Secondary Legislation Scrutiny Committee

Corrected oral evidence: Departmental support of secondary legislation

Tuesday 20 April 2021

4 pm

Watch the meeting

Members present: Lord Hodgson of Astley Abbots (The Chair); Baroness Bakewell of Hardington Mandeville; Lord Chartres; Lord Cunningham; Lord German; Viscount Hanworth; The Earl of Lindsay; Lord Lisvane; Lord Sherbourne of Didsbury; Baroness Watkins of Tavistock.

Delegated Powers and Regulatory Reform Committee—Members present: Lord Blencathra (Chair); Baroness Meacher; Lord Tope.

Virtual Proceeding Questions 1 - 16

Witnesses

I: Elizabeth Gardiner, First Parliamentary Counsel, and Permanent Secretary, Government in Parliament Group, Cabinet Office; Susanna McGibbon, Treasury Solicitor and Permanent Secretary, Government Legal Department; Tamara Finkelstein, Permanent Secretary, Department for Environment, Food and Rural Affairs, and Head, Civil Service Policy Profession.

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Examination of witnesses

Elizabeth Gardiner, Susanna McGibbon and Tamara Finkelstein.

Q1 **The Chair:** I thank the three Permanent Secretaries for joining us this afternoon. The life of a Permanent Secretary must be a very busy one always, and no more so than at the present time, so thank you for carving out a bit over an hour to talk to us. Could I just begin with a couple of formal background items that I have to deliver? This is a formal evidence-taking session. It is on the record and is being webcast live. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. We will of course be sending you a copy of the transcript for the amendment of any errors or misunderstandings, and I am sure the team will be grateful if you could respond to that as quickly as possible. That was the formal bit.

We have three members of the Delegated Powers Committee joining us: Lord Blencathra, Baroness Meacher and Lord Tope. We have matters that overlap between our two committees and we thought it would be helpful for you to be able to answer two for the price of one, as you might say.

First, a bit of choreography. We want to make the best use of the time available, so you should take it as a given that we will all have read the very extensive and helpful briefing that you have sent to us. You do not need to refer to that again in the next hour.

Secondly, we will be asking you questions individually, if we may, and there is no need for all of you to answer every question, although if one of you feels there is an important point to be made, please wave violently and we will give you a chance to say your piece about the issue that concerns you.

Thirdly, I and the members of the two committees have undertaken a self-denying ordinance about the length of questions, so may I ask you to take a similar self-denying ordinance about the length of the answers so that we get as much as possible done in the hour?

That is the choreography, and we understand that you would like to be addressed more or less informally, so if you are happy with this we will address you by your Christian name and your surname, for example, Tamara Finkelstein and so on. I hope you are happy with that.

That is all the formalities, and so to horse. Neither Tamara Finkelstein nor Susanna McGibbon have been before one of these committees previously, so it would be helpful if you could give a brief strategic overview of how, in general terms, you plan to promote good practice in relation to secondary legislation.

Tamara Finkelstein: Thank you very much. I welcome the opportunity to appear before the committee and to go through the questions that we gave some answers to before.

I took on the role of the head of the Government Policy Profession in the autumn. The profession has an important role in raising professional standards among policy professionals in government and those more broadly involved in policy-making. Of course, that includes engagement

with Parliament, working on legislation and drafting Explanatory Memoranda.

We are currently establishing the priorities for our work programme as a profession. Some important elements of that which are relevant to the committee are that we will be reviewing our professional standards and ensuring that the training available and the opportunities for knowledge share across the profession are fit for purpose.

We will be developing a process for departments to self-assess their policy-making capability, and we are considering good output and outcome measures for good policy-making. Clearly, the work that policy professionals do as part of the process of legislation will be reflected in those priorities and that work plan, so having the opportunity to read the committee's concerns and hear from you today is very helpful as we shape those priorities.

Very briefly, as the Permanent Secretary for Defra, I recognise the issues and challenges that the committee has identified, because with the EU exit we have had a very significant number of SIs over the last couple of years. We have had to make a quite steep improvement in our approach and hope to learn from that in helping the profession more broadly. I am sure we will touch on some of the areas for improvement and further improvement.

The volume of secondary legislation required for the EU exit, and particularly the pace of what is required for Covid-19, probably hides an underlying improvement in skills and processes. We need to build on that, and that would be a commitment for me as part of my role in leading the policy profession.

Susanna McGibbon: I, too, would like to thank the committee for the opportunity to appear today. As the new Treasury Solicitor, I am deeply committed to ensuring that government lawyers continue to play an important and central role in supporting policy colleagues and Ministers in the difficult decisions they have to make that are then implemented through secondary legislation. Together, there is an important role for us to continuously improve our capability on secondary legislation. I am looking forward to working together over the coming months to do that.

In support of the programme of work which the policy profession is undertaking, which Tamara mentioned, I would describe my aspirations in this area as follows. First, I would like to build on the clear success of the Government Legal Department's Statutory Instrument Hub as a centre of excellence for secondary legislation across government departments and the drafting community.

