



Constitution Committee

Corrected oral evidence: Consequential amendments

Wednesday 26 November 2025

10.30 am

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Members present: Lord Strathclyde (The Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Beith; Lord Bellamy; Lord Burnett of Maldon; Lord Foulkes of Cumnock; Lord Griffiths of Burry Port; Baroness Hamwee; Baroness Laing of Elderslie; Lord Murphy of Torfaen; Lord Waldegrave of North Hill.

Evidence Session No. 1

Heard in Public

Questions 1 - 14

Witnesses

I: Jessica De Mounteney, First Parliamentary Counsel; Diggory Bailey, Director, Office of the Parliamentary Counsel.

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Examination of witnesses

Jessica De Mounteney and Diggory Bailey.

Q1 The Chair: Welcome to this meeting of the House of Lords Constitution Committee. Today, we hear from Jessica De Mounteney, First Parliamentary Counsel, and Diggory Bailey, Office of the Parliamentary Counsel, at the Cabinet Office. You are both extremely welcome to this session. We examine every Bill that comes forward. We spend a lot of time thinking about secondary legislation and the kind of drafting pressures you are under, so we understand all of that. Most of us round here are very experienced either in examining legislation or inspiring it as formal business to be managed and so on. We have a good understanding of what you do.

We have a few questions. We want to talk about consequential amendments and whether you increasingly use these as standard powers. I begin by asking whether you have any general reflections on the parliamentary Session so far, which presumably is coming to an end in the next four or five months, your view of that, the pressures you have been under and how that impacted on your drafting.

Jessica De Mounteney: It has generally been a very busy Session. I looked up the stats and it is what you would expect in a first Session of a new Parliament with the Government of a party that has been in opposition for quite a long time. We have introduced 49 Bills, 32 of which have reached Royal Assent. There is still quite a lot of work going on and there are several Bills that either have been or may be introduced that will be carried over to the next Session.

I had a quick look at stats from previous Parliaments. I think it is fair to say that first Sessions in any Parliament tend to be the busiest. Looking at the 1997 Parliament, the first Session introduced 52 Bills, 51 of which got to Royal Assent. In the 2005 Parliament, similarly in the first Session 58 Bills were introduced and 53 achieved Royal Assent. We are pretty comparable with those first Sessions of earlier Parliaments. Interestingly, the one that was lighter was the first Session of the coalition Government in 2010 and onwards, where only 42 Bills reached Royal Assent. That is probably an interesting reflection of the operation of a coalition Government. Things were naturally slower because there were probably more stringent procedures for cross-party coalition agreement, but, generally speaking, this Session is in line with what we would have expected to see in terms of number of Bills. That is not to say it has not been without its challenges. I am not giving away any state secrets in saying that none of us expected an election in July. I think there was a general assumption across the Civil Service that probably there was more time to work up policies and proposals. It is always a challenge with a new Government because, obviously, they come in without the same level of experience of what is required to prepare Bills.

Having said that, generally speaking, we have collectively managed pretty well. Everybody has been very busy, but it feels like we have done

okay. It is also worth saying that a lot of the lessons of the first Session have been learned and fed into preparation for the second Session. As ever, in any Session of Parliament we have had to deal with unplanned issues. That happens in every single Session of Parliament. We had the emergency Bill to deal with the steelworks and the unexpected Bill to deal with the issue concerning the Lord High Commissioner of the Church of Scotland, but you would expect to see that in pretty much any Session.

Q2 The Chair: One thing in which we are particularly interested is secondary legislation. Before we get into the detail of consequential amendments, we have a sense that there is an increase in secondary legislation with very wide powers. Is that reflected in your thinking and instructions from Ministers?

Jessica De Mounteney: Undoubtedly, there has been a lot of secondary legislation made, but in volume terms much of it reflects our departure from the EU. A large number of statutory instruments are being made, but I think you are asking about statutory instruments that make amendments to primary legislation. We discussed this yesterday. We do not keep exact figures because that has never been within our remit, but, in terms of what comes through our door, we vet all secondary legislation that amends primary legislation. The Office of the Parliamentary Counsel looks at those amendments to ensure they are correct for the purposes of the statute book. Our sense is that that is not significantly more than it has been in the past.

On the question of powers and being asked to provide for them to make consequential amendments, that is not something of which we keep a record, in part because in the end we do what we are told. That is not to say we do not actively engage with departments and ask them to think very carefully about whether they need consequential amendment powers, but the policy of the Bill is ultimately not our decision.

The Chair: One of our concerns is to make sure that we do not see more skeleton Bills with those kinds of order-making powers which demonstrate that Ministers—I hasten to add that this is not your problem—have not yet made up their minds about things and are asking you to produce legislation which allows them to think on the hoof, as it were. Do you feel that that is a legitimate criticism?

