



Delegated Powers and Regulatory Reform Select Committee

Uncorrected oral evidence: Delegation of legislative power

Wednesday 12 May 2021

10.20 am

Watch the meeting

Members present: Lord Blencathra (The Chair); Baroness Andrews; Baroness Browning; Lord Goddard of Stockport; Lord Haselhurst; Lord Janvrin; Baroness Meacher; Lord Rowlands; Lord Tope.

Secondary Legislation Scrutiny Committee members also present: Lord Cunningham of Felling; Lord German; Lord Hodgson of Astley; Lord Lisvane; Baroness Watkins of Tavistock.

Evidence Session No. 1

Virtual Proceeding

Questions 1 - 24

Witness

I: The Rt Hon Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons.

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Examination of witness

Jacob Rees-Mogg.

Q1 **The Chair:** Good morning and welcome, Lord President. On behalf of the Delegated Powers and Regulatory Reform Committee and colleagues from the Secondary Legislation Scrutiny Committee, may I extend a warm welcome to you? This is a formal evidence session that is on the record and is webcast live. A transcript will be taken and put on the parliamentary website. You will be given an opportunity to see the transcript and propose minor corrections.

Lord President, the timing of this could not have been better. It is just 24 hours since Her Majesty, in her most gracious Speech from the Throne, announced 30 Bills, which, as you said in an article in the *Daily Telegraph* yesterday, have been many months in detailed preparation. They are not an emergency response to the pandemic, nor Brexit measures, which may, of necessity, have had to include many delegated powers and Henry VIII clauses. We look forward to these Bills having flesh, not being skeletal and having full parliamentary scrutiny, since, as you also said in the *Daily Telegraph* yesterday, now we are out of the EU there is no excuse for Parliament not scrutinising our laws properly.

Without further introduction, we will begin. I will not take up time introducing colleagues, as our names should all be displayed. Lord President, please feel free to make an opening statement if you wish. Otherwise, we will proceed to questions.

Jacob Rees-Mogg: I would merely thank you for the opportunity to appear before your committee and to thank you for the work that DPRRC does, which is very important in ensuring that Parliament passes high-quality legislation.

Q2 **The Chair:** Thank you, Lord President. That is very kind. The role of the Cabinet Office, according to the Government's UK webpage, includes helping to ensure the effective development, co-ordination and implementation of policy. As we heard in evidence to the SLSC from the head of the government policy profession, Tamara Finkelstein, "There is competition for parliamentary time". The First Parliamentary Counsel, Elizabeth Gardiner, said that sometimes "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".

Who has the final responsibility for ensuring that Bills contain an appropriate balance between primary and secondary legislation? Is it the Chancellor of the Duchy of Lancaster, as Minister for the Cabinet Office, or you, as Lord President?

Jacob Rees-Mogg: The legislation has to be signed off by the PBL Committee, which is a committee chaired by the Leader of the House of Commons, but obviously has the Leader of the House of Lords on it as well, as well as the Chief Whips in the House of Lords and the House of Commons. It has representations from the law officers. The Attorney-

General is usually represented by the Solicitor-General, and the Advocate-General is there. That is the sub-committee of the Cabinet that approves the structures of the Bills. As with all collective responsibility, this is ultimately a decision of the Cabinet, even if made by a sub-committee.

The Chair: We have had 30 Bills announced in the most gracious Speech, and there would be competition from many more, I suspect. What oversight role, if any, does the Chancellor of the Duchy of Lancaster have in prioritising legislation, in particular in resolving the conflicting pressures of various Ministers wanting to implement government commitments as soon as possible and allocating scarce parliamentary time, but also ensuring that Bills do not confer over-wide powers as a cover for imperfect policy development? Who has the final say?

Jacob Rees-Mogg: The Chancellor of the Duchy of Lancaster is not involved in this way in the evolution of legislation. As a member of the Cabinet, he is obviously involved in the broad discussions on the legislative programme. As you know, the Leader of the House makes a brief report to the Cabinet every week on what is happening legislatively in the House of Commons, and the Leader of the House of Lords likewise in the Lords. The Chancellor of the Duchy of Lancaster would be involved in that.

The Prime Minister is also part of the Cabinet Office. Decisions about legislation that are more the high-level "What are we going to do?" kind are in the purview of the Prime Minister, rather than the Chancellor of the Duchy of Lancaster.

The Chair: Those of us who have been in government have all heard of Christmas tree Bills; departments want to hang as many baubles as they can and squeeze in as much legislation as possible into the one Bill they get in that Session. When the Cabinet Office talks about the effective implementation of policy, is there this overriding interest to squeeze as much secondary legislation as possible into the primary legislation, knowing full well that it might be a while before a department gets another primary piece of legislation? Who in the Cabinet Office would challenge it? Would you challenge it, or would the Cabinet Office challenge this desire of departments to have an awful lot of secondary legislation, because they know they will not get primary legislation every Session?

Jacob Rees-Mogg: I do not think that is quite how it works. There is a great pushback from PBL to ensure that Bills are limited in scope, to ensure that the focus on the Bill as it goes through Parliament is on the bits that the Government are prioritising, rather than opening it up to be the Christmas tree Bill that you are talking about. Indeed, from a government point of view, our worry about Christmas tree Bills is not the way you are looking at it. I am afraid to say it is what might happen to the Bill in the Lords, when their Lordships see that there are opportunities to hang their favourite bauble on the Christmas tree. Therefore we focus on keeping scope reasonable.

In the last Parliament, the erosion of the strict rules on scope was problematic from a government point of view, as well as from a House point of view. The return to greater clarity on scope that we have seen in this Parliament is helpful.

Q3 The Chair: We have had exceptional times in the last few years. Of necessity, there has been some urgent Brexit legislation and there are a lot of Brexit regulations to come through. We have also, of course, had pandemic legislation, which has given rise to some exceptional Bills and regulations coming through. I think you would agree that there is now a need to reset the dial, especially since we are out of the EU and do not have to pass automatically hundreds, if not thousands, of EU regulations.

If the Government, through the Cabinet Office, wanted to bring about a significant cultural shift in the way in which policy development and co-ordination were undertaken, with a view to ensuring that all Bills contained an appropriate balance between primary and secondary legislation, who would drive that shift? Would it be you? Would it be the Cabinet Office in the guidance? How would it come about to get that proper scrutiny you called for in the *Daily Telegraph* yesterday?

Jacob Rees-Mogg: First, you are absolutely right that this is a fundamental shift. So much legislation went through under the Section 2(2) power of the European Communities Act. Even our most skeletal Bills will not be as skeletal as the Section 2(2) power was. That is a really fundamental improvement in parliamentary scrutiny.

When it comes to the PBL Committee, the Leader of the House of Lords and I invariably ask for the powers to be justified and recognise that it is in the interests of the Government to be as specific as possible in the Bills that have been brought forward. I say "as possible", because there are some circumstances, as we all agree, where powers make sense and you need to have powers to make intelligent legislation.