I want to be able to learn lessons—today's committee hearing will help us to do that—from the experience of legislating through an emergency and to reflect on how we might build further resilience to do that well. We should be exploring opportunities to make more use of digital technology developments in the production of legislation, an important way of making sure that our service remains modern and up to date.

I mentioned working with the policy profession. Together we have a lot to do, and can do, in building legislative capability among policy colleagues. As lawyers and policy colleagues, working together in multidisciplinary teams is one way in which we can really support each other to get that quality as high as it can be.

I am looking forward to working closely with Elizabeth and Tamara over the coming months, so that we can aspire to and reach the highest standards of legislative delivery. Thank you.

The Chair: Thank you very much. Elizabeth Gardiner, you are an old hand at this. Do you want to add two sentences, or are you happy to crack on with the questions?

Elizabeth Gardiner: I am happy to crack on. We are a supporting act, and we are very happy to support both the policy profession and the legal profession on secondary legislation.

Q2 **The Chair:** Let us then turn to the questions. My first question is to Tamara Finkelstein. In your reports to us, you acknowledge that very broad powers have been taken to deal with the pandemic, and we have to recognise that too. We are concerned about secondary legislation becoming a default option: that is to say, a tendency to use pandemic legislation more widely than was originally anticipated. I would like you to comment on whether you see it as part of your role to say, "Hang on, Minister, this is nothing to do with the pandemic. This is a primary legislation issue and it should not be put through under secondary legislation that was really for the pandemic".

Tamara Finkelstein: Ministers, advised by legal and by policy officials in departments, consider carefully what is the appropriate vehicle for making any change. They can only do secondary legislation if there is a parent Act that enables that to happen, which obviously has been through considerable scrutiny. However, there is competition for parliamentary time, so there is no question that, when thinking about making changes, there will always be a question as to whether they are suitable for secondary legislation because of the challenge of space for significant primary legislation.

That is part of the conversation that happens, but we would certainly not advise using the wrong vehicle. Ministers will make the judgment ,but we ensure that they are provided with the right advice from policy colleagues and legal colleagues.

Q3 **The Chair:** Let me take one further step forward. There has been a discussion about how a gap has emerged between the governors and the governed and how secondary legislation, because it is relatively less explained and less scrutinised, has led to that gap. Do you see it as part of your role to try to make sure that we make government be seen as relevant and important to our fellow citizens, or is that purely a matter for the politicians?

Tamara Finkelstein: There is clearly a role for the politicians in that. Policy professionals and lawyers have an important role in ensuring that the legislative process works effectively. Part of their role—I am sure we will come to it—is to provide Explanatory Memoranda of as high a quality as possible to ensure that anything that is available publicly explains things as much as possible, to keep to deadlines and time for scrutiny as well as possible in order to allow scrutiny to take place, and to support the proper running of the system.

I do not doubt that in the exceptional circumstances we have been in, some of these things have not happened quite as one would wish. There have been other routes through which politicians in particular have opened themselves up for questioning and scrutiny but, clearly, we have a role in supporting that process. We try to do that as best we can.

Q4 **Lord Lisvane:** Can I address this question to Elizabeth Gardiner and recall our happy professional co-operation over a number of years in the past? My question is not about Covid-19. It is about a long-term change in the way in which legislation is approached. I am after a view from the other side of the road, particularly in relation to skeleton Bills—Lord Blencathra will come on to this in a moment—as to how the threshold between primary and secondary legislation is seen, particularly when a Bill comes to the Parliamentary Business and Legislation Committee.

Those of us longer in the tooth remember the former Legislation Committee, which used to be quite fierce. How far are Ministers warned about the parliamentary downside of trying to do in secondary legislation what they should be doing in primary legislation? I think there is a theme here about skeleton Bills, which we will come to in a moment, but that is very much a change that I have seen being closely involved with the parliamentary side of legislation over the last two or three decades.

Elizabeth Gardiner: I have also been involved, as you know, over three decades. I do not know whether I would say that there has been such a marked change. I think we could look back at the historical statute book and find examples of wide powers taken in the past. Clearly, we have had Bills in recent years, particularly on EU exit and Covid-19, where we have taken extremely wide powers, and we acknowledge that.

As for the attitude of the PBL, it is part of a long process, so policy officials understand the issues between separating what goes into primary and secondary. They will discuss that as part of the development of the policy and how they will develop their Bill. The lawyers will also advise on that, and parliamentary counsel has a significant role in discussing with departments what would be seen as an appropriate division between primary and secondary legislation.

Our starting position is that we want the Bill to tell its story in such a way that Parliament can scrutinise the policy framework and the policy at a sufficient level of detail that they understand what the Bill is about. There may always be issues that are better delegated to secondary legislation, but the aim, the starting point, is your hope that the main points of

principle of the policy are set out in the Bill to enable Parliament to give it sufficient scrutiny.

Clearly, we do not always achieve that, for a variety of reasons. There is a variety of reasons why you end up delegating powers. Sometimes, for example, the detailed policy cannot be worked out at the point at which you bring forward the primary legislation, but there may be practical or political drivers to bringing forward the legislation at a particular time.