Jessica De Mounteney: It is something we are pretty constantly alert to, but the current Government have been making really significant efforts to avoid those kinds of Bills. You will know, because I think you talked to the Attorney-General in an earlier session, that he has made it a real focus of his work as a law officer to underline that putting secondary legislation-making powers in Bills is not a substitute for proper policy-making. Departments over the course of the past six to 12 months have become very much aware of that imperative. That obviously feeds through into our interaction with departments where we say to them, “If you don’t flesh out this policy on the face of the Bill you are likely to face significant issues, particularly in this House”.

The Chair: That is very helpful.

Q3 Lord Griffiths of Burry Port: We are surrounded by eminent lawyers. There are one or two “make-up-the numbers” people, of whom I am one. I speak from personal experience because I was involved with the gestation, the preliminary papers and subsequently legislative proposals on the Online Safety Act. It took a long time and implementation was staggered so that it kicked in well after we passed it. In the course of that I became aware that the speed at which we do legislation is not the same speed at which developments in the field of technology take place, so there is an inevitability that laws we pass will be outdated by the time they are on the statute book and have received Royal Assent. I heard myself asking, in a non-legal way, whether there could be laws that are nimbler and can respond to circumstances that we know will happen, although we cannot foresee what they will be. Since all of those discussions and my discovery of this great word “nimble”, we have had all the developments in AI, for example. We are beginning to see punishments imposed on platforms and others are refusing to pay the fines placed on them. In other words, it is a fast-moving field of work.

Big Bills—and that was a big Bill—inevitably will be hostages to fortune, to put it that way. Can we imagine ways of being defter, perhaps with a succession of smaller Bills rather than long and complicated Bills? I do not know the answer to the question, but I felt the outcomes of our deliberations. We were talking to people whose children had committed suicide and so on; there were things happening out there contrary to the spirit, as well as the letter, of the laws we were trying to promulgate. That was my bewilderment, and that is what I share with you.

Jessica De Mounteney: It is absolutely true that Bills in certain areas are quite often out of date by the time they are passed. It is a relatively small subject matter space where that happens. There are possibly two ways round that. Unless one is going to come back and take up an enormous amount of parliamentary time, one answer to that inevitably has to be some form of legislation that is not primary, because the process of Parliament is such that it is not particularly agile in relation to these very complex subject matters.

Your question about smaller and more focused Bills is very pertinent. I think that, at least in theory, it is a good way forward. The problem is that even small Bills take a certain amount of time to go through Parliament. Each has its processes and stages. If you split up 10 clauses into 10 one-clause Bills, that would take longer. That is a very rough illustration.

That is not to say that this is not something to be thought about. We have been talking quite a lot about that in the course of preparing the second Session. There is definitely something to be said for thinking about Bills where it is easier to get consensus. Quite often, having just one issue makes it easier to get consensus. Of course, it requires discipline on all sides because, if you have a Bill dealing with one particular aspect of AI, for example, inevitably you will have MPs and

Peers lobbied by people very vociferously about another aspect of AI. There is no perfect solution, but, undoubtedly, smaller Bills are easier to navigate through Parliament. That is certainly true. My primary answer to your question about how we can have greater agility and more nimble law is, almost inevitably, to have a process that does not involve full parliamentary scrutiny of every change.

Q4 **Baroness Andrews:** My question sounds rather banal. I think you have answered it in part. What is the problem that consequential amendments are designed to solve? You have already explained that it is catching up with the legislative process in a way, making sure it is consistent. That is perfectly understandable given the speed at which legislation moves and so on, but future legislation is really where it bites. One of the concerns of the committee is the tendency to project and use consequential amendments to interfere with Bills that will happen in the future, which is quite a crucial point. Why does government feel that it has to take those additional powers? Colleagues will want to come in on this, too. Is there some danger that we are preventing what government might want to do in the future, or indeed undermining the power of Parliament to scrutinise things as they come up in future legislation? Is this a tendency that you have noticed? Is there something that can be done instead of that? Is there an alternative way of solving that particular problem?

Jessica De Mounteney: I will hand this over to Diggory because it is something that he has thought about quite a lot.

Diggory Bailey: It is probably worth noting at the outset that the powers to amend future legislation are nothing new, although perhaps the way we are drafting them now makes slightly more explicit the point that they can be used to amend future legislation. There is an example which I think this committee has been given in the context of the Mental Health Bill this Session. We had a look at 2006, just a random year. In that year there were 13 Acts that included general consequential amendment powers. Seven of those included the power to amend a future Act in the same Session; two included other powers to amend future legislation; and only four of them did not expressly confer a power to amend future legislation, but there may be arguments in some contexts that, even though it was not expressed, it could be implied. That is an example where 20 years ago there were quite a lot of powers to amend future legislation.

Then you have to split up the powers to amend future legislation. There are two categories. One is a power to amend a future Act if passed in the same Session as the Bill in which the power is contained. The second is the power to amend that in future Sessions. On the first one, the reason we include powers to amend later Acts in the same Session is uncertainty about the timetabling of Bills. A Bill introduced early in the Session might receive Royal Assent later, or vice versa. You do not know the relative timing of two Bills in the same Session and the order in which they come into force is not known.

