?

Mr Alister Jack: I am just telling you what the position is.

Lord Anderson of Ipswich: I understand that.

Mr Alister Jack: I am just saying what it is. I just want to be clear for the record, that is all.

Lord Anderson of Ipswich: You might think it was worse for a Minister to alter an Act.

Mr Alister Jack: I suspect that the view is that it has gone through primary legislation with the Sewel convention. Therefore, having gone through primary legislation, it should not go through secondary legislation. That is the standing position.

Lord Strathclyde: I assume you are continuing the practice of successive Governments, since Sewel conventions were originally created that did not apply to secondary legislation.

Mr Alister Jack: This has always been the case. We are very respectful of the Sewel convention, as I say. We do not think it needs altering, as I have said already; we do not believe that at all. Recently, the Scottish Government have obviously made great play of us legislating without consent but, as I have made clear, the SNP never backed a trade deal in the European Parliament and was not backing any trade deals in this Parliament. We knew where we stood on that, but we had to get our trade deals done and we had to get the Brexit legislation done to have a softer landing. That is why we proceeded as we did.

Lord Thomas of Gresford: What is your objection in principle to a Minister not normally legislating in devolved matters through secondary legislation without consent of the devolved Administrations?

Mr Alister Jack: This is not something that I have given a terrible amount of thought to but, to reiterate what I have just said, the Government's position is that the Sewel convention does not apply to secondary legislation. That is the position.

Lord Thomas of Gresford: What is the objection? We do not understand it.

Mr Alister Jack: If you want, we can look further into that and write to you in some detail on our position. That is the Government's position and I have not come along today to change it.

Lord Thomas of Gresford: It is not a veto.

The Chair: We are coming on to the issue of the Sewel convention in a moment. The issue of the Government using delegated legislation is a wider problem for the House of Lords. You are probably aware of the Delegated Powers and Regulatory Reform Committee report to the House, which was received and accepted, that there is a growing trend to use delegated legislation rather than primary legislation. That general problem also manifests itself when it comes to the areas of devolved competence. We did get a commitment from the Government where they reiterated the importance of making every effort to achieve consent in the exercise of delegated powers in devolved areas. How do you operationalise that commitment from Government?

Mr Alister Jack: Can I clarify just on this last point? I got slightly cut off. If we are amending the legislation of the devolved Administration, we always consult. That is why we do not believe that there is a need for a formal mechanism. If we are amending devolved Administration legislation, consultation takes place. Even with the secondary powers, it takes place. I am not sure that we are that far apart, to be honest.

The Chair: No, but what we do not have is the evidence of what you have just said. If legislation impacts on areas of devolved legislation, how do you deal with this?

Mr Alister Jack: We can write to you on that. I am not sure there are many examples, as the Secretary of State for Wales said, where it has actually happened. There are a few, but there are not many. We would be very happy to write to you on what consultation took place.

Lord Anderson of Ipswich: For my part, that would be very useful. I was reassured by what you just said, Secretary of State. We had written evidence from DLUHC indicating that the UK Government seek the agreement of devolved Administrations for statutory instruments in devolved areas where there is a statutory requirement or an existing political commitment to do so. That sounded to me a little less full-hearted than the reassurance that you just offered.

Mr Alister Jack: DLUHC often is less full-hearted than I am.

The Chair: Maybe we can exchange correspondence to clarify that, because that is something we want to report on. Whether the Sewel convention should be extended is another question we want to come on to.

Q86 **Lord Strathclyde:** This is a detail point, but you talked earlier on about the legislative committees that you all sit on. To what extent are specific instructions given to parliamentary counsel about the use of secondary legislation? Are they in a position or do you ask them to be in a position

to tell you what their view is of the requirement to consult? We have seen a huge increase in the amount of use of secondary legislation. It is good to know just what the relationship is between the legislative committee and parliamentary counsel.