The advantage of being as specific as possible is twofold. One is that it smooths passage through your Lordships' House. Every Bill has the discussion, "How will this land in the House of Lords?", in relation to a power and particularly in relation to a Henry VIII power. It is also not just the passage of the Bill that helps the Government. When it becomes an Act, the more that is in primary legislation, the more robust the Act of Parliament is in relation to judicial review. Therefore, it is strongly in the Government's interest to have the relevant detail of what is going to be done on the face of the Bill in primary legislation. The DPRRC is very good at holding our feet to the fire, but our interests are aligned.

Having said that, there are circumstances—I would be happy to give examples—where powers are the sensible way to proceed because of what you are trying to achieve.

The Chair: I can accept that, Lord President. I do not want to misquote you, but I think you said that you hope to see fewer skeletal Bills in this Session or in future, following the last two years. Both my and Lord

Hodgson's committees would certainly welcome Bills with a bit more flesh on them.

It is also interesting that, in the guidance we see issued to parliamentary counsel, they are warned, "Be careful of this, because the Lords might not like it and will criticise". I am concerned that there does not seem to be the same concern in the Commons, with advice given to drafters of Bills that the Commons should be concerned about excessive delegated powers. However, that is not a question; it is merely an observation at this stage.

Q4 Lord Janvrin: Good morning, Lord President. Can I pick up on this issue of guidance? The Chancellor of the Duchy of Lancaster, as Minister for the Cabinet Office, has responsibility for the "oversight of all Cabinet Office policy". As such, does he have the final responsibility for the contents of the Cabinet Office guidance to making legislation, or does this responsibility fall to PBL?

Jacob Rees-Mogg: The final responsibility for the guidance is with the Cabinet Secretary, not with the Chancellor of the Duchy of Lancaster.

Lord Janvrin: Who actually drafts a guide?

Jacob Rees-Mogg: The guide is drafted by civil servants. It is drafted by the secretariat of the Parliamentary Business and Legislation Committee.

Lord Janvrin: The last version was published in 2017. Who would be responsible for deciding to update it or, in other words, to amend it if necessary? Who is the guardian of the guidance?

Jacob Rees-Mogg: It is the PBL secretariat that writes the guidance and the Cabinet Secretary whose name it is then issued in. The updating of it is really in relation to ensuring that Bills are written effectively. It is not something that necessarily needs to be updated annually or with any particular regularity. It just sets out the best way to legislate. Without fundamental changes, you would expect that to be relatively stable.

The Chair: I assume that a Minister has to sign off on it. Surely, if the Cabinet Secretary or the secretariat drafts the guidance for parliamentary counsel, the Chancellor of the Duchy of Lancaster or you signs off on that guidance?

Jacob Rees-Mogg: I do not know who would have signed off on it in 2017, when of course I was not a member of the Government, and whether that would have been the Leader of the House or somebody else. The chair of the PBL Committee is the Leader of the House, rather than the Chancellor of the Duchy of Lancaster. The mechanics of legislation are more the Leader of the House's purview than they are that of the Chancellor of the Duchy of Lancaster. The politics of legislation is under a committee chaired by the Chancellor of the Exchequer and is therefore in his responsibility and that, overarchingly, of the Prime Minister, as I mentioned earlier.

Q5 Lord Tope: I was going to pursue the points that the Chair has just been asking about. I am really still trying to understand which Minister ultimately has the political responsibility for the guidance. I understand they are not involved in drafting it and all those details, but surely somebody, at some level, must have political responsibility. One of the reasons why we are asking these questions is because our committee has had some concerns about some of the omissions from the guidance that we feel could do with some correction. We can certainly take that up with the Cabinet Secretary, but we have you before us, Lord President. We are trying to find out what, if any, responsibility you have for the final sign off for the guidance.

Jacob Rees-Mogg: I chair the PBL Committee and therefore a document produced by the PBL secretariat is the responsibility of the PBL Committee, but it is part of the collective responsibility of the Government. It is one of these occasions where saying which particular Minister has responsibility is not necessarily the best way of looking at it. It is a government document, for which all Ministers have responsibility, but the PBL sub-committee of the Cabinet is the one that is most immediately connected with these issues. I am the chair of the PBL Committee, so I will be as helpful as I can with any suggestions you have as to how this document could be improved.

The Chair: Thank you, Lord President. I cannot say at the moment what will be in our report, but we are certainly concerned about the document. As Lord Tope has said, it seems to have some serious omissions. It advises the Bill team in a department on how to draft legislation and what should be in it, and it misses out some of the different forms of regulations we can have. At the moment, we see some serious flaws in it. If you are amenable to us suggesting how it could be amended and improved to give better quality legislation, we will probably be in the market to supply that advice.

Jacob Rees-Mogg: Thank you very much. The Government want legislation to be as good as it possibly can be. That is naturally our aim.

Q6 Lord Goddard of Stockport: Our analysis of the DPRRC report during 1993 to 1997, at the inception of the DPRRC, compared with the period of 2015 to 2019, so pre-pandemic but including some Brexit legislation, suggests a recent increase in the use of skeleton legislation. Do you agree with that, and can you account for that?

Jacob Rees-Mogg: I am sure that your report is accurate in what it has revealed. The timescales are obviously important as to what the Government of the day was, what the electoral timetable was and so on. By their political nature, you find that skeletal Bills tend to be—I am sure you will have the statistics on this—more likely immediately after a general election, for the respectable reason that a Government have just got elected promising to do something and therefore they have an urgency to do it, to implement it. Speed and detailed development of primary legislation are not always compatible.

I know that the DPRRC had concerns about the Childcare Bill, which were perfectly reasonable ones—it was not an ideal Bill and was too skeletal—but that was a response to a general election and a promise to deliver on something. I am very sympathetic to the DPRRC's ambition to ensure that Bills are invariably as fleshed out as they can be. Inevitably, there is a political imperative and pressure on some occasions to deliver on a commitment quickly, which goes in the other direction. Those are competing pressures that I think we all recognise.

Baroness Andrews: Good morning, Lord President. This question leads rather naturally from what you just said. You mentioned the Childcare Bill, and indeed we described that as nothing but a vague mission statement. It had, in fact, rather dire consequences for the childcare sector, which could have been predicted had there been more flesh on the Bill. In that Session, and indeed in the later Session, there was also the Cities and Local Government Devolution Bill, which was an enabling Bill. In 2017-19, there was the Civil Liability Bill, which we described by any standards as being skeletal. These are not judgments that we make lightly. Your own statement to the three Lords committees of 19 October 2020 was that "Bills with substantial powers ... should not be a tool to cover imperfect policy development"; I presume you meant that in all circumstances.

My question relates in part to what Earl Howe told the Secondary Legislation Select Committee: that there were checks and balances that were sufficient to prevent these sorts of skeletal accidents, shall we say. What would have been those checks and balances within the department? Who, apart from Ministers, would have taken the Bill policy team or the lawyers aside and said, "Hang on. You haven't come forward with sufficient justification here. We can do better than this and you are going to get a rough time in the Lords if you let it go through"?