Lord Beith: Before you leave that point, surely the subsequent Act can

be the means of dealing with the problem. Whichever Act comes second, which you cannot predict, when you get there you can deal with the problem.

Diggory Bailey: Sometimes, the need for a consequential amendment might arise due to an amendment that is put into one of the Bills during its passage, which might be after the last amending stage of the other Bill. It might even be during ping pong; it could even be on the same day as the last amending stage, so it is not always possible to anticipate what is needed in each Bill.

The Chair: What you are arguing for is a kind of contingency catch-all, in case the Bill becomes unbalanced because of an amendment, so you have this extra power to deal with it.

Diggory Bailey: Yes. I will give you an example of something that came very close to that in any event. In 2022, as you are probably aware, the NHS Commissioning Board was renamed NHS England. In the summer of 2021, there was a Bill to do the renaming—the Health and Care Bill—but another Bill, the Down Syndrome Bill, referred to the NHS Commissioning Board. They both received Royal Assent on 28 April 2022, within seconds of each other. The Down Syndrome Act still had that reference to the NHS Commissioning Board left in it. It referred to the right body but by the wrong name. The consequential amendment power in the Health and Care Act was recently used to amend that and update that reference.

What would have happened if we had not had that power to amend? The answer is probably very little. The Down Syndrome Act would have carried on referring to the NHS Commissioning Board. You could have had a new Act to try to correct the reference to the name, but in practice it is probably not a good use of parliamentary time to have an Act just to replace the name. Clearly, the courts would have known that the reference was to the same body, so in practical legal terms nothing would have gone wrong. However, the user coming to the Down Syndrome Act would be faced with the reference to the NHS Commissioning Board and say, “What’s that? I don’t know what that is”, which seems unhelpful. I think part of the purpose of these consequential amendment powers is to ensure that the law means what it says and reflects reality, and that plugs into concerns about acceptability and the rule of law.

The Chair: Baroness Hamwee has her hand up. She is joining us remotely.

Baroness Hamwee: Yes, I am sorry not to be with you; I do not intend any discourtesy to our witnesses by this.

You gave, if I can put it this way, a benign example of a change of name. I suppose that could be very controversial. Often, names are. The use of the powers could be much more significant than a change of name. As parliamentarians, we cannot anticipate what may be coming. You probably cannot, either. How much do you monitor departments’ use of powers to make consequential amendments? All of us will be very

conscious of the fact that our scrutiny is limited and we cannot make amendments when something comes through as an SI. In part, it is the relationship with the departments that we are interested in as well.

Jessica De Mounteney: Thank you for that. I take your point about the example that Diggory just gave being a benign one. We can perhaps come back to that in terms of addressing what it really means for an amendment to be consequential. It is quite a narrow band of things that you can do under a consequential power, which I hope meets that point that nothing too significant would be done.

We do not monitor what departments do in the sense of keeping a league table and interrogating what they are doing and why. You will probably know that we vet all subordinate legislation that makes amendments to primary legislation. We will look at the amendments made, check that they work from a structural legal perspective, and ensure that the integrity of the statute book remains. We see all those amendments. It is not for us, strictly speaking, to tell a departmental legal team that what they have done goes outside what we would consider to be consequential. The exercise of a power is ultimately not for us to opine on. We nevertheless opine from time to time. If we see something that we think is questionable as a consequential amendment, we always discuss that with our instructing lawyers. The government legal profession as a whole keeps a very close eye on these kinds of powers.

If what you are asking is whether we have a list of how many such SIs have been made, the short answer is no. I thought about this just before I came to see you this morning. I should have tried to put together a list, which I shall do. I have left people trying to put that list together to see if we can find a comprehensive list of numbers. Also, the wider Government in Parliament group, of which I am the head, has a triage function for statutory instruments generally, not just those that amend primary legislation. The purpose of that triage function, basically, is to organise the laying and making of SIs in Parliament. We have a cross-departmental view of what is going on.

Baroness Hamwee: I was not asking for a list, although I suppose everything starts with one, but more the content. You touched on that by talking about the triage. Do you have any sense as to whether SIs falling in this category cover wider ground as the years go on?

Jessica De Mounteney: I do not think so. Ultimately, it will of course be a matter of legal judgment in any case whether an amendment is truly consequential, and the only way that one would get a final decision on that would be if the instrument were challenged in a JR. I have not been aware that departments have used these powers more significantly. I have been doing this job for almost 30 years, and it is not something that I have become aware of.

Q5 **Lord Bellamy:** Mr Bailey, a moment ago you told us that there were two categories, and that Bills tumble over each other in the same Session and you need to sort that out, which is one aspect. The other power that we

are probably quite interested in is the one to amend future Bills that are not in the same Session. I have one particular question just to frame this. There is a case that I know a little bit about where, following a judgment of Strasbourg, it was thought it might be necessary to amend the Human Rights Act, and there was a proposal that eventually did not proceed to do that by consequential amendment powers. Is that a one-off or does it happen from time to time that a need arises to use this power, perhaps because of a judgment from the courts or for some other reason? If so, can you give an indication of how frequently that sort of thing might occur?