One example might be because the legislative programme is so tight and there is great demand for legislation each year. If you have a Bill on the fire brigade in one year, for example, you are not likely to get another Bill about the fire brigade the following year. So if you know that you will want to legislate on something but you need to consult on it in some detail before you know the detail of your policy, you might be driven back to thinking of taking some powers, properly drafted with sufficient clarity and sufficient detail, to enable you to implement that policy later and to give Parliament the ability to scrutinise it at the time.

Thus, there are lots of different factors playing in when you are deciding on the division between primary and secondary legislation. I think those factors are the same as they would have been 20 years ago, but the pace of life is probably faster and the volume of legislation and secondary legislation has increased, but I think that reflects life. I am not sure that, as a matter of principle, we approach it any differently than we did then.

The Parliamentary Business and Legislation Committee takes the powers very seriously, and Ministers understand that. When they come before the committee, they know they will have to discuss the powers they are taking and how they might land in Parliament, and that is a significant part of the role which the Parliamentary Business and Legislation Committee plays in relation to the clearance of Bills.

Lord Lisvane: Elizabeth, I think I understood what you said, but I had the benefit of getting three of you for each one answer. Those of us who are long enough in the tooth remember Michael Foot’s enthusiasm for skeleton Bills, so this is nothing new, but on this side of the street I think you would accept that there is concern about where the threshold between primary and secondary legislation lies. If parliamentary concern, which is quite widespread and long lasting, exists, how do we push back? I realise that I am asking you to betray the position that perforce occasionally you have to take up, but what do you think is the answer to that?

Elizabeth Gardiner: I do not think that we are on a different page on that. We understand and we are always listening to what Parliament has to say. We are very interested in the reports of the DPPR Committee and the other committees and of what is said in Parliament. We are always looking at those things and letting them inform our advice on future legislation. I think we are well aware of the parliamentary response, and that is very much built into the advice we give as we develop policy and Bills. There are things that we know will not land well in Parliament, and that would always be reflected in the advice that we give.

There is no one size that fits all. When we had the EU legislation for EU exit, the situation was such that we had to legislate at a time when we did not know what the outcome or the timing was going to be, and we certainly did not have parliamentary capacity to pass primary legislation to dot every "I" and cross every "t", so these powers were the only way in which we could give effect to that.

Each Bill is considered on its own merits but very much against the background of understanding Parliament's concerns about the devolution of power into secondary legislation. Those concerns are very much understood and taken account of. The Office of the Parliamentary Counsel works with departments. We have a training course that we run with lawyers. One of the main aspects of that course is discussing Parliament's concerns about the sorts of powers that might be taken in Bills.

Q5 **Lord German:** Tamara and Elizabeth have both mentioned time as the problem you are usually are facing, both in terms of detail not being worked out in time or parliamentary Bills being available.

I want to ask about the interface between your recommendations and what Ministers want to do. There is obviously, and we all understand this, a political motivation to get going as fast as possible to do as much as possible. At the same time, is it your role to ensure that the legislation is as sound and as good as possible? If legislation cannot be understood because the detail is not there, would you recommend delay? What role do you play in advising Ministers about the necessity for good legislation as opposed to hasty legislation? That question is for both Tamara and Elizabeth, since you both mentioned time.

Tamara Finkelstein: Clearly, we have a role in advising which legislation and legislative vehicle is appropriate, and the pros and cons are of a different route. We generally advice on whether you can achieve your policy objectives by using a particular route. You are generally saying that, by not using primary legislation, you might not be able to achieve what you were seeking to achieve, so you might have to wait until you have a chance to do primary legislation in order to do that.

Therefore, we definitely have a role to play in advising on the best way to achieve policy objectives. We do that very much with our lawyers in the PBL secretariat when thinking about the right vehicles to use, so we have that role.

Elizabeth Gardiner: Just building on that, we could possibly advise on the danger of proceeding too fast if the result would be that the quality of the legislation was so poor that we would fail to enact effective legislation. That is something that we are always thinking about: "If we do this too quickly, will we miss the target?" If so, it would be better to take more time. That is always in the mix when we are advising on timetables on Bills.

Q6 **Lord Blencathra:** My question is for Elizabeth Gardiner. I think my colleagues on the Delegated Powers and Regulatory Reform Committee would raise an eyebrow or two at your assertion that parliamentary counsel takes into account your criticism and reflects it in the Bills we see, because

we do not seem to see that in fact.

Your written response justifies the significant extension of delegated powers because of the pandemic, but numerous reports from the delegated powers committee over the last 20 years have complained about inappropriate delegation, so I do not think we should pretend that this all started from March 2020.

You do say in your written evidence that these exceptional times "do not necessarily provide a model example of how Parliament would like to see legislation brought forward", so I would like to hear what your future model will look like. How will this model be different from all the legislation we have seen recently, and will it be different from the model in your 2020 OPC guide, which makes no mention at all of skeleton Bills, no mention of regulations being dressed up as protocols to avoid scrutiny, no mention of Henry VIII clauses and many other inappropriate delegations that we have complained about over the years.

Elizabeth Gardiner: I think we accept that some of the way in which we have legislated in the context of the EU exit and Covid-19 do not represent the model way to do things, but I do not think we have a single model way of doing things. It is the nature of primary legislation that there is no single ideal and that the role of parliamentary counsel is like the bespoke tailor, where they are producing the right piece of legislation to give effect to the Government's policy in a particular situation. Each piece of legislation has to be crafted to deliver the policy in the particular case.