Jacob Rees-Mogg: First, I would like to defend the Cities and Local Government Devolution Bill. That had, of its nature, to be a Bill that had powers because of what it was trying to achieve, and the way it was trying to achieve it, on the basis of consent from the councils that were being reorganised. I do not think it would have been possible to do that. That is one of the examples where powers are appropriate. Both the Government and the DPRRC need to get this balance right. Detailed legislation is very important and is the right way to go in most cases, but in some cases powers are the only way to achieve the objective and are a reasonable way of doing it, particularly if there are proper safeguards as to how those powers are used.

To come to your point about how this would have been checked and chased up between the department and PBL during the development of the Bill, I cannot really speak before my time as Leader of the House. I was not even a member of the Government before, so I would not have been involved or would not have seen how they did it. Via PBL, we work very closely with the departments from the outset. We have been holding earlier meetings with the Minister or the Secretary of State promoting the Bill. I can assure you that the Leader of your House is always very clear

about the need to make a strong case for any powers because of the reception it will receive in the House of Lords.

OPC is also very clear with departments and, inevitably, it works closely with them and the Bill managers on the need to have specific policy set out. You need the policy set out so that you can be clear as to whether you need a power or whether it can be on the face of the Bill. A lack of policy development just leads, in the end, to a lack of clarity all the way through. OPC is very effective at doing that.

From PBL, we have pushed Bills back to make sure that things are developed properly and to ensure that the flesh is put on to the Bills, in the process we have before the Bill is published, but also recognising that we may want to have some planned amendments coming in to add flesh to the Bill when it is making its progress through either House.

Baroness Andrews: In the light of what you said about manifesto commitments suddenly having to take on flesh, as it were, in the form of a Bill, in your *Daily Telegraph* article you pay tribute to the fact that there was another process, which was a long and complicated process. I am not persuaded that, because it is the first six months after an election, we should be braced for more skeletal Bills. Do you think there is something you can do to add a corrective in at that stage to say, "Hang on. This need not be pushed through quite so quickly. There's a job of work to be done here"?

Jacob Rees-Mogg: The Leader of either House has a role in the development of legislation of sometimes saying internally within government, "We need to spend more time on this". It is a collective responsibility and sometimes there will not be the time available. That may be because it is an emergency or because it is a manifesto commitment that needs to be delivered on; it may be that the Government have promised to do things in the first 100 days. It is those sorts of promises, which are very reasonable political promises. It is this balance between what you might call perfect legislation and perfect democracy. We have to try to square the circle somehow.

Q7 **Lord German:** Can I pursue this issue of time, which is pretty critical to parliamentary work? Is it not the case that there will always be pressure on parliamentary time? There will always be more Bills that the Government want to produce than there is time available. That was the evidence that we got from Tamara Finkelstein to our committee. As a result of that, the pressure to get more Bills through might mean that you think that having less detailed Bills will take less time and therefore you can get more Bills through the programme.

I wonder whether there will always be these pressures for time, not just after an election. How would you seek to contain that, given the demands, on the one side, of politics and wanting to have more Bills and parliamentary time being finite, unless of course you thought that Parliament ought to sit for longer?

Jacob Rees-Mogg: I think it was Lord Palmerston who said he thought that Parliament would eventually run out of things to legislate on. We show absolutely no sign of doing that. We seem to think up more every year. Time is obviously the main constraint, but it would be a relatively naive Minister who thought that a skeletal Bill would save that much time, partly because your Lordships would spend more time on it and would spend a lot of time trying to flesh out the bones. There would be, at your Committee and Report stages, many amendments discussed to try to do that. Even if the Government did not accept those, it would take up a lot of parliamentary time.

As I have pointed out to Ministers, if they want to take a power, they very often have to have the argument twice and spend the political capital twice. They first have the argument about what they may use the power for when it is going through either House. Then, when they bring forward the statutory instrument, they have the argument all over again. Both politically and time-wise, the argument for detailed Bills is strong.

It is part of my role as Leader of the House to make this argument within PBL to Ministers, to make them see that actually the interests of the DPRRC and the Government are pretty closely aligned and that detail helps all of us. I am probably more sympathetic to things like the Cities and Local Government Devolution Bill than you may be, because I feel that they could not have been done in another way. That is how I see it in an overall way.

Q8 **Lord Haselhurst:** I do not think anyone would think of you, Lord President, as anything other than the most zealous defender of the role of Parliament in our constitution. I wonder whether, in your role as chair of the PBL, you feel therefore that you have to keep a particularly watchful eye on all the departments of state to see that some of them are not taking liberties, as it were, to ease the passage of the legislation through Parliament, but are maintaining a similar and appropriate balance between what is needed by way of acquisition of delegated powers and what is not.

Jacob Rees-Mogg: This came up with the NSI Bill, where the initial suggestion was for a wide power and then the sectors were put into the Bill later in the process. That was something that PBL was very encouraging of. We wanted to see it happen. We knew it would be an issue in the House of Lords and we thought it made for more robust legislation. Inevitably, within government, there will be arguments about whether a broad power is more useful. I can assure you that the Leader of the Lords is even more assiduous than I am in standing up for proper parliamentary processes. Passage through the Lords is very difficult in Bills that give wide powers.

The Chair: I will merely comment again that so much of the Government's response or cautiousness is because the Lords will cause trouble and the Lords will object to inappropriate powers. I would dearly love it if the Commons would also have the same concern about inappropriate delegated powers.

Jacob Rees-Mogg: I do not know whether you want me to answer that.

The Chair: Yes, please.

Jacob Rees-Mogg: I think this is one of the beauties of our constitution. I think very strongly that the Lords, as a revising Chamber, is doing absolutely what it is there for. Forgive me for telling your Lordships what I think you ought to be doing; I hope that is not viewed as impertinent. Improving legislation, saying, "This is the best constitutional practice", is one of the fundamental roles of the House of Lords and is one of the great justifications for having a bicameral system. It is natural that the Lords should do this and it is an absolutely fundamental part of your role in our constitution.

The Chair: Thank you, Lord President. I am quite content for you to tell us what we should be doing. I would then hope that, when the Delegated Powers and Regulatory Reform Committee comments that this should be an affirmative rather than a negative SI, the Ministers would pay equal attention to what we recommend. However, let us move on.

Q9 **Lord Tope:** I was just thinking that the Lords is not usually too reluctant in telling the Commons what we think it ought to be doing.

We now move on to probing a little further the role of the PBL Committee. What is the role of the PBL Committee in policing the use of delegated powers in Bills? For instances, does the committee act as a brake on their use? If it does not, who in government does?

Jacob Rees-Mogg: PBL discusses every single power and every single Henry VIII power that comes forward. It has a note provided to it on the use of powers and the legal consequences of those powers. The law officers sit in and we have to be convinced that those powers are needed and are proportionate. The law officers are very important in this, particularly in relation to Henry VIII powers. PBL is the check and the pressure to ensure that Bills are fleshed out at the first stage.