Diggory Bailey: First, it is probably best to say that the power in the Human Rights Act is, I think, a separate power to give effect in domestic law to ECHR judgments to ensure that the law conforms. That is a rather different power.

Lord Bellamy: It is a power to amend that Act rather than other Acts.

Diggory Bailey: Yes. I thought it had been used at some point to amend that Act. That is not really in the same category.

Lord Bellamy: That is a self-contained issue, you would say.

Diggory Bailey: Yes, that is a very specific power to deal with that thing, as opposed to the powers that are included in a lot of Bills, probably even half the Bills in a Session, that say that you can make amendments that are consequential on the Bill itself. You are right; I had not dealt with my second category about future Acts.

Lord Bellamy: Please do.

Diggory Bailey: They are less common. We would normally include the power to amend future Acts in the same Session when we include a consequential amendment power. We would only include the power to amend Acts in future Sessions if we thought there was a specific reason to include them.

Lord Bellamy: What would that reason be?

Diggory Bailey: The example might be where there is likely to be a significant time lag between the passing of the Bill and its implementation, so there is likely to be a lot more legislation coming along. An example of that was the Pensions Act 2014 that replaced the state pension, which had been years in gestation. It was introduced in 2013. It was passed in 2014, and everybody knew that it was going to be implemented and apply to people who reached the state pension age after April 2016. There would be that big intervening period. You could have said, "Shouldn't later Bills that come along in that intervening period take account of the new state pension?", but a decision was taken that it would be more apt to take a power so that shortly before implementation in 2016 you could go and make changes to any existing legislation. I have not looked to see how that was used but that was the justification for that power. At the time, I think the Delegated Powers and Regulatory

Reform Committee and everyone noted this but said it was an understandable use of a power to amend a future Act.

Lord Bellamy: If you can give us—not now, but at some point—some general impression of how often that sort of situation arises, that would be very helpful.

Diggory Bailey: They are relatively rare, but we can look at the statistics.

Q6

Lord Anderson of Ipswich: Jessica said earlier that there was a narrow band of things that can be done under the consequential power. You also indicated that you did not think that band had widened over the years. I suppose by the time it crosses the barrier and comes to us, there are various people who might look at that. The Secondary Legislation Scrutiny Committee of this House might look at it. The courts, as you indicated, might look at it. I would be interested to know what happens, in a sense, on your side. For a start, is there any working definition that you have as to what is a consequential amendment? Is there any code of practice? Is there any process within government or the Office of the Parliamentary Counsel that might examine whether this is truly nothing more than a simple consequential amendment or might have wider ramifications that would make it more controversial?

Jessica De Mounteney: There are a couple of bits to that question. On the first, we do not have a definition of a consequential amendment as such, but we rely on general statutory principles, the statutory construction, which Diggory may be able to come back a little more on.

In terms of the process and how people decide whether something is consequential, we do not have a committee or a regular meeting. There would be several stages. A department would be looking to make what it hoped would be consequential amendments or supposed consequential amendments. It would probably have an internal discussion if there was anything. There would be an enormous number of amendments that were very obviously consequential: anything that dealt with a name change to a body or the change in a period of time within which you could make an appeal, all those sorts of things where you had the headline provision in primary and you knew that there were things elsewhere in the statute book that you needed to sort out. There is a category where everyone would assume that there was no problem. Then there is a sliding scale, and the closer you got towards the edge of what you might think was truly consequential, the more you would discuss with colleagues what their concerns might be.

In the end, we have a number of ways of sharing our knowledge and views. We have good relationships across the entire government legal profession, the 3,000 or so lawyers in the Government Legal Department. I talk regularly to the Treasury Solicitor about potential challenges. We talk to the Attorney-General's Office. It is relatively rare that we would have to do that, but those are the processes that are there for us if we need to take soundings and make decisions.

Lord Anderson of Ipswich: Diggory might have something to add from the Government's side, but it sounds from what you said as though you see yourself as perhaps having something of a role as a constitutional guardian on this sort of issue.

Jessica De Mounteney: I think all government lawyers are constitutional guardians. It is at the heart of what we do. We perhaps do not articulate it that often publicly, and perhaps not even to ourselves. Helping the Government to govern within the rule of law is in fact the Government Legal Department's strapline. We do not have one, unfortunately. We probably should. That is at the heart of what all government lawyers do, whether we articulate it or not. On the question of how we approach the concept or the definition of a consequential amendment, we talked about that a bit earlier.