I would like to assure Lord Blencathra that we are very aware of the reports of the committee, and reflect that in our advice. That is part of the mix in deciding how a Bill might proceed. In carrying out their role, parliamentary counsel work alongside policy and legal colleagues to try to work out the changes needed to give effect to the policy and consider how the Bill can best deliver them.

We recognise the importance of a Bill containing well-developed and well-crafted policy detail to enable it to be properly scrutinised, and if powers are to be taken we try to ensure that those powers are clear and well crafted, and that they have the legislative detail that will enable Parliament to look at them down the line.

At the end of the day, the appropriate split between primary and secondary legislation is a matter of judgment. It is a matter on which parliamentary counsel and departmental officials will advise, and on which indeed Ministers are likely to have views. We start from a position where we are trying to craft a policy with sufficient detail on the face of the Bill and the detailed powers that we might want to take underneath, but there are lots of factors at play.

An example of things that drive us to powers might be the need for flexibility. There might be things that are just unknown at the point at which we are legislating. I do not want you to feel that we do not take those things very seriously, because we do. At the end of the day, the Government put their legislation before Parliament and ask Parliament to

grant them certain powers. It is for Parliament to decide whether it is willing to grant those powers to the Government, and it is for the Government to justify those powers to Parliament once they put them in front of Parliament in their Bill. I might stop there, unless Lord Blencathra wants to follow up.

Lord Blencathra: There are quite a few things that I would like to come back on, but I am conscious that my committee will be speaking to Elizabeth in a few weeks and I do not want to take up the time. Colleagues have other issues to raise.

The Chair: Baroness Meacher, I see you and you are muted. We cannot hear you. Right, who else wishes to join in on this? Lord Tope, you are muted, too.

Lord Tope: Not any longer I hope. Can you hear me now?

The Chair: Yes, we can hear you.

Q7 **Lord Tope:** I will not try to speak for Baroness Meacher. I would never dare to do that. I am quite sure that when Elizabeth appears before the delegated powers committee—I think next month—we will want to pursue further the very helpful paragraph in the written answer to question 12 about the consideration given to delegated powers, the training given to lawyers and so on.

One particular point has struck me in my year or so on the committee, which has been an unusual year, I guess. There have been quite a number of occasions when counsel advising us have suggested that an appropriate procedure that could be used would be the draft affirmative procedure or the made affirmative procedure.

I cannot recall in the more than a year now that that has ever been mentioned and considered as a proposal, either in the stuff that has come to us or in the response that has come to what we have said, so can I ask Elizabeth whether those two procedures, which perhaps are only an example, are included in the training and when, or if, you will consider their use to be appropriate?

Lord Blencathra mentioned the guidance and what was missing from it. Those two procedures are missing from the guidance, too. As far as I am aware, they are still available for use but are never used. We are, I think, concerned that they do not simply wither on the vine and that they are increasingly forgotten and carry on never being used. When do you think it would be appropriate to use such procedures?

Elizabeth Gardiner: Certainly. I am sorry that I do not have at my fingertips everything that has come to the committee over the last year, but I would be very surprised if there were no draft affirmative instruments in the legislation that has come before you over the last year. I will certainly check that and write to you, because I would expect that there would be such powers. A number of those Bills will have had Henry VIII powers in them to amend primary legislation, and our default provision is that we would have draft affirmative procedure attached to those powers.

The made affirmative procedure is interesting. It is the procedure that has been used for a lot of the Covid regulations but, in fact, it is a very unusual procedure historically. The only legislation prior to this that I was aware of having this procedure was either civil contingencies legislation or a lot of indirect tax legislation where there is a concern about forestalling. If you change the rate of cigarette duty, you want it to come into force immediately. You do not want to have a draft affirmative procedure whereby people can buy cigarettes without the raised duty. They are really the only places where we have encountered that procedure in the past. It was not the standard procedure that was used in run-of-the-mill primary legislation.

I do not think that the guidance to which you refer, the parliamentary counsel guidance, is about policy decisions about the appropriate procedures to apply to instruments. That is a policy decision advised by legal advice and parliamentary counsel at the end of the day. Our guidance is about drafting. Therefore, you will find there forms of words that we would use if we were putting in the negative procedure and forms of words for the draft affirmative procedure.

In fact, just this week, something came across my desk from a colleague who was proposing an amendment to our guidance in response to seeing comments, I think by your committee, so we have a standard form of words for made affirmative procedure. We have not had that in the past because we have not really used that procedure in normal Bills, but we are looking to standardise it. That guidance is not about the division between primary and secondary legislation, which at the bottom line is a policy decision, or indeed about the level of scrutiny that should apply to any particular instrument. It is very much about drafting guidance, and that is set out in that material.

Q8 **Lord Sherbourne of Didsbury:** This question is for Susanna McGibbon. It is a question that has been a big concern to our committee and lots of other people, and it is about the confusion that has arisen due to the lack of clarity between what is law made by the regulations and what is guidance. I want to probe a little as to how these things are decided in government.