Lord Tope: At what stage does this happen? To what extent is the committee involved in the gestation of a Bill, or does it really only see it when it is at its final stage, ready to be launched on the world? Would that not be too late, if that was the case?

Jacob Rees-Mogg: Over the last couple of years, we have brought Ministers in informally to see the business managers at the very earliest stages of the Bill, at which point the issue around powers is made. We then have a gateway meeting to discuss how the Bill is proceeding. That, again, is an opportunity to say what we really need.

In the structure of Bill making—you probably know all this anyway, so forgive me for stating the obvious—the real-time pressure is on policy-making. Therefore, we at PBL have to put pressure on the department to agree its policy and get all that lined up properly, so that OPC has the time to write the Bill. The bit that people sometimes try to concertina is OPC, and that is not good for the legislative process. PBL is trying to

make the policy-making more disciplined in its use of time, so that OPC has the time to write the Bill in full.

Over the last couple of years, we have moved to involving ourselves much earlier in the process. It is fair to say that, when I first became Leader of the House, I saw Bills just as they were ready for introduction. If we stopped them at that stage, it would have been quite problematic. Now, they are not getting to that stage until they are completely ready. We have had all the discussions, sometimes months earlier, in relation to what the Bills need. Perhaps I should come back to your committee later in the session, when I can talk perhaps about some of the Bills that are coming forward now and possibly explain what happened. I do not think it would be right for me to go into Bills that have not yet been published.

Lord Tope: I am sure we would welcome your appearance at a later stage before our committee. Can I probe this a little further? I understand, of course, the priority that has to be given to policy development. That is the business we are all in. We are a delegated powers committee. Can I probe a little more the attention that is actually given to the delegation of powers in a Bill? How much depth do you go into on that? How much do you actually probe that and at what stage in your considerations?

Jacob Rees-Mogg: PBL needs to be convinced throughout that the powers are justifiable. That starts at the earliest stage. OPC has a role in this. OPC will always be questioning whether powers are suitable or whether it should be on the face of the Bill.

Q10 **Lord Hodgson of Astley Abbotts:** Lord President, thank you very much indeed. I am here as a guest, because I am wearing a Secondary Legislation Scrutiny Committee hat. We are interested in what is happening at the end of the process. I am not clear on the extent to which things like the power to make guidance and the power to make regulation are starting to become blurred. We have certainly seen quite a lot of occasions during the pandemic where the two have become very much blurred—the law as opposed to advice. In that sense, to what extent does the PBL think through the ramifications and consequences, intended or not, of what is being proposed in detail?

Does anybody ever run a check on the effectiveness of the checks and balances that you say are within the PBL? I understand the arguments for detailed Bills are strong. They do not seem to hold water all the time, so we need to make sure that we are clear about the detailed observations before the Bill starts and the follow-up after the event.

Jacob Rees-Mogg: On the issue of your last point—whether the checks that I am talking about are effective—there are essentially three classes of Bills. There are the ones that have the powers put in them clearly; they are there and everyone is happy with them. There is the middle ground, where the DPRRC may say that the powers should be more clearly specified and I may say that I think there is a strong argument for powers, and PBL has accepted the argument, and there is a fair

disagreement. Then there are the Bills where I will accept that, for political reasons, they were brought in without the powers being specified as clearly as they should have been in the legislation, and those were the competing factors I mentioned earlier.

On secondary legislation and guidance, I very strongly agree with your point that guidance is guidance and the law is the law. The Government should not give the impression that they can make law by guidance, because they cannot and no British subject has any obligation to follow non-law. That is a basic constitutional principle and freedom that we all enjoy. That is pretty fundamental, so I am very glad that you make that point both in this meeting and as a committee. We have been in correspondence about it before.

How do we check the statutory instruments? The statutory instruments that are brought through are looked at by a number of Ministers when they are proposed by the relevant departments. On a monthly basis, I get a great wodge of SIs that are coming through, on which I am entitled to ask any questions I feel like. I regularly send back questions, and the Whips' Office sends back questions about them, to see that they are achieving government policy, that they are what is wanted, that they are fair and proportionate and that they will have the proper parliamentary mechanism. I am pretty sure that, while I have been Leader, we have made time to consider every prayer that the Opposition have brought forward against a negative statutory instrument in the House of Commons. That is an important check that is there.

Yes, there is a process to look at the SIs that are coming through, although you make a very fair point about post-legislative scrutiny. How much effective post-legislative scrutiny is there to see whether Bills have really achieved what was intended? This is something where there is always more to do, and it is a very good area for committees of both Houses to look at.

Q11 Lord Haselhurst: It is the amount of rejection of our recommendations that concerns us. We are perhaps therefore inclined to see a trend in government departments to take more powers if we suggest limiting them, which, after all, is basically the role of the DPRRC. We are not usually saying to you, "Arm yourself with more powers". We are in fact always putting obstacles in your way to justify further those that are being sought. I do not think we accept very readily the argument that the recent level of rejections has been largely concerned with the fleetness of foot that the Government have wanted in light of the two great crises or issues that Parliament has spent a great deal of its time on.

At the same time, I am not sure that I can find fully credible the statement in your article in the *Daily Telegraph* that, in the wake of these big crises, all parliamentarians will want to recognise their enhanced responsibility as lawmakers, scrutinising and improving the measures brought before them. I am a little sceptical about whether the Commons has a real appetite for that—obstacles by way of argument as to the principles—but not on whether there is sufficient justification for the

Government acquiring extra powers.

The Government perhaps do not always find time for what they might see as rather refined arguments about the level of power or delegation that we are suggesting. In your opinion, is there a genuine argument now for re-examining the guidance so that we are not seeing the rate of rejection when we put forward suggestions that certain powers might be excessive?

Jacob Rees-Mogg: I would say a number of things in answer to that. We take into account and adopt your recommendations on many occasions before you have made them. That is to say, they are taken into account before the Bill is published, because PBL knows the angle that you are going to be coming from, recognises the importance of this and broadly agrees. What the DPRRC is going to say is built into the process of Bill-making. So when you say that some of your recommendations are rejected, that is after the very profound influence you have had on the structure of the Bill in the first place.

In addition to that, departments are obliged to consider the recommendations of the DPRRC and have to explain why they do not want to follow a recommendation, which is very important. There will be occasions when we disagree. Your figure is that two-thirds of your recommendations have not been acted on. That is not taking into account how much we have put into the Bills in the first place, which has therefore had a fundamental effect on the legislation.

On what I said about enhanced scrutiny from the Commons and no excuses, we have just had the most remarkable change in our whole legislative system away from powers. The Section 2(2) power was all-encompassing, overwhelming and an incredibly convenient mechanism for the Government to push things through with no effective scrutiny at all. If it were under the Section 2(2) power, Parliament could not object to it even if it did not like it; it just had to go through.

I think that both Houses are beginning to recognise that their scrutiny of secondary legislation now really matters, because the rejection of a piece of secondary legislation affects domestic law in a way it did not while we were still a member of the European Union and in the transition period. Domestic law had to follow EU law, so if Parliament ignored a Section 2(2) statutory instrument it did not matter; it still became our law. The clawing back of parliamentary power over both primary and secondary is fundamental. That has removed the most skeletal of skeletal Bills.