Mr Alister Jack: We are always directed by parliamentary counsel on these matters. On the PBL committee that I mentioned, we have the Leader of the Lords and both Chief Whips. The Treasury and the territorial officers are present. The Bill Minister is important for the Bill. For any other legislation coming forward, the department is responsible for it. They work with parliamentary counsel to get something that is fit for presentation. It never ceases to surprise me how many times parliamentary counsel send things back and say, "We're not ready to go. We can't bring this Bill forward". We listen to that. We take a decision. The Chair, who is the Leader of the House of Commons, the Lord President, will conclude following discussion on many occasions that legislation is not fit as OPC would like it to be. A lot of work goes into that.

Lord Strathclyde: From that, I sense that the parliamentary counsel do not specifically advise about the role of secondary legislation on the powers of devolved Administrations.

Mr Alister Jack: That is for the Bill Minister and for the advisers. On my left, we have the former Advocate-General for Scotland, who would also have been a member of the PBL committee. He would have been advising. Is that a fair point, Lord Keen?

Lord Keen of Elie: That is correct.

Q87 **Lord Falconer of Thoroton:** Just to pursue that a little bit, I would be interested in this question. Do you have special procedures if a Minister is given a power whereby, in being able to promote secondary legislation, he or she can amend devolved legislation? Is there some procedure whereby, before that happens, you have to be consulted? There will be lots of Bills going through in which you are not primarily involved. Is that a red light for you? What are the instructions given within Government about that situation?

Mr Alister Jack: Yes, we have to be consulted. As I said, if they are amending devolved Administration legislation, they must have consulted the devolved Administrations. We need to see the outcome of those discussions.

Lord Falconer of Thoroton: I am talking about where the Bill itself does not amend the devolved legislation, but a Minister is given power to do so, should he or she wish in the future. I am interested to know what the instruction is within Government in relation to that.

Mr Alister Jack: It is on a case-by-case basis. We debate it in the PBL committee.

Lord Falconer of Thoroton: Would you expect to consult your relevant

devolved Administration or Parliament if you were giving a UK Minister power to change devolved legislation in a devolved area?

Mr Alister Jack: Yes, our officials and our legal department would be discussing it with those.

Lord Falconer of Thoroton: Can you recall an occasion, or has it ever happened, where that consultation has taken place, and the drafting of the Bill has been changed as a result of the fact that you have taken cognisance of what the devolved parliamentary assembly has said?

Mr Alister Jack: There will be examples. In the interests of time, I will write to you.

Lord Caine: I could give an example on the Northern Ireland legacy Bill, to which Lord Thomas referred. There was a part of it that did touch on the Scottish courts. I consulted the Solicitor-General for Scotland and changed the legislation.

Lord Falconer of Thoroton: We would be interested to hear the detail of that. That is very interesting. Thank you.

Lord Caine: I will provide the detail.

Q88 **The Chair:** On a subset of a debate we have already had, on the issue of consulting to seek legislative consent, can you give us a sense of your experience on that particular issue, in the Scottish Parliament, the Senedd and the Northern Ireland Assembly?

Mr Alister Jack: This is the experience of consulting, did you say?

The Chair: Can you share with us some general observations you would make as a result of experiencing the process of seeking legislative consent?

Mr Alister Jack: We have covered this, to be honest. We engage with the Scottish Government through officials, through the legal departments, and then through Ministers if there is a problem. If there is not a problem, everything proceeds quietly, as many Bills do, in the right direction. Where there are issues, we try to seek alternative solutions. As I have said, my preference is for consult clauses to be put in.

At the moment, we have the Levelling-up and Regeneration Act. There has been some disagreement with the Scottish Government on parts of that, but solutions have been found. I have in fact made a note of them here. Powers that were held by Scottish Ministers in the Electricity Act were lost due to the repeal of the European Communities Act 1972 and, to let the regeneration Act go ahead with an LCM, there was a mechanism put in and the Secretary of State at the Dispatch Box said, "We will address this issue. We will transfer the functions to you". That is going through now. The Scotland Office is working to deliver this. It is on us to get that over the finishing line.