In your written evidence, you said that it was for government departments to strike the right balance between law and guidance. First, was there understanding in government departments that this was likely to lead to confusion for the public and for the police, who should not be expected to enforce what is not law but simply guidance? Who actually decides whether these things are law or guidance? Is it politicians or lawyers? That is my first, very simple, question.

The second question, very simply, is this, You say in your written evidence that there is what you call a central clearance process to ensure that guidance is consistent with the law. That does not really reassure me. I understand, of course, that guidance should not contradict the law, but it does mean that the guidance is additional to the law and different from the law. Therefore, this central clearance process does not actually deal with

the problem of the confusion.

Susanna McGibbon: Thank you very much. I recognise the concerns expressed by Lord Sherbourne on the difficulty of distinguishing sometimes between law and guidance. Throughout the pandemic the Government have been keen to communicate as clearly and as simply as possible what sort of behaviour is recommended to citizens and members of the public to limit their exposure to the virus.

We have tried to make the changes to legislation very clear, alongside guidance as to what we think is good practice from a behavioural perspective. I think it is worth separating the two out. There is guidance that explains the law and what is required by law, and guidance that then adds to the law, as you rightly say. I think in the very, very early days there was some confusion between the two, because the Government wanted to be very clear and simple in the messaging they were giving and not overcomplicate things with the distinction between law and guidance.

That has been improved quite significantly, I would say, by the introduction of the central clearance process so that we are able to be clear about what is required, backed up by potential enforcement sanctions, as you mentioned, for the police to respond to, and about the behavioural response to the pandemic that in many cases it would not be appropriate to legislate for.

You ask who decides and how we strike the right balance. That is generally the result of a fairly rich conversation between Ministers, policy colleagues, lawyers and often stakeholders about what intervention would be effective to achieve the result we are trying to achieve. In some circumstances, it is right to legislate—for example, for the use of face coverings on public transport. In other circumstances, it might not be appropriate to legislate to enforce the so-called two-metre rule. If I bring it to practicalities, there is no law for example prohibiting embracing a colleague or a family member in the street if you bump into them. However, it is very unwise to do so if they are not part of your household, so the guidance will advise against that sort of behaviour.

It is quite important to keep that distinction clear. The guidance that is now cleared by the central clearing process, which is quite extensive and involves input from public health colleagues to ensure that we are giving the right sort of public health advice, is significantly contributed to now and improved to be much clearer. It was a problem in the very early days, I agree, but I think we have made significant improvements over the last few months.

Lord Sherbourne of Didsbury: One very simple question, if I may. In deciding which is guidance and which is law, which was the most important criterion? Was it the worry that there would be confusion, or was it the lawyers saying, “This is not the right thing to introduce by law”?

Susanna McGibbon: It was certainly not the latter. The thing that guides whether something goes into law or guidance is predominately what will

be most effective; what will achieve the behavioural changes on the part of members of the public to protect each other.

Q9 **Baroness Bakewell of Hardington Mandeville:** Susanna McGibbon, I find your answers really useful. However, there are occasions when the instrument comes out and the guidance does not come out at the same time, as happened with the heather burning. This causes a great deal of anxiety and confusion. Are there measures to ensure that, where you have something that is as complex as the heather burning was, that does not happen again?

Susanna McGibbon: The timing of the issue of guidance and the issue of legislation is something that we have been acutely aware of. It has not always been perfect, particularly in the technical areas, as you rightly say, where the headline legislation might be clear and enacted and then more detailed practical guidance is required. I am also conscious that at times the guidance has preceded the legislation, which does not always help, either. It is something that we are very much attuned to. Our advice collectively to Ministers is to marry those up as effectively as possible so that we give clear messages, as I stressed earlier.

Q10 **Lord German:** This question is also for Susanna and is about the use of emergency legislation during the pandemic.

I know that you have not yet conducted a formal review, but have you identified any weaknesses thus far in the way the Government have brought forward emergency legislation during the pandemic? If you have identified weaknesses, what are they and how have you dealt with them?

Susanna McGibbon: You are right that we have not conducted a formal review, but we have tried to keep our practices under review as we have gone along, both in policy development and in developing legislation and implementing those policies.

There are two particular areas of concern or learning that we have identified as we have gone along and which this committee may be concerned about. One is the limited opportunities for parliamentary scrutiny of the legislation. The second, which I will come on to shortly, is the increased risk of errors as a result of the speed at which we are developing policy and legislation.

As far as the parliamentary scrutiny point is concerned, we have always tried to ensure that there is time in our timetabling for parliamentary scrutiny of the legislation that we are bringing forward. However, certainly in the very early days and quite recently, the speed with which the data has emerged from the scientists, from our public health experts, which has required us to respond very, very quickly, has unfortunately sometimes limited that time for parliamentary scrutiny, and quite often in advance of the legislation coming into force.

In response to that, and particularly when time on the Floor of the House in relation to the legislation might be limited, the Government have tried

to increase the briefing opportunities, the information sharing, among parliamentarians to ensure that they get sight of what is coming.