Lord Haselhurst: Do you see that there is an appetite among Members of the House of Commons to devote more time to this particular issue? They are pressed by their constituents more on the generality of the policy, rather than being aware of the provision in a Bill that a power is retained by government which some people may think excessive.

Jacob Rees-Mogg: Lord Haselhurst, you were a very distinguished, long-serving Member of the House. You will remember from your constituency postbag that lots of constituents write in when they get hit

by the detail of a statutory instrument, rather than the general principle. As these things have come back under our control, there will be more interest from Members of the Commons, as well as the Lords.

It is worth bearing in mind that the EU's sifting of SIs was added because of Commons insistence. As that Bill was passing through, the sifting came about because MPs were interested, not just Peers. As things are shifting back to being domestically controlled, we are seeing greater Commons interest. That will be driven by constituency postbags, too.

Q12 Lord Janvrin: Lord President, I had a quick follow-up on some of your earlier points about the working of PBL. You said that there was quite a lot of informal discussion with departments in the gestation and production during the Bill process. To reassure me that PBL is not a rubber stamp, do you have examples of where your pushback has occurred really rather formally on this question of powers? You have actually declined a slot in the parliamentary timetable because the PBL is not satisfied with the outcome.

Jacob Rees-Mogg: We delayed the NSI Bill for two weeks, because it was not ready in terms of what it was going to do in terms of its powers. It had to agree to specify the sectors that would be involved. I cannot remember whether it did it at Bill publication or by amendment. I think it was by amendment.

Lord Janvrin: I think it was, yes.

Jacob Rees-Mogg: PBL is not just a rubber stamp. It has to have Bills presented to it that are satisfactory. The delay for two weeks was to give them time to get the drafting of the powers right, to specify on the face of the Bill what they were really intending to do. There are other Bills that we have delayed because of readiness issues within, and that would include powers to get the meat on the bones. Sometimes the political imperative has been to push ahead, but we have felt it more important to ensure that the Bill is right.

The Chair: Lord President, I am delighted to hear that you see a strong distinction between guidance and regulation. I hope that we will not find Bills in future that have odd terms like "Ministers may issue protocols", which the Delegated Powers and Regulatory Reform Committee has come across. Protocols are a device that do not need parliamentary scrutiny and that should be regulations. You will probably find that in our report. That is just a comment at the moment. We should have regulations and, if necessary, guidance laid before Parliament, not funny new terms like "protocols", seeking to avoid scrutiny.

Q13 Baroness Meacher: Lord President, good morning. Before I get on to the question I was going to ask, can I respond to the point you just made about the PBL holding up Bills for a week or two for them to be prepared better? Bids for Bills come to the PBL right at the start, do they not? I just wonder whether, at that stage, a department will have to make clear whether the Bill is actually a skeleton Bill. Does the PBL get into a

discussion and a probing of that decision, presumably by a department, right at the start, when you get the bids for the Bills? I wonder whether you can clarify that a bit for me.

Jacob Rees-Mogg: That discussion would not take place at the bid stage. Some departments have had potential Bills in their cupboard for many years that have been pretty fully drafted, so they sometimes say, "We've got this Bill all ready". Usually those are not the most politically exciting Bills. They sometimes say, "This is all ready. It could be done quickly and it may be useful to have available during the Session".

At the bidding stage, it is more outline. Once the bids are accepted, that is when the discussions will begin in earnest on ensuring that the Bill is properly and thoroughly drafted. The PBL secretariat will be working with the Bill team on a pretty much daily basis to ensure the process of writing the Bill is going properly. Then the business managers will be involved at a political level to ensure that the Ministers are aware of the fundamental importance of writing Bills properly.

Baroness Meacher: Do you feel satisfied that your people are sufficiently exercised about the issue of skeleton Bills and Henry VIII clauses, so that they really are trying to get rid of these things as far as they possibly can—as you say, not at bid stage but in the early stages? Do you feel they have that sorted?

Jacob Rees-Mogg: I have been in post for just under two years and we have got much better at it over that two-year period, partly because we have had time—time very much helps—and partly because it has become clearer, both in how legislation works once it is enacted and in its passage, that the more detail that is provided, the more effective the legislation will be.

Baroness Meacher: I am supposed to be asking about the guide to making legislation. In your letter on 19 October 2020, in response to our complaint about the prevalence of skeleton Bills, you suggested that you would consider issuing communications to Secretaries of State, encouraging them to minimise the use of delegated powers where possible and to ensure that sufficient time is allowed at the outset for the development for policy. The committee was wondering whether you have issued those communications to Secretaries of State.

Jacob Rees-Mogg: Yes, I have communicated that to Secretaries of State, both individually and collectively.

Baroness Meacher: We owe you some congratulations and gratitude for that.

Jacob Rees-Mogg: It leads to better legislation. As I said, there is not as much difference between the Government's attitude and the DPRRC as you may think.

The Chair: When we see the details of the Bills, we shall see if they have paid the slightest bit of attention to your guidance.

Q14 Baroness Meacher: I was to ask you about whether the Cabinet Office guide to the making of legislation will be revised. You had quite a discussion about this guide and indicated interest in hearing from us about our concerns about the guide. I wonder whether you can go a tiny step further and commit to the proposition that the guide actually needs to be upgraded, since it was written in 2017, bearing in mind the ongoing concerns of the Delegated Powers and Regulatory Reform Committee. Can you give a commitment that you will make sure this happens?

Jacob Rees-Mogg: I would rather wait and see your report. That will give me a better idea of what your specific concerns are and what the best ways of answering them may be.

Baroness Meacher: That is fair enough. I certainly understand that. The final point is that obviously the main work is done within the departments. At what stage would you say that a decision is made that a Bill needs to be a skeleton Bill? You have possibly answered this question, but to what extent is the PBL actively involved at that decision point? If a department wants a Bill to be a skeleton Bill, are you made aware of that immediately and do you then have an opportunity to question that firmly?

Jacob Rees-Mogg: We would be aware at a very early stage. If you exclude emergency legislation, we would need a lot of persuading as to why that was reasonable.

Q15 Lord Cunningham of Felling: Good morning, Lord President. You recently said, in response to a question, that you thought the Government had improved their performance in the roughly two years for which you have been Lord President. I am a member of the Secondary Legislation Scrutiny Committee, and I am a guest member of this meeting. Why do we continually receive statutory instruments that do not meet the requirements of the committee?

Jacob Rees-Mogg: It is right that the committee is always questioning the powers that are put in Bills and that it is for the Government to justify them, but there are occasions when powers will, in the view of the Government, be justified. I mentioned the Cities and Local Government Devolution Bill. I think those powers were justified, and there will be other Bills coming forward in that category. There will be Bills coming forward in this Session where the DPRRC and the Government may well disagree as to whether the powers are reasonable. In the PBL Committee, I have seen a very solid focus on ensuring that powers and Henry VIII clauses are completely justified and have a strong argument, with the exception of emergency legislation. That is different, but I think everyone recognises that.