Diggory Bailey: I will try to set out what it is. We follow probably what the key textbooks in this area suggest, which is that a consequential amendment is something that can reasonably be described as in consequence of the substantive provisions of the Act. Perhaps it does not take it that much further forward. It is not limited to the bare minimum that can be done and that needs to be done to make the provisions work, but it still has to be fairly described as consequential. You cannot introduce whole new substantive policies, but there may be some second-order policy decisions involved in that. Sometimes there are two ways of dealing with an issue, so there might be some second-order policy issues.

As to how we approach it, I do not think I have ever been asked to look at a set of consequential amendments and regulations where I have had any doubts about it clearly being within the vires. I wonder how often there is any attempt to push at the edges. The other thing that we have not said yet is that we do, where possible, try to include consequential amendments in the Bill. We try to identify all of them and put them in. Where the power is used, that might slightly be coloured, or at least you have an indication of the sorts of things that might be expected to be consequential, by looking at the consequential amendments in the Bill itself that are indicative of the nature of the power.

Lord Anderson of Ipswich: Can you give us an example of a consequential amendment that might involve a policy choice?

Diggory Bailey: I am trying to think of something.

Lord Anderson of Ipswich: Perhaps come back to that.

The Chair: Yes, come back to it. Have a think. Lord Burnett, you have a question.

Q7

Lord Burnett of Maldon: Lord Anderson substantially covered what I was going to come in on now. The answers we have got very helpfully from you illuminate a little bit the concerns that parliamentarians and others have that we do not really know and cannot find out enough about how these powers are used. Mr Bailey, you explained that the powers are

included fairly frequently, and we see that all the time. You gave examples from 2006. Essentially, they are a precautionary measure. They broadly split into two categories: amendments to existing legislation; the more concerning one, amendments to legislation that Parliament might just have passed. Then, as Lord Bellamy indicated, there is legislation that might be passed in future Sessions. You indicated that there are sometimes discussions with departments and perhaps with law officers about whether a proposed amendment is within the proper bounds of consequential or perhaps stretching them.

I have a very general question. These are real concerns that people have because of uncertainty, as I see it, about the need for the powers, the use of them and how often they are used. Are there processes or mechanisms particularly that can be put into the public domain to enable not just parliamentarians who are concerned about this but more widely people who are concerned about the operation of the law, the certainty of the law and the rule of law to be satisfied that these powers are conferred and used for good reason?

Jessica De Mounteney: I will come back to the main question. I should say that in the examples that I gave about the ways in which we would resolve conflicts about potential vires, as Diggory said, I cannot think of any example where that happened to me in relation to a consequential amendment. I used it to illustrate the sorts of processes that we have across the government legal profession when anything feels like it might be slightly questionable, difficult or on the edge of vires. As Diggory said, that happens pretty rarely in relation to consequential amendments. I just wanted to make sure that I had put that on the record.

In relation to your question about greater awareness, I do not think there is an easy answer to that. For people who are rightly concerned and want to understand more about the principles of the rule of law and the way in which these kinds of powers are used, there is almost certainly no substitute for looking at the material freely available. On legislation.gov.uk all legislation that is made is published and kept up to date. It is increasingly easier with technology to work out what these instruments are doing.

Lord Burnett of Maldon: It would be lovely if one could go to GOV.UK, or legislation.gov.uk, and put in a search for “use of Henry VIII powers”, but you cannot at the moment. It is not the way that the website can be searched. You have to know precisely what you are looking for.

Jessica De Mounteney: [Legislation.gov.uk](http://legislation.gov.uk) is not our product.

Lord Burnett of Maldon: No, I know.

Jessica De Mounteney: It is run by the National Archives. That question and those problems are among many things where, increasingly, legal AI will be hugely helpful in running those kinds of searches. At the risk of sounding overly lawyerly, one problem is that it may not always be entirely clear what you are looking for. The definition of a Henry VIII

power would be a power to amend primary legislation, but there will be a wide range within that of matters that are of concern and those that are not. For example, if all that an order or a regulation is doing is changing a number from five to six, that is not of real interest. It seems superficially like it would be quite easy to collate that kind of data, but, in practice, all these issues are quite complex and there is simply no way around that. We in OPC and I know other government lawyers are always very happy to talk about how we go about these things and what processes we go through. I always encourage people to make the most of the enormous amount of literature that is available for free as well as what is on the Parliament website about the process for making secondary legislation.

Lord Burnett of Maldon: Could I follow that up further? It may be anticipating questions that will come later. In your introductory comments and observations, you told us that departments show you any proposed SIs that amend primary legislation, and that is very good to hear. I was not aware of that. Given that your department sees them all, would it be too difficult a task, if they are then laid and approved, for them to be listed somewhere?

Jessica De Mounteney: I would not have thought it would be difficult at all for them to be flagged in that way. I certainly am not in the business of making promises on behalf of the National Archives and legislation.gov.uk. We meet with it. We have a primary legislation committee every six months. I will talk to it about that.

The Chair: We will have Lord Beith and then Lord Foulkes, who has been very patient with his hand up.