We do, and always try to, get legislation through where we are seeking a legislative consent motion. We consult in a respectful manner.

David TC Davies: There is one thing I want to add. I do not know whether it will be helpful or not, but I have been thinking about the way in which these questions are being asked. Clearly, there is a concern on this committee, which I had not previously been aware of elsewhere, that UK Government Ministers through secondary legislation have been given powers to ride roughshod over the devolved settlement, although you have not put it that way.

Funnily enough, although I have dealt with many criticisms from the Welsh Government and beyond about relationships and the way we approach devolution, I have not really heard that. On the eight or so pieces of legislation where we have legislated without an LCM, which is UKIM, Brexit and trade deals, there have been great, political rows. However, I have not really heard the criticism that we are constantly giving secondary powers to UK Government Ministers to legislate in devolved areas. It is not really a criticism that I have had to deal with before, so I take seriously what the committee is saying.

The Secretary of State for Scotland had a point, and maybe it was Lord Strathclyde, in saying that, when we pass a piece of legislation that is going to have an impact in a devolved area, there is a lot of consultation beforehand. Many members of this committee have been in the PBL committee, as I have over the years. We discuss very much what the impact on devolved bodies or devolved Administrations will be and what sort of consultation has gone on. I do not want to give actual examples, but I know in some instances we have gone back to Ministers and said, "You need to consult a lot more". We want things to go through smoothly. We want to get LCMs wherever we can.

If we take, for example, the smoking legislation, there is a big debate going on here. We have the support of the Welsh Government in passing this bit of legislation. I am absolutely certain, although I cannot give you examples, that within that there will probably be secondary legislation. There will be powers probably given to UK Ministers to legislate in what will effectively be health areas. The fact that we have already discussed the main legislation with the Senedd and got its agreement to it means that it is reasonable to assume that it will be happy with a UK Government Minister having the power to pass secondary legislation over a period of time into the future. I wonder if that answers the main part of the question here.

The Chair: It does in part, but the fact that you have said you are not aware of it rings a slight alarm bell. We are trying to get from you what you do and what you say you do in relation to seeking consent. Various sources of evidence indicate that there is a perception or a belief—views vary depending on who is giving the evidence—that the Government are increasingly using secondary legislation or Henry VIII powers either in the moment or for future opportunity to circumvent the consent process. We are trying to identify exactly the extent of that problem and what you say

you do.

Mr Alister Jack: Can I just say something in the interests of brevity? In some ways this is slightly cheeky, Chair, but, if you wrote to us about the number of times this has happened, it is very small. If you have concerns about Henry VIII powers, I would be very interested to know when we have used them, because it is absolutely not our *modus operandi*. I believe the number of times it has happened is vanishingly small. I am not saying it has not happened and there may be very good reasons why it did happen, but let us explore those. We can write to you. If you feel there are many more cases that we have missed then, by all means, please come back to us.

The Chair: I have taken that point and we will do that. It is not only the exercising of the Henry VIII power, but the banking of that power in order to potentially use it as some future point.

Mr Alister Jack: We have agreed that that would be consulted upon if it were changing devolved Administration legislation. That is the Government's policy.

The Chair: That is why it would be useful to have that.

David TC Davies: The UK Government are still sovereign and therefore have the power to legislate in many areas in the future, as I understand it.

The Chair: We are not challenging the principle of parliamentary sovereignty. We are looking at governance, integrity and confidence in how the devolution settlement works. We are not seeking to rewrite the constitution on parliamentary sovereignty.

Lord Burnett, do you want to develop your point to Lord Caine on this?

Q89 **Lord Burnett of Maldon:** Yes, and I suspect it can be dealt with very quickly, given the time pressures we have. In your opening remarks, you identified the differences between the Northern Ireland settlement and those in Scotland and Wales, and in particular that the devolved institutions can be suspended. We know that they were for a long time recently. We are interested to get a general sense from you of the impact that having no Assembly and no Administration in Northern Ireland had on seeking devolved consent, because obviously the ordinary ways of dealing with things could not operate, and how it is going now.