Lord Cunningham of Felling: The argument I am expressing is not about the powers in the legislation. It is more a question of errors in the statutory instruments. It is nothing to do with powers, just plain errors: inadequate Explanatory Memoranda, for example, inadequate impact assessments and, in some cases, no impact assessment at all.

When we recently took evidence from three members of the

Administration, not Ministers but civil servants, we were told in fairly straightforward terms that there was a senior civil servant in each government department responsible for seeing to the proper provision of secondary legislation. It turns out, and we found this out on 5 May, that the Cabinet Office, the Treasury, the Health and Safety Executive and the Northern Ireland Office, all in their different ways important departments, do not have a senior responsible officer in post. Why is that?

Jacob Rees-Mogg: From the point of view of the Leader's office, we have been asking every department to have a Minister who is responsible for secondary legislation. Some departments had a huge amount of secondary legislation, particularly for example Defra, in the run-up to the end of the transition period. Inevitably, out of the very many SIs that it brought forward, some had mistakes within them. The Department of Health and Social Care was bringing forward a large number of Covid-related SIs, some of which had mistakes in them because they were being turned around so quickly. That was the pressure of time.

This is important. Statutory instruments need to be got right. The processes that have been introduced around statutory instruments have been tightened up. If you go back five years, the Leader's office was not expected to have a Minister responsible for statutory instruments in each department. Things had been improving before my time and I hope that is continuing. Every department should have an SRO for this. We will take up the issue with the departments you have mentioned and will revert back to the committee on why there is this gap.

Lord Cunningham of Felling: You say it is important and, of course, I agree with you that it is very important. The four departments I have mentioned account for about 10% of the statutory instruments that the committee receives, so it is a significant problem.

Jacob Rees-Mogg: I accept that. It is very important, and statutory instruments need to go through proper processes. It is quite interesting that when we question statutory instruments, which we do quite regularly, some of them then get removed altogether. It turns out that they are not wanted or there were mistakes in them. There is a process. It does reduce the flow to some extent, not hugely, but the process is important to ensure the quality of the secondary legislation that is being produced.

Lord Cunningham of Felling: Can you tell us who would be responsible for that process?

Jacob Rees-Mogg: The individual departments are responsible for their statutory instruments. They then come to the business managers to ensure that they are in line with government policy and for handling.

Q16 **The Chair:** I understand that, in answer to Baroness Meacher, you cannot give a guarantee, of course, that you will rewrite the Cabinet Office guidelines based on what we may say in our report. Since 1929, the House of Lords has complained about Henry VIII clauses, and there

has been no Cabinet Office guidance since then that has ever mentioned to departments that the House of Lords rather dislikes Henry VIII clauses. One thing we may put in our suggestions to you is that the departments should be made aware of the pros and cons of Henry VIII clauses.

Jacob Rees-Mogg: I obviously stand correction on this, but I think that the House of Lords showed its power in reforming Henry VIII clauses in the first passage of the proclamations Bill when the Commons passed a Bill that gave enormous power to the king. The House of Lords put in amendments that made the proclamations Bills almost completely ineffective. That was at the very end of Henry VIII, so it is around the 1540s that you succeed in doing this, before it is repealed under Edward VI.

Your record on dealing with Henry VIII clauses is great, but I understand that there is mention of it in the guide, and I will note how specific it is. It says that particular attention should be given to Henry VIII powers, but it does not say that the House of Lords does not like it, does it? It certainly mentions the House of Lords in relation to Henry VIII powers, but I shall be interested to see your report specifically.

The Chair: I stand corrected; it is mentioned. It probably requires a bit more elaboration of the pros and cons of it.

Q17 **Baroness Browning:** Good morning, Lord President. Could I take you back to the rejection of two-thirds of the committee's recommendations in that 2019-21 Session? You seemed to indicate in your response to Lord Haselhurst that you rather felt that such a lot of good work has been done to pre-empt the committee finding too many complaints that somehow the two-thirds was not so bad. Is that where you would see the optimum amount in terms of the legislation that comes forward?

Jacob Rees-Mogg: No, I would see the optimum as being complete harmony between HMG and the DPRRC, although that may well be the triumph of hope over experience.

We always take your recommendations very seriously, but inevitably we are not going to accept every one. There will be areas of reasonable disagreement within the broad parameters of what we are all trying to achieve. Perhaps 2019-21 was a very exceptional Parliament anyway, which made it harder, because of the challenges we were facing, to accept as many DPRRC recommendations as might be ideal.

Baroness Browning: Lord President, I think the committee would be as keen as you are to see harmony in this area. Would it be too ambitious to say that at the end of the present new Session, 50% would be where we would all feel a lot happier?

Jacob Rees-Mogg: This is a rather difficult negotiation to hold over Zoom.

Baroness Browning: It is ideal, Lord President. Should we say then

something nearer 50% than two-thirds?

Jacob Rees-Mogg: This reminds me of the negotiation that Lot has with God over the cities in the plain to see if there are 10 good men there, 20 good men there, et cetera, and it is rather a difficult negotiation.

Q18 **Baroness Browning:** I am sure you are used to difficult negotiations, if anybody is. We will let it hang in the air, but it may be something we would wish to come back to later in this Session, when you kindly agree to come before us again.

Could I ask you a more specific question? When you receive a report from our committee, who decides whether to accept or reject a recommendation? Whose responsibility is it?

Jacob Rees-Mogg: It will be the department sponsoring the Bill, with the business managers.

Baroness Browning: Who in the department exactly?

Jacob Rees-Mogg: It will be the Minister in charge of the Bill with the Secretary of State. It will be a cross-government effort. Depending on the precise the recommendation, it may require the consent of Downing Street as well. It is the department, Downing Street and the business managers, and there will be a discussion as to whether the recommendation should be accepted. I am included in those discussions, but I would almost always, if it is a Lords amendment or suggestion, go with the view of the Leader of the Lords. As a business manager in the Commons, I would not think it my role to challenge what the Leader of your House was saying.

Sometimes there is a discussion about whether the issue can be done in line with meeting the objectives of government policy. There may be an argument that, for handling in the Lords, this would be much easier to accept, but in terms of meeting our policy objective we cannot accept it. Those are the discussions that would go on.

Baroness Browning: Because the majority of Bills begin in the Commons and our reports come out later in the process of the Bill going through both Houses, does the time factor kick in here when something comes forward when the Bill is in the Lords?

Jacob Rees-Mogg: No, not particularly, because the Lords stages are usually quite well phased, which usually gives you time. I am obviously not expert in the Lords' procedures, but from the way I understand you phase your Committee and Report stages and your ability to take amendments on Third Reading, which we broadly cannot in the Commons, the timing is not the particular problem.

Baroness Browning: Have you made any examination, when you receive a recommendation from our committee, of whether, when that section of the Bill went through the Commons, it was part of the Bill that was guillotined and did not receive very much scrutiny in the Commons?