One of the biggest challenges has been to legislate at speed, as you will appreciate. Many of these projects would normally take several weeks or months to see through, whereas now we are trying to respond to the latest data. That is not only so that we are legislating as far as is appropriate but no further, but so that we are legislating in a way that protects our fellow members of society with the public health data that has been emerging.

Where we have had to respond very quickly, we have tried to ensure that there has been parliamentary scrutiny as soon as possible thereafter. In December, for example, when we had to respond very quickly to the emergent new variant and had to introduce tier 4 restrictions very quickly, those restrictions came into force on 20 December and were approved by Parliament at the very first opportunity thereafter. Unfortunately, that was 10 days later, but it was important for us to put those regulations in place there and then.

I think the Government have also recognised that parliamentary scrutiny challenge by indicating and giving a commitment to Parliament that matters of national significance will be brought before the House, ideally before they come into force. When we went into national lockdown on 5 January, Parliament was recalled, you may remember, to allow those regulations to be debated and approved later on the same day.

Coming on to the issue of errors and the pace of decision-making, it has, of course, had a very significant impact on policy colleagues and lawyers who have had to respond so quickly. People have been working seven days a week, and 24 hours a day in some cases, as you would expect, because of the need to take account of the latest data. Against that background, I recognise that errors have occurred. Where these errors have occurred we have made corrections very, very quickly, and they have been reflected on legislation.gov.uk as soon as possible—to pick up on colleagues' earlier point about the need for accessibility of the legislation.

Having recognised this pressure on a small group of drafting lawyers, we introduced a new way of using our drafting resources. That has meant involving additional lawyers across my department to support those who are doing the key drafting to ensure that we do not slip on the importance of checking our secondary legislation, even in these times of very fast pace. By rallying the troops and getting colleagues from other government departments to assist the drafting lawyers, I think the quality of our legislation has held up pretty well. However, we are not complacent at all and keep looking for opportunities to try to improve.

Those are the two areas where we have, as we have gone along, recognised that our use of legislation at a very fast pace required improvement.

Q11 **Lord German:** Thank you for that answer. Can I pursue one issue that came up in your written evidence, which was the use of the word "coronavirus" in the title of the legislation? In perhaps 15% of the

legislation, that word has been missing from the title. Perhaps more significantly, we have also found that some legislation under the title of "coronavirus" has introduced permanent changes, particularly in the town and country planning legislation that has been before us.

Do you think it is correct that pandemic emergency legislation of this sort should make permanent changes to law that would benefit from proper scrutiny elsewhere? Again, is a question for Susanna.

Susanna McGibbon: Thank you very much for that question. As a general rule, we would normally try to avoid that, both as a matter of policy and as a matter of legislative practice.

My understanding about the Town and Country Planning Act changes is that that was long-standing policy that had been consulted on and had been long in the policy minds of our MHCLG colleagues. If it was within the vires of the relevant legislation, unless I am thinking about another provision I do not think that was improper. I think we would recognise that if there is a suitable vehicle and the powers available, it is open to Ministers to use those powers.

Lord German: It is not just once. This has happened on a number of occasions. I go back to my earlier question about time. If Ministers want to put things through, and it is in their policy objectives, I do not think that using emergency legislation to do it is appropriate. You said that you would recommend that they do not do that. Can we assume that that is a principle on which you operate: that emergency legislation should not be seen as an opportunity for putting forward permanent policy changes that may be more appropriately dealt with elsewhere?

Susanna McGibbon: Potentially, as a general rule. However, if the emergency requires that provision to be enacted, the first thing to do is for that to be enacted now in response to the emergency.

The Chair: Some of the emergency issues that we faced were to deal with matters that were perfectly obvious, such as the turkey slaughter legislation, which was brought in especially at very short notice. We knew when Christmas was coming and we knew about slaughtering turkeys and selling Christmas trees. However, both of those were rushed in in a way that was not necessary. Susanna, would you like to comment on that?

Susanna McGibbon: I recognise the turkey issue. However, what we often find when we start to legislate for turkeys is that we have to be very careful about what other breeds of bird we might be straying into. I suspect it was not quite as simple as just turkeys around Christmas. In fact, we had to be very clear, and there were some complex judgments to be made, about what the knock-on consequences might be if we did not take the time to think that through fully.

The Chair: Fine. We will move on to the next question, which is from Lord Cunningham down the line to Tamara Finkelstein.

Q12 **Lord Cunningham of Felling:** Thank you, Lord Chair. My questions are about the quality of legislation coming before our committees and the

quality of the supporting information used to explain them.

The reality is that, because of the pandemic, SIs have increased in number and have been brought into effect with little notice. It is essential in those circumstances, I believe, that Explanatory Memoranda clearly explain the intention and effect of the instrument. We have seen some unacceptably poor Explanatory Memoranda in the last few months. The correction rate of SIs—it continues to improve, or so we are assured—is unacceptably high. We know that efforts are being made to improve these qualities. How do you think further improvements can, and should, be made?

Tamara Finkelstein: We are in total agreement on the importance of the supporting material being of high quality and the Explanatory Memoranda being really clear, recognising some of the experience that has happened particularly over this last year.