Lord Caine: Just on a technical point, most recently the institutions were not suspended. The power to suspend was actually repealed in the Northern Ireland (St Andrews Agreement) Act 2006. They simply did not function.

Lord Burnett of Maldon: Forgive that solecism.

Lord Caine: They didn't function and to suspend would have required fresh primary legislation.

In short, how did the absence of the Assembly and the Executive affect the process? I have lost count of the number of times I turned up at the PBL committee and said, "In normal circumstances, this would require an LCM process, but as there is no Northern Ireland Executive and Assembly, we can't engage that process". During that period, we instead consulted very closely with the Northern Ireland Civil Service, with the Permanent Secretaries, and with the Head of the Northern Ireland Civil Service. Quite often at those PBL meetings, I would make it very clear that our departmental view was that the sponsoring department needed to continue those conversations during the development and the passage of the legislation. That was made very clear.

I will ask my officials. I cannot be precise, but there were around 20 Bills that would have normally engaged the LCM process in Northern Ireland which, during the most recent period of non-functioning between 2022 and 2024, just did not take place.

Now that the Executive and Assembly are back up and running, and functioning, the LCM process is similarly functioning. There are currently three LCM memorandums being considered by the Assembly in relation to Pet Abduction Bill, Tobacco and Vapes, and of course the Post Office (Horizon System) Offences Bill. One LCM has already been secured for the Pensions (Special Rules for End of Life) Bill. Long may it continue.

Q90 Lord Keen of Elie: Gentlemen, I wonder whether I could return momentarily to the Sewel convention. We understand that it is just that: a political convention, not a legal obligation. It is often approached on the basis that this political convention applies to the Westminster Government and that it is for that Government to exercise its obligations under the Sewel convention.

Can I suggest that what underlies the Sewel convention is in fact a bilateral obligation? The LCM process cannot work unless there is engagement not only by the Westminster Government but by the devolved Administrations with regard to this matter. I raise the question of whether the operation of the Sewel convention might be improved, and the requirement for engagement underlined, if there were an express obligation of a duty to engage in good faith, not only on Westminster but on each of the devolved Administrations, when it comes to trying to resolve the issue of operating within devolved competence.

Mr Alister Jack: I hear all you say. There should be an obligation on both. I think there is an obligation on both under the convention, but a "duty" takes it to a higher place than I would be comfortable with. Would it improve things? I do not think so. The convention works very well. We always engage. By the nature of it, from my experience with the Scottish Government, they have to engage. They make it very clear to us very early on, if it is linked to Brexit, that they are not engaging. At least we know where we stand on that. On other matters, the engagement works very well. I would stress that we have legislated without consent 10 times. We have legislated with consent over 200 times.

We have something that was not expected; it is really important to remember that. When the Scotland Act was put together in 1998, and when devolution then happened in 1999 and the Scottish Parliament was set up, no one envisaged when they wrote that out that the United Kingdom would leave the European Union. In the same way, Labour wrote itself a soft ticket, as I have said before, because it thought that it was shooting the nationalist fox. In a similar vein, Labour did not write it thinking that we would leave, so there was bound to be a bump in the road when we left the European Union.

We have got over that now. We have moved forward. There may still be some obstruction to trade deals, but enormous consultation goes on when doing the trade deals. There is a huge amount of stakeholder engagement, for instance, around farming with the NFU Scotland and other bodies. We put a lot of effort into getting these trade deals right.

Broadly, just to go back, there should not be a duty to engage. The Sewel convention in the main, bar bumps in the road, as we saw with Brexit, is working.

Lord Keen of Elie: I just wonder whether senior officials should be able to go back to a devolved Government and say, "You can't simply ignore this. You have an obligation or a duty to engage in the consent mechanism, even if you anticipate not consenting".