Jacob Rees-Mogg: No, I have not made an examination of that, although it would be a very interesting thing to look at.

Baroness Browning: Could you perhaps say that you might do that for us?

Jacob Rees-Mogg: Looking at how a Bill has been examined in the Commons is very often an important part of the discussion in the Lords when the Lords are looking at the detail of the Bill. There is a general reluctance of the Lords to overturn things that have been fully considered in the Commons and a feeling of greater latitude when you think that things have not been looked at thoroughly in the Commons. I understand how that works.

Q19 **Lord Haselhurst:** I do not want to pursue this too much, but we are at the point that is really fundamental to our whole operation, if we believe that devices are being used in government that are shortcuts or that do not really accept what we say.

On the point latterly made by Baroness Browning, from my experience I do not recall there being much detailed discussion in the Commons following a recommendation that a Lords committee may have made. It does not seem to work like that. You get a lot of people who are put on statutory instrument committees with the appreciation that they may not take too much time arguing the toss about the particular issue. I am not sure that is proper scrutiny.

You very kindly said, as I think is absolutely right from my short experience in the Lords compared with the Commons, that one of the prime justifications for the second Chamber as it is presently constituted is that we have a range of people with great experience there who spend a great deal of time looking at legislation. We may not always get it right, in the Government's view, but it is slightly worrying that the trend has been so sharply against us in recent times.

Jacob Rees-Mogg: I hope that scrutiny of statutory instruments will become increasingly thorough now that the Section 2(2) power has gone and that statutory instruments can more routinely be challenged. That will be good in terms of scrutiny but also in terms of the legislative process. Ultimately, as you know, MPs must decide for themselves what level of scrutiny they want to give to particular things depending on the other commitments that they have. The Lords' scrutiny of statutory instruments is often very good.

Q20 **Lord Tope:** Lord President, you have commented that our committee's success rate is higher than we realise, because your committee is so good at anticipating what we will be likely to say and acting accordingly. I hope that is so. I wonder whether, as we are nearing the end of this session, you have any suggestions as to how, together, we might increase the success rate for both of our committees in this respect?

Jacob Rees-Mogg: The work you are doing has been immeasurably helpful to me as chair of PBL in understanding how legislation can be most successfully crafted. It really works in everybody's interest. I am

not going away from the thought that there are some Bills that really need powers and that is the only way to make them work successfully. I believe that in a parliamentary democracy that passes clear law the law has the proper mandate required by a constitution and that primary legislation is a higher form of law than secondary legislation. It is not challengeable in the courts in the way that secondary legislation may be.

I will certainly be very interested in your report that is coming out and the recommendations that it has. We are pushing very much in the same direction. I would make a plea for recognising that the reality of the political imperative that sometimes comes up, as with the Childcare Bill, is not unreasonable in a democracy. You do sometimes have to respond quickly, and sometimes speed and perfection are not bosom pals.

The Chair: We will push on. We have two very important points to conclude on; let us hope we will be pushing in the same direction on these as well.

Q21 **Lord Lisvane:** Good morning, Lord President. It is a pleasure to be renewing our discussions on these matters. I am an interloper this morning by the courtesy of the DPRRC. The dates you were searching for earlier on were enactment in 1539 and repeal in 1547, but that may be a conversation for another occasion.

Jacob Rees-Mogg: Thank you.

Lord Lisvane: If you will forgive me, there does not seem to be a complete meeting of minds between government and Parliament on the scrutiny of legislation, whether it is on the delegation of powers, Henry VIII clauses, major matters dealt with in statutory instruments and so on. Draft Bills, on the other hand, provide an opportunity to work these issues through, to expose them perhaps at greater leisure and detail and, as with the Agriculture Bill recently, to make real improvements. The gracious Speech was pretty light on draft Bills. Why do we not have more?

Jacob Rees-Mogg: Thank you for mentioning the Agriculture Bill, which it is widely accepted was considerably improved by bringing more of the effect of it on to the face of the Bill rather than having it in powers. That is a very good example to use as legislation is being developed.

Why are there not more draft Bills? There was the draft Bill for the repeal of the Fixed-term Parliaments Act. There is a draft Bill for the online protections Bill. The difficulty with draft Bills is that your arguments are indisputable. It is absolutely right that draft Bills help, but you need to get your legislation through and done and dusted; it is the challenge of time that we all face. In an ideal world, we would have many more draft Bills. Probably every Leader of the House in recent years has said that and has thought that it would be a good thing to do but recognises that the pace of government does not necessarily allow for draft Bills in that way.

Lord Lisvane: Of course, there are always arguments against draft Bills

in the first Session of a Parliament. When you can plan not at leisure but with a longer horizon, surely the opportunities are greater. We are not talking here just about scrutiny. We are talking about the ability to open up the process to public involvement, which, in terms of achieving respected and well consulted upon legislation is a real plus. Might you feel able to make a commitment to move a bit more in this direction?

Jacob Rees-Mogg: It is dangerous to make commitments, because it is a matter for cross-government agreement rather than for me making a commitment this morning.

Lord Lisvane: Might you feel able to identify virtue, in that case?

Jacob Rees-Mogg: I agree with you on public engagement. I think that public engagement with Bills is pretty good and that MPs receive considerable communication on Bills, although, oddly, a disproportionate amount on Private Members' Bills, and one has to write back explaining that their chances of becoming law are not necessarily that high. They certainly receive a good deal of public engagement.

You are right that, as Sessions move from the first onwards, there is more time, but there is limited OPC resource to draft the Bills in the first place, so you have that competition. OPC's resources are inevitably being expanded, because we have a big legislative programme, but it is the competing pressures. Should they be on draft Bills or Bills that you are about to introduce? How far ahead are you setting the legislative programme because, if you have an annual bidding system for Bills, you will need to have some of them coming through relatively shortly after they are written? Again, there will not necessarily be time, even in later Sessions, for draft Bills.

I am in the rather awkward position of agreeing with you but finding that the practicalities of doing it much more than it is done are probably quite difficult.

Lord Lisvane: Thank you for that agreement, and in view of the time I will leave it there.

Q22 **The Chair:** Is there another dynamic at work in departments here? Are departments concerned that, if they have a draft Bill, the rats may get at it and it will not end up the way the department might have liked it? If it is in the Queen's Speech, you can drive it through whipped, with a few changes here and there, but you will largely get the political legislation one wants, whereas, with a draft Bill, anything could happen by the end of it.

Jacob Rees-Mogg: I do not think so, actually, no. Government, by and large, wants to pass good Bills with the most political wind behind them. A draft Bill can often pick up a great deal of energy because people realise that it is doing something important and good. With the Fixed-term Parliaments Act repeal, which was done as a draft Bill, a great deal of the potential controversy around it has been taken out of it by having the draft Bill and by having a very good Joint Committee look at it

and come up with a report that made some very sensible recommendations that were mainly taken on board.

The Chair: That is a good one to start in the Lords, possibly.