Q8 **Lord Beith:** In the event, which you made clear is very unlikely, that you are in dispute with a department as to whether it is an appropriate use of a consequential clause, where do you go? Do you go to the law officers? Can you recall ever having done so either in the narrow case of consequential powers or in other ways in which the drafting of the legislation, never mind the policy, is not good law?

Jessica De Mounteney: We are never in dispute with departments. What happens is that we would mutually agree that the answer was not clear, and at that point anything that fell within the remit of the law officers could be resolved by them, but it happens very rarely. I certainly cannot remember it ever happening on something like the use of a consequential amendment power.

Diggory Bailey: When we prepare Bills, the law officers will be involved in any event. There are discussions in the department often involving us at the early stages of the preparation of a Bill, flagging areas where there might be things of interest to the law officers. That is hard-wired into the process. It is trying to identify areas where concerns might arise and making sure that they are resolved in an effective way rather than trying to deal with specific areas of tension.

The Chair: Lord Foulkes has been trying to get in for some time.

Q9 Lord Foulkes of Cumnock: Thank you very much, Lord Chair. Welcome to both of you. You mentioned that you discuss and consult with all the hundreds of government lawyers about consequential amendments and Henry VIII powers. What discussions do you have with Andy Beattie, the Chief Parliamentary Counsel in Scotland, about that? You will probably be aware that the Scottish Parliament's Delegated Powers and Law Reform Committee has been looking at this issue. Do you know what direction it is moving in?

Jessica De Mounteney: In answer to your first question, I maintain very close relationships with the heads of all the other drafting offices—Scotland, Wales and Northern Ireland. I am regularly in contact with Andy about all drafting matters. We have to operate within the confines of the devolution settlements and propriety, but we share a lot of knowledge and information about the way we draft and the best approach to drafting.

On the question of the Scottish Parliament's committee, Diggory and I gave evidence to it in January. It produced a report, but I am not sure whether anything concrete has come of that. I do not know.

Lord Foulkes of Cumnock: I have been trying to find the report. I cannot find it.

Jessica De Mounteney: Forgive me, maybe I was thinking about the evidence session.

Lord Foulkes of Cumnock: The evidence is not published.

Jessica De Mounteney: No, you are right; probably not, then. I do not know the answer to how it is progressing.

Lord Foulkes of Cumnock: Thank you. I am very pleased with your answer to my first question. It is very encouraging that you are having that kind of consultation with the devolved authorities.

The Chair: Thank you, George.

Q10 Lord Murphy of Torfaen: Good morning to you both. Is the power to make consequential amendments a standard power that is automatically included in most Bills? If it is not, who decides these issues? You partly answered this. Is it the department, or is it you?

Diggory Bailey: I do not think we would say that it is a standard power in the sense that it is routinely shoehorned into every Bill. We will consider in the case of each Bill whether it is necessary. That said, it is fair to say that most medium to large-scale Bills will have a consequential amendment power in them, and that is because of the increased risk of interactions that have not been identified between different Bills in Parliament.

It takes us back to the reasons we have consequential amendment powers at all. If you have a smallish Bill that is doing something entirely new, it is free-standing and is not operated by amendment, the risks of a

missed consequential might be so small that we think it is not appropriate to include a power. An example of that in this Session is the Sustainable Aviation Fuel Bill. That does not include a consequential amendment power. You can find others. As to who decides, there will inevitably be a process of discussion between us, the departments, departmental lawyers and policy officials, but it is ultimately a question of policy for the government department to instruct us on, so we will take instructions from it. Given our expertise, we will have a discussion with it about that.

Lord Murphy of Torfaen: It is essentially the department, liaising with you as to how it is included in legislation.

Diggory Bailey: Yes.

Lord Murphy of Torfaen: Thank you.

The Chair: Lord Beith, has your question been answered?

- Q11 **Lord Beith:** I will briefly widen my earlier question while we have you here. You may have noticed that I criticised quite a bit the inclusion of a non-exhaustive list of prohibitions in the Sentencing Council legislation. There must be some issues like that where I would expect Parliamentary Counsel to say, "Good lord, this doesn't make sense. The person affected by it can't know what they're prohibited from doing". Is that covered by some standard set of guidance on things to look out for in your office?

Jessica De Mounteney: Not the specific issue of an illustrative list of prohibitions, but it would fall within our usual approach, which would be to make law that is effective. In answer to that particular question, it is always a question of judgment and negotiation. Ultimately, as long as we are not able to say that that is wrong and will lead to a legal absurdity, we are very much at the mercy of being instructed to draft. It is a very difficult line, and it is the question I know that over the years so many of my predecessors have been asked. The truth is that there is no really clear answer. Where an individual drafter would say, "I simply don't agree that this is sufficiently clear or sufficiently good law", and draw that line probably varies from person to person.