Mr Alister Jack: They do anyway, other than when they have said, "We are not discussing Brexit with you". Otherwise, they always engage. The level of engagement is good.

Q91 **Lord Falconer of Thoroton:** Correct me if I am wrong, Secretary of State for Scotland, but you have described a slight tinge of exasperation about the way that the Scottish Government behaved during the conduct of Covid. When you said that you gave them great powers, what were you referring to?

Mr Alister Jack: We delegated the emergency powers to the Scottish Government to then get on and do everything they wanted to do. I suppose that I was going back to my points that I made in the Covid committee that, while we shared information, the information flow was not coming the other way as to what they were going to do. They tended to look at our decisions, then do something slightly different a couple of days later. It was very frustrating. I feel that the First Minister was very political in the way she conducted herself. I have said that on the record already. That is what I was referring to.

Lord Falconer of Thoroton: Good governance, I would have thought, would have involved people co-operating even though, for example, the SNP or Plaid want to get rid of the union altogether. Nevertheless, in the current arrangement they want to co-operate. You are never going to get people to co-operate always in politics. What is wrong with there being a quite light-touch obligation to engage? For example, in relation to the deposit return scheme, even though they may be playing politics, they

may be trying to make the British Government look bad, nevertheless there must be formal discussions about it. They have to be minuted. You have to be able to put your point of view.

Gender recognition was another area where you were bold. Had there been a clearer duty to engage, you would not have ended up, as one did on gender recognition, in a "he said, she said" situation as to whose fault it was that there had not been proper engagement. The courts are reluctant to intervene but, as the former Advocate-General says, Ministers and officials would be operating in an atmosphere where their duty is to do their best to get the best for the people of Scotland. Maybe some people would say that is what the public would expect.

Mr Alister Jack: Officials are engaging at an early stage. This will change if there is a unionist Administration. Whatever form of coalition that may take in Holyrood, you will see this problem go away. The Scottish Government would not pay any attention to any duty to engage or change their approach towards us. They want to destroy devolution. They want to break up the United Kingdom. It is not in their interest to make it work. It would be naive of us to think that anything will change that.

You mentioned gender recognition. They decided that they were going to challenge us on that, come what may. I wrote to them on UNCRC—the rights of the child—and they decided to ignore my letter and to challenge us, come what may. Even though Lord Hope of Craighead said that our case was devastating for them, they still challenged the UK Government in court and lost convincingly, and have now accepted they will pay our costs. Creating a grievance and a fight is part of what they do. It is part of their playbook, and we must recognise that.

The Sewel convention, in the main, works very well. It was not going to change anything coming the other way regarding their legislation. We told them that there were issues around the Equality Act regarding gender recognition and adverse effects. On the deposit return scheme, we explained what the problems were. It does not stop them ploughing on, I am afraid, because either they get their legislation over the finishing line or they have a fight. They do not mind which, because they are not of the United Kingdom.

Lord Falconer of Thoroton: Let me just take another example, looking forward. Tell me if you cannot or do not want to deal with this. There is every possibility that Scotland might pass an assisted dying Bill. You do not need to debate the merits of this, but what would you expect a good UK Government to do in the face of that, regarding a duty to engage?

Mr Alister Jack: It is a very good point. The Bill is a Private Member's Bill. It is being brought forward by a Lib Dem MSP called Liam McArthur. Maybe a year ago, I had my initial meeting with him to go through it. I will not go into the merits or otherwise, but we have identified where the pitfalls might be and we have helped him with that legislation. That is a very good example of a unionist MSP wanting to work with us to get his

legislation to the finishing line. That would involve Section 104 orders, of which we have given many, to amend UK Government legislation to accommodate the devolved Administration.

David TC Davies: May I just come back to something, Lord Falconer? I am detecting within this committee a slight feeling that perhaps the UK Government does not always show the respect to the DAs—in my case, the Senedd—that they merit. I want to push back a little bit and say that there needs to be reciprocity in all our dealings. I feel that we do show respect and have defended the position of the UK Government in this, but we need to talk about actual examples.