Some of the improvements that have already been put in place have helped, but there is more to do and in a number of areas. I think Elizabeth mentioned that identifying accountable SROs—senior responsible owners—in departments who are accountable on SIs, and having a Minister for SIs, has made a considerable difference. I see that in Defra. There is proper accountability. We need to build on that so that those SROs across departments are co-ordinated by the PBL secretariat to meet and to share ways in which to improve, and that there is a genuine sense of accountability to make improvements.

Training is clearly very important. I think the training is really good and so, actually, was the swiftness with which we moved to doing the training online and to provide desk aids and the other things that we set out in the written evidence. It was important that we did not drop that because we were in a challenging situation, because it is even more important that we are training people. We need to build on that, and the SROs need to take real responsibility for ensuring that people go on that. I would very much encourage departments—we will be doing this a bit through the policy profession—to do additional bespoke training. We do that, and a number of other departments do that, so we are assuring ourselves that we are raising the capability all the time.

More broadly, communications are important. A monthly newsletter is now going out. I think the Chair kindly made a contribution to a recent newsletter that gave people further tips and raised some of the issues which this committee and others are raising. It is important that people know about those things. The newsletter goes to 3,000 people.

There are other, different routes to improvement. We are also revamping the Explanatory Memorandum template, particularly to take account of the future relationship Act, and just the act of that raises it up people’s agenda.

Improvement is an ongoing process. We are committed to improvement in the policy profession and, I know, in the legal profession. We need to use those routes to continue to build on it. Your scrutiny adds to that, because it gets our intention to exactly the place it should be.

Lord Cunningham of Felling: Can you assure the committee that there is a senior responsible officer permanently present in every department that produces statutory instruments?

Secondly, can you explain to us—I do not think you have, and I say that as gently as possible—why we keep receiving instruments that we reject on the ground of inadequate explanation, and we publish our reports to that effect? It seems to me that the Civil Service really needs to raise its game here.

Tamara Finkelstein: To the first point about whether there are SROs in all departments, there are 20 SROs in place in a few departments, but there have been changes of personnel. I am very committed, although it is probably not for me but work for my colleagues, to ensuring that we get SROs in the few departments that have had a change of personnel. We have people in place in the majority of departments, and where we do not we swiftly replace them. It is a very important role.

I would love to have been here with you having seen and recognised the steady increase in improvement. The reason you have not is because of the situation that we have been in and people having to do this work at an incredibly fast pace, which has lost some of the quality. From conversations I have had with colleagues at the Department of Health and Social Care, I have learned they have made quite a lot of effort to try to improve the situation over the year, despite the pace, by building in more time more quality.

It is difficult to say what the counterfactual would be. If we had not made some of the changes that we have made in the process, I think the counterfactual would have been worse. That does not help us, because clearly it is very important that these instruments should be of higher quality than they are. We are very focused on it. It is not something that we take lightly. As the head of the policy profession, I consider it the mark of proper professionalism that this stuff is done well. I am committed to the areas of improvement that we put in the written evidence.

Q13 **Baroness Meacher:** There are all sorts of issues that I would have loved to have raised, but I will now have to be very quick. One relates to guidance. I am told that the guidance is not supposed to deal with issues of what I would call the democratic deficit and excessive delegation of powers and so on. Elizabeth Gardiner, should there be a bit of guidance about those issues for departments, for SROs and for everybody else, because it seems like a gap that needs filling?

Another question, if I may, is who should be accountable, now that we have adjusted to Brexit and the pandemic—I would not say that any of their consequences are over by any means—for making sure that the degree of delegation now comes back to a previous age so that skeleton Bills, Henry VIII clauses, and using sunset clauses to limit these things is rare? Is the Office of Parliamentary Counsel responsible? Elizabeth Gardiner said Ministers are responsible, that they make decisions, but surely the Office of Parliamentary Counsel has a major responsibility to try

to make sure that we do not have a democratic deficit here and that Parliament has the ability to question all these issues.

Elizabeth Gardiner: That was not to say that we did not have any guidance. It is just that the particular guidance that was being referred to was our drafting guidance, which serves a different purpose.

There is something on the internet called the "Guide to Making Legislation", which is published by the Cabinet Office and is the bible for all departments that are enacting primary legislation. That has some quite detailed guidance about the appropriate approach to delegating powers in Bills. That is the first port of call for Bill teams who are considering the division between primary and secondary legislation. The sorts of things that are in there are factors that you would approve of. They are very much informed by the reports of committees in the House of Lords and the concerns they have raised over time. It is not that we have no guidance; it is that it is the Parliamentary Counsel drafting guidance.

As to the degree to which parliamentary counsel are accountable, we feel responsible for the quality of our primary legislation, and it is our purpose in life to produce the best quality legislation that we can. Part of that is providing departments with advice about when it might be appropriate to delegate power and how that might be done. We certainly take that role extremely seriously, as do the departments. They understand the challenge of taking delegated powers and they look at that very carefully. It is not that we were washing our hands of it at all. We care about this, and about 18 months ago we ran a course for departments, which we are about to rerun before the second session, just talking through the various issues that arise with taking delegated powers. They are all the sorts of issues which this committee and the other committees raise with us over time.