Generally speaking, we try our hardest to give effect to what elected Ministers want to appear on the face of their legislation, and, for my part, that is as it should be. We will always say, "In our view, it might be better set out like this or like that". There are rare occurrences where one could categorically say, "This is wrong", and that is where questions of opinion and judgment come in. It is difficult. That is one reason why our job is difficult. The answer is not always clear. We will sometimes give very clear advice but are not able to say, "No, you simply can't do that because it doesn't work or it doesn't make sense".

- Q12 **Lord Bellamy:** Strictly on consequential amendments and in particular the prospective power for future Acts, what would be the practical consequence if that was not done and you did not have that power?

Jessica De Mounteney: I suspect that we partly touched on that already in relation to examples where Acts would say the wrong thing. Diggory gave that example.

Lord Bellamy: I do not mean the tidying-up power in the same Session; I mean the power to amend future Acts after that Session. If you simply said, "That's not a good way to run the constitution", what would be the practical consequences?

Jessica De Mounteney: Again, the answer would be that there would be Acts that said the wrong thing in future. It is impossible to know always exactly what you are going to need to do. Was there anything that you wanted to add?

Diggory Bailey: The power to amend consequentially Acts in future Sessions is rare and normally specifically justified in the delegated powers.

Lord Bellamy: If it is rare, why can you not use the normal parliamentary process rather than a delegated power?

Jessica De Mounteney: For me, the answer to that is that it is probably a question of the proportionate use of parliamentary time. One approach might be that, if there were something where the will of Parliament was that it came back and took up a whole Bill slot, of course one could do that. There is a reality check that sometimes needs to happen. In a world where there is so much competing for parliamentary time—not just legislation but debates, Back-Bench business, Urgent Questions and so forth—there will always be a judgment about the best use of parliamentary time. It is quite difficult to say, generally, where that decision lies.

Lord Bellamy: The root cause takes us back to parliamentary procedure, effectively.

Jessica De Mounteney: And parliamentary time, yes.

Lord Bellamy: Will the Chair permit me one supplementary question, picking up Lord Burnett's point? With modern technology, if one took the statutory instruments that had been made over the last five years and excluded the EU statutory instruments, it should not be too difficult to work out how many times consequential amendment powers were used in either category. A fairly straightforward computer program would give us the answer, would it not?

Jessica De Mounteney: One would hope so. I know that at the moment we do not have those figures, but that is not to say that we could not find them reasonably easily. It is one of the things I will take away.

Q13 **Baroness Laing of Elderslie:** There is an interesting point there about parliamentary time. With all due respect, I wonder if it is more the pressure of time on your department. If one were to examine how time in the House of Commons is used at present, you would find that real

legislation only occurs on Tuesdays and Wednesdays, and it does not occur on Mondays and Thursdays. Of course, for Private Members' Bills, it is on Fridays. Is it that in fact there is a lot of pressure on your department for the work that you have to produce?

Jessica De Mounteney: We are busy. It is part of the picture, but I would not say it is the most significant part of it. Certainly, in this Session, one thing that has been difficult in terms of putting things through Parliament has been the unpredictability of timelines, particularly in this House. It has been quite difficult from the outset to know how long a Bill will take to get through.

Baroness Laing of Elderslie: You are being very polite about it. Let us be honest: the House of Lords has taken a long time to examine several Bills.

Jessica De Mounteney: I would not like to say that we would not always like more resource, but we are managing to keep up at the moment with the demand for the amount of legislation that is currently realistically able to get through both Houses.

Baroness Laing of Elderslie: I wonder if I could take you in the direction of thinking about the management of the legislative programme, again on this issue of use of time. Would it help if there was improved co-ordination between government departments that might render consequential powers unnecessary? It was interesting to hear the example that you gave about the necessity of subsequent legislation because two Bills were passed, effectively, as you said, within minutes of one another. The example you gave is an exception because the Down Syndrome Bill was a Private Member's Bill. I can see very well that there can be times where a Private Member's Bill, which is not a government Bill, clashes with a government Bill, and there is every excuse for that to happen. You gave it as a good example, but I put it to you that it is an exception. Where you have government Bills clashing, they should not clash in the first place if there was better management of the legislative programme.

Jessica De Mounteney: Diggory looks like he might have some other examples to give you. In terms of the general question about management of the programme, a lot of time and effort goes into managing the legislative programme, particularly in relation to working across departments, working out what the best timelines are, when departments will be ready with their policy development to instruct us, and so on and so forth.

To come back to the point about when Bills get passed, the Government do not always control parliamentary time and it is not always immediately possible to work out exactly when certain Bills will get through all stages. That has definitely been apparent this Session. There is also something there about needing to factor in the need for legislative consent Motions from the devolved legislatures. That has proved quite difficult sometimes for political reasons and sometimes for pure reasons of administration.

We have elections coming up in May in both the Scottish and the Welsh legislatures. We are already having to consider that Bills that will need legislative consent Motions will need to take precedence potentially over other Bills. That is a real issue. Again, I would point to the unexpected Bills that sometimes come in and interrupt the best-laid plans.