My colleague made the point about the actions of the Scottish Government during the Covid crisis. I can talk to you of what happened in Wales, where we made sure at a national level that the Welsh Government were represented at all COBRA meetings, and rightly so. It did not matter whether we were discussing things that were devolved or things that were reserved. They were there in the room, or sometimes on the screen, so that they knew exactly what the UK Government were doing. I sat in a few, though not many, of those meetings when the Secretary of State was elsewhere. I was the junior Minister at the time.

Similarly, I did a lot of the IMGs and the other four-ministerial collaboration. Obviously, I was representing the UK Government, but we discussed a range of issues. We made sure that the Welsh Government Health Minister, who was usually but not always Vaughan Gething at that time, was present. Sometimes it was other Ministers, depending on the nature of the discussion.

The Secretary of State then wrote to the Welsh Government and said, "We would also welcome knowing what's going on in Wales, what your thinking is, what you are doing, so that we can all work together and understand each other's positions". We were not looking to make any kind of political capital out of any of this. Eventually, after some trying, I was invited to go to one meeting where Ministers in the Welsh Government were discussing things, but only to stay for the parts of the meeting that related to reserved matters which, from memory, were policing and the input of the Army.

I felt quite strongly that there was an imbalance here, in that I was invited graciously enough to go along to meetings of Welsh Government Ministers who were discussing things with organisations that are reserved, ie, police and Army, but told that I would have to leave the meeting when discussions were taking place with the NHS. I thought that was wrong, because there had been a spirit of openness shown by the UK Government at the time.

It would have been outrageous if we had turned round to the Health Minister in the Welsh Government and said, "I'm sorry, but you can't stay for this part of the COBRA meeting, because we're going to discuss what we're doing with the Army now". That would have been ludicrous,

childish, outrageous and wrong, and we of course did not do it, but that is exactly what was going on.

Lord Thomas of Gresford: That is an argument for you to engage, is it not?

David TC Davies: Indeed, it is. I felt that we were engaging, but the engagement must come from the Welsh Government as well.

Lord Thomas of Gresford: That is what we are talking about: a duty to engage.

David TC Davies: Absolutely, there is a responsibility to engage, yes.

Q92 **Lord Anderson of Ipswich:** Building on that, the committee is very alive to the point that you make. In fact, the duty to engage was presented to you as a way of perhaps ensuring that the devolved Administrations played their part in engaging. What interested me was to hear the Secretary of State for Scotland say it would not really work in Scotland, because we have an Administration that are not a unionist Administration. Things will get better, we hope, when a unionist Administration is in power. In Wales, your position is rather different. You have a unionist Administration, but I am hearing very similar frustrations.

Is your view the same as the view that Mr Jack expressed, in that there really would be no point in having such a duty, because it would simply be ignored by politically opposed devolved Administrations?

David TC Davies: We cannot lay down legislation. I hope that we never face a crisis of sort that we did during Covid ever again, in my lifetime or beyond. We cannot really legislate for these sorts of situations. I just feel that there ought to be a responsibility on all Senedd Members and MPs to understand that, when a crisis of this nature happens, it is in everyone's interest for everyone to have as much information as possible as to what the other parties are doing.

Lord Anderson of Ipswich: You need good will, but you cannot build it by writing it down.

David TC Davies: That is a fair point.

Q93 **Lord Thomas of Gresford:** Similarly with the Tata problem, surely you would think there is a duty for both sides to engage in finding a solution.

David TC Davies: Yes, indeed, but there has been.

Lord Thomas of Gresford: I know there has been, but suppose there were not.

David TC Davies: On the Tata situation, there has been. I have no criticism at all. I have some criticisms over what happened during Covid, but in fairness there has been good collaboration at the transition board. There are two aspects of what is going on with Tata. One is the decision to close the blast furnace and the need to support an electric arc furnace.

That has been entirely done by the UK Government, because the UK Government have put £500 million towards it.