Baroness Bakewell of Hardington Mandeville: Tamara Finkelstein referred to the sheer number of statutory instruments, and I want to comment on the fact that had led to errors occurring so that we were looking at the same subject of a statutory instrument sometimes months later, sometimes only weeks later, because things had been missed out or something had been put in that was not correct. Are there sufficient resources in the various departments to deal with the sheer weight of statutory instruments? That will only get worse the more skeleton Bills we have. I do not want to tread on Earl Lindsay's toes.

The Chair: We will just take that as noted and turn to Earl Lindsay.

Q14 **The Earl of Lindsay:** This is a question about sunset clauses. Your written response states that the Government have moved away from requiring sunset provisions in secondary legislation, providing "Departments with flexibility to deliver government's priorities proportionately". This is a surprise, as the use of sunset clauses has been accepted as being basic good practice and the default option for legislative and regulatory measures, be they of long-term or short-term effect.

Could you explain what brought about this change of approach and who

could have been instrumental in bringing it about? Could you also clarify what is meant by flexibility to deliver the Government's priorities proportionately?

Susanna McGibbon: Thank you very much. Sunset clauses are among the range of tools we have to make secondary legislation proportionate to that which it is seeking to achieve. I do not recognise the world where all secondary legislation was subject to a sunset clause. There will be some circumstances where secondary legislation is setting up a scheme that will always require, for example, a fees regime, so it would not be appropriate to have a sunset clause in those circumstances.

What we want is a tool for policymakers to impose an automatic expiry of a provision where that is suitable for the policy that we are seeking to achieve. Another similar tool, which is slightly different, is a statutory review clause that might also be required. It is not a sunset clause that brings about the expiry of the legislation but a clause that prompts the Minister, the decision-maker, to do a statutory review. An example of that is where the impact on small businesses might be significant.

It is for departments and for Ministers to work out which of the legislative vehicles is most suitable for all secondary legislation. Some secondary legislation will include sunset clauses, some will include statutory review clauses, and some will have no automatic expiry but will continue to persist because the regime or the policy the statutory regime establishes is needed for the foreseeable future.

Q15 **The Earl of Lindsay:** I have one other question, probably to Tamara Finkelstein, in response to our written question suggesting that the wide variety of different sunset provisions is causing confusion. You replied, "We do not see that the use of different approaches to sunsetting of itself creates a lack of clarity". However, yesterday the Government had to make an apology and issue a fairly lengthy correction by way of a statement in relation to their one-year status report on the pandemic, because they gave the wrong expiry date for an instrument.

Would you accept that there is at least the potential for confusion from having different types of sunset clauses out there? Are you confident that departments can cope with different styles and types of sunset clause and the monitoring of their expiry?

Tamara Finkelstein: Departments are responsible for monitoring things that they have committed to, which we do across a wide range of things, including sunset clauses. However, there are all sorts of end dates and review points that we need to keep track of, and we should do so. I do not know about the specific example that you gave, and I do not know if my colleagues want to add to that at all.

The Chair: If not, we will go straight to Lord Chartres.

Q16 **Lord Chartres:** I was very interested to hear from Tamara Finkelstein about the review of the Explanatory Memorandum template. We have noticed on quite a number of occasions with the pandemic instruments that the Explanatory Memorandum omits any impact assessment on the

argument that, since the regulation is only likely to last 12 months, it would be disproportionate.

It would assist the committee and the House to have some sort of impact assessment, even if not very detailed. It is always very difficult to balance public health interests and costs to industry and others. I notice that in your written response there is a comment about advice from SAGE, which might be useful to the House. My suggestion is that that is the sort of thing that would be very useful in the Explanatory Memorandum. My question is about impact assessments and the Explanatory Memoranda.

Tamara Finkelstein: Yes, as you say there are specific circumstances in which a full impact assessment is done, but I have to fully agree with you about the importance of providing information on impact in the Explanatory Memoranda. The idea with the briefings and the work that we do on Explanatory Memoranda is to provide as much information as possible on impact, financial impact, context and so on.

It has, without doubt, been a challenge over this period, as has the pace at which things have needed to be done to provide as full information as possible. The reference in the written evidence to the other things—the SAGE information, the ONS information, and some of other things DHSC has produced—provides some context and further information of use. I fully recognise that, ideally, information to make it easily accessible, clear and relevant is captured in the Explanatory Memoranda.

The pace at which things have needed to be done has driven a difficult balancing act. I must say more broadly that it is very important that we continue to develop that aspect of the way in which we improve the Explanatory Memoranda. It is part of the improvements that we need to continue to make while accepting where we are coming from, driven by an unusually great pace. DHSC has continued to develop and improve things during this period, but the challenges remain.

The Chair: Thank you very much. Our time is up. Before I close, a request from our team to Tamara Finkelstein. Could you send us a list of the senior responsible officers and the SI Ministers for our education and information?

Tamara Finkelstein: Yes.

The Chair: That apart, I thank all three of you very much for your frank and helpful information. We will obviously reflect on it carefully and may want to come back to you with some further and better particulars, as they say, but in the meantime thank you very much indeed. I know you are very busy and we do appreciate your coming to see us.