However, I emphasise how much meticulous planning has already been done in relation to the second Session, how it all fits together, and how departments are thinking about their priorities and what needs to be done. It is impossible to get it right when you are dealing with a Parliament that is a living, breathing thing. That is one of the wonders of our constitution. I would not really want to live in a world where the Government could say, "Right, this is going to happen then". It would not be who we are, really. It is okay to live with some of that slight muddle in a very small number of places.

Baroness Laing of Elderslie: Thank you for that answer. That goes very well to the point you made about government lawyers being guardians of the constitution.

Jessica De Mounteney: Did you have some more examples?

Diggory Bailey: I do have more examples. We did an exercise of trying to identify some examples of where the powers to amend future Acts in the same Session have been used. There seem to be so few that they are very hard to identify, but we identified a couple and shared them with the advisers to the committee. Perhaps we could reshare them if you are interested. They are quite involved. I am happy to take you through them if you want.

Baroness Laing of Elderslie: The fact that you say they exist is good.

Lord Anderson of Ipswich: We would like to see them if we have not already.

Q14 **The Chair:** Lady Hamwee has a question on statistics and monitoring, which I think you have partly answered. Lady Hamwee, have you heard enough?

Baroness Hamwee: I do not think there is anything more I need to add.

The Chair: You have covered that. Lord Waldegrave, is there anything you wanted to add to that?

Lord Waldegrave of North Hill: No. The more data in a timeline that could be accumulated, the more it would be helpful. I find it very reassuring, curiously enough, that you, with your long experience, have not seen any major increase in what you might call conflict between departmental enthusiasm and the rule of law as represented by Parliamentary Counsel and the government lawyers. I suppose all of us are thinking all the time of Lord Hennessy of Nympsfield's question: could it happen here? We are always looking at defences. The scarcity of parliamentary time and the necessity of law not banging its head acutely

against your concerns are valuable parts of those defences. I do not think one would want to see things speeded up that much more. I am a little worried about how the House of Commons timetabling everything has removed one of our defences, which was what you might call the Maxwell-Hyslop defence, very troublesome Back-Benchers who could make trouble, but they are much diminished. Another of the checks on overweening legislative ambition is represented by your service.

Baroness Andrews: It follows from what Lord Waldegrave said that one reason we became interested in this subject is in the whole context of what we see in Parliament as happening to secondary legislation, the optics on secondary legislation over the past few years and the way the boundaries have shifted a bit between the balance of primary and secondary legislation, which was primarily intended for technical amendment and delivery but which has gradually been slightly eroded. It is the principles of design often put into secondary legislation. The argument is: why are they not in the Bill? These are the sorts of arguments that have been explored by the DPRRC and the Secondary Legislation Scrutiny Committee over the past few years. It is really all part of that package about the optics of the role of Parliament in being able to do its duty in terms of scrutiny and proper legislation.

We discussed this morning whether it is possible to create lists that would allow people to say that there are few exceptions. It has been very reassuring that you said that, and the routine is that this process is well understood, respected and transparent across Whitehall. I wonder whether it could be made a bit more transparent in the context of what people expect from Parliament. We are dealing with issues of trust. Is there anything that could be done to be more open about these very complex processes that, frankly, are a bit nerdish to people outside? Nevertheless, there may be an element of duty here to try to make them a bit more accessible.

The Chair: Lady Andrews has very nicely brought us to a conclusion and explained the rationale for having this meeting in the first place. It has been really useful having this meeting and you being able to explain what it is that you do. What we see from this side of the fence is legislation, these consequential amendments, and the thought that they are all standard powers. It raises a suspicion, but you have been very helpful in explaining exactly why things are done the way that they are, so I thank you very much.

While you are here, it suddenly sparked a question about Keeling schedules, which have in the past been extremely useful and now seem to have disappeared. I have seen from your career as Parliamentary Counsel that you are aware of them and have seen them. Why do they seem to have gone out of fashion?

Jessica De Mounteney: The short answer to that is because they are so time-consuming to produce. I should not make any promises here, but that is one thing that we are most actively working on in terms of the use of advanced computer processes, because it is the single thing that would

make it easier for parliamentarians to scrutinise legislation properly. I have long been of the view that if you could do that well enough it would be a really good thing to do.

The Chair: Lady Hamwee has a question. I did not want to launch a great debate on this because I have not given you any warning, but what you have said is very positive. I will take it as a little bit of encouragement. It is an area that we would like to see some progress on relatively soon because it really is very helpful, as you said. Lady Hamwee, what would you like to say?

Baroness Hamwee: What I was going to say—Jessica answered this as I was thinking about it—is that it is difficult for Parliamentary Counsel and very difficult for parliamentarians. I would be glad if you can look at it through that lens as well.

The Chair: We have covered a lot of ground. Thank you very much for the clarity of your answers. We will ponder on them, and if we have any further questions we will let you know. Thank you very much for taking the time and trouble to be here.