The second part of it is how we support the wider community. On that point, there has been a huge amount of collaboration and close working between UK Government and Welsh Government Ministers. I want to make clear, on that particular issue, that I have absolutely no criticism of the Welsh Government at all. I have some criticisms of some of the politicians' and political statements that have been made, but that is another matter, which the committee will probably not want to hear about today.

The Chair: I just want to answer the reciprocity point. This is a second report. We did the first on respect and co-operation. We accept the principle of reciprocity, but we are testing with you, as three Ministers coming here, what your view is and how you participate in the governance. It does not mean that we do not understand the importance of reciprocity.

Q94 **Lord Foulkes of Cumnock:** I just wanted to pick up on the Covid crisis. One problem facing the UK Government there, which faces them on many other occasions, is that the UK Government have to speak for England and for the United Kingdom. That creates a problem, and that is because devolution is unfinished and unbalanced. Do you agree that the main problem is the democratic deficit in England and that something needs to be done? David has already spoken about the mayors. We have papers about a whole scheme of regional assemblies in England. Is it not about time that we did something to help get rid of the democratic deficit in England?

David TC Davies: Lord Foulkes, you make a very good point. If we go back to the situation with Covid, it would be very helpful, if, God forbid, something like that happened again, we could make sure that the elected mayors are just as involved as the First Ministers. We have to think about that. It is not really my role to do that as Secretary of State for Wales, but the committee might want to consider how we ensure that the mayors of London, Liverpool, Manchester and Teesside are included. These mayors have enormous powers and responsibilities, and surely should be included in all the interministerial groups in the same way that the leaders of the devolved Administrations are. That is not perhaps a matter for me.

Lord Foulkes of Cumnock: That does leave out bits of England, though, because they govern only parts of England. It would need to be looked at in a rather more comprehensive way, would it not?

David TC Davies: Again, Lord Foulkes, you make a good and interesting point, but it is probably not one for me as Secretary of State for Wales, necessarily, to opine on.

Q95 **The Chair:** We do not have time now but, when we exchange our notes, on the Section 35 exercise on the gender recognition Bill, I know

something from previous discussions that we have had, but we would like a little bit of understanding about protocol around engagement before exercising that. You probably do not have time to deal with it today, because it is novel.

Mr Alister Jack: The protocols on Section 35 and Section 33 are laid out in the Scotland Act. Lord Keen could talk to you on this subject. He certainly has unofficially advised me, and officially advised me in the past, on it, but it is very simple.

If you look at what happened with Section 35 on the gender recognition Bill, between November and 22 December, there were many clauses that could have been adopted that would have changed the outcome. We got to Christmas and then we had a certain number of working days from 22 December. From memory, 17 January was my cut-off, and when either it went for Royal Assent or it did not. That is the period, Chair, when I get my legal advice, because that is when the Bill has passed. The process happens once the legislation has been passed in the Scottish Parliament.

When I refer to the finishing line for the assisted dying, my opinion on assisted dying is irrelevant. The point is that we were giving advice to the Bill provider, as requested, to get it into the Parliament in fit shape. That is what I mean. As far as I am concerned, that is the finishing line. We have always given advice when asked for it; the Office of the Advocate-General for Scotland gives it to the Scottish Government law officers as and when they need it. There is a lot of collaboration between the legal department in the Scottish Government and the Office of the Advocate-General.

My role regarding Section 35 comes with the legal advice that I get after the Bill passes. I have to make that decision, based on the advice I am given, to say whether it goes for Royal Assent or it does not. We never say what our legal advice is or whether we have followed it, but, believe me, I did the right thing. The Supreme Court agreed with me. You can read all about it.

The Chair: I just wanted to give you the opportunity to put that on the record. I thank you, especially for all three of you coming at the same time. We have taken more time than you probably had, but it is appreciated. We will exchange on this consultation point on delegated legislation and Henry VIII powers. Thank you. It is most appreciated.