Q23 **Lord Rowlands:** Good morning, Lord President. I would like to discuss the use of Henry VIII powers and clauses. They are, by any standards, extraordinary and I wondered how you would justify them.

Jacob Rees-Mogg: I share your concerns about Henry VIII clauses; I do not like the idea of changing primary legislation by secondary legislation as a general principle. But the reality of our statute book is that it is so complex and has evolved over such a long time that there are some occasions when a Henry VIII clause is necessary. There are some occasions when it is even desirable, because you want to have the detailed power in the Bill but you recognise that it may need tweaking. To some extent, the Henry VIII power becomes almost a compromise between the DPRRC and the Government, because you get more details of the power in the Bill but there is a recognition that it may need some subtle tweaking.

This has happened with the whiplash Act. The tweaking there may take place in case there are bits that have not worked perfectly. Henry VIII clauses will always be problematic, and it is absolutely right that the House of Lords and the PBL Committee question them at every instance, but they are something that would be very difficult to do without.

Lord Rowlands: You say that there are some occasions. Could you give me an illustration or two of where you think such an occasion is justifiable?

Jacob Rees-Mogg: In the leaving the European Union Act, we needed to have the ability to change minor words that may no longer have had relevance in Acts without having primary legislation that potentially listed dozens of previous bits of legislation, changing a few words in many clauses. That was a completely reasonable and functional thing to do.

Lord Rowlands: That was an exceptional piece of legislation and, although we did not agree with it, we were not critical about many aspects of the use of Henry VIII powers in that Bill. In normal circumstances—let us take this following Session—could you find a justification for using Henry VIII powers in any of the Bills that are coming before us that are not Covid-related or Brexit-related?

Jacob Rees-Mogg: There are likely to be limited Henry VIII powers in some of the Bills coming forward, but they will all have been debated at PBL. Every Henry VIII power has a section on it explaining its need in PBL papers and is almost invariably raised in the discussion as to its suitability.

In the example I gave of whiplash injury in the Civil Liability Bill, the definition of whiplash was going to be made by regulations, but the Bill was amended to provide a definition, on the request I think of the Lords,

and then with a power to amend that definition in case, after consultation and further deliberation, the definition needed to be changed. That seems to me a perfectly reasonable use of a Henry VIII power, so there are non-exceptional cases when it can be a prudent thing to do.

Lord Rowlands: For example, one of the first Bills that is going to come before the House is the Professional Qualifications Bill. That is largely making legislation changes through delegated powers. You have had nine delegated powers, of which six are Henry VIII powers. Is that the sort of Bill that you consider to be an appropriate use of such power?

Jacob Rees-Mogg: Yes, that is an appropriate Bill for the use of such power, because you are regulating 100-odd professions. You have a lot of individual regulatory bodies. To legislate for every single one of those would have been very inflexible. What would you do about new professions that develop? It is very hard to see any other way of regulating professions and the recognition of qualifications. That is a case where it is thoroughly justified, but I can assure you that we discussed this in PBL before approving the Bill.

Lord Rowlands: Is it, generally speaking, the department that decides that it wants these powers? How are they governed? How are they monitored?

Jacob Rees-Mogg: The department will propose what it wants in its Bill and the PBL will then approve it or not. If we do not approve it, we will say, "This mustn't be a power. This needs to be on the face of the Bill".

Lord Rowlands: Is there is a case for giving more specific guidance to departments on the use or misuse of Henry VIII powers?

Jacob Rees-Mogg: There is guidance in the documentation that they receive and they receive guidance from OPC as to how to use Henry VIII powers as the Bill is being drafted.

The Chair: As I said earlier, Lord President, that is something we may wish to comment and seek clarification on in our report.

Jacob Rees-Mogg: Absolutely.

Q24 **Lord Hodgson of Astley Abbotts:** Lord President, you have made, in many ways, a powerful case about how we are entering a new world, post pandemic and with the ending of Section 2(2) powers, which will raise the importance of secondary legislation. Therefore, there is a need for a reset between primary and secondary legislation. Do you have any thoughts about, first, how that can be achieved in a way that carries the confidence of both Houses and, secondly, how one would monitor that progress post event, as people other than your good self, with your very strong constitutional principles, take on the role you now have?

Jacob Rees-Mogg: The role of the DPRRC is fundamental in this. It is really important, in that whoever is in my role will know that the DPRRC is going to be holding his or her feet to the fire and will be expecting

whoever is chairing PBL to be saying to departmental Ministers, “Is that power proportionate? Is that something where you have to have a power, or are you simply asking for it because you haven’t yet written the policy? Do you realise that that’s not only problematic in terms of how your law will work in the end, but it also means you’ll have a rougher ride in the House of Lords?” This is a really important means of scrutiny. It has clout, because the DPRRC is a well-established and respected committee, which other Peers take notice of. Passage in the Lords is affected by that.

How do you look at it retrospectively? How do you view what has happened after the event? Has it been done well or badly? That is the post-legislative scrutiny issue to which no Government have yet come up with a great answer. We all get very excited by new legislation coming down the tracks. It has a huge focus of political attention and everyone thinks this is the latest shiny thing and it is what we are all going to think about. When it has been in for 10 years, it is there and nobody looks at it and says, “Is it really doing what it’s meant to do?” That is essentially a role for parliamentary Select Committees to review things and say, “The law intended to do this and instead it’s done that. What are you, the Government, going to do about it?” It is an important task and one that needs to be done better.

Lord Hodgson of Astley Abbotts: Thank you very much for that, but when you say, rather flatteringly, that a piece of secondary legislation will get a rough ride in the Lords, yes and no. Secondary legislation, as we know, is unamendable, so the rough ride will be ripples rather than a gale-force wind.

Jacob Rees-Mogg: I hope that the wind force will be picking up a bit on the Beaufort scale as we all recognise, in both our Houses, that it is now under our control. That is potentially very important.

Lord Hodgson of Astley Abbotts: I agree with that.

The Chair: We are slightly over time, but I will have the last word on Henry VIII powers. We all accepted in the Delegated Powers and Regulatory Reform Committee that the European Union (Withdrawal) Act had to have, of necessity, some Henry VIII clauses. We then seemed to detect a lightbulb moment for all the senior civil servants and departments. They thought, “Ah, Henry VIII powers—jolly good idea. We’ll tack them on to every tiddly little Bill we’ve got”. We seem to have had a lot of legislation now with additional Henry VIII powers. I am not asking you to comment on that. That is just an observation we had and we may refer to it in our report.

Lord President, we have taken a considerable amount of your time this morning. We are over time, but I wish to thank you most sincerely for the exchange of views we have had. As Lord Haselhurst said some time ago, you are devoted to the sovereignty of our Parliament and you are a champion of the roles of the Commons and the Lords. Therefore, we hope you stay in post for some considerable time so that you will be able to

implement whatever the SLSC reports and whatever we report, because we are on the same side on this.

Neither of our committees is in the business of holding up your legislation. The Delegated Powers and Regulatory Reform Committee has no say on the merits; we do not look at the merits at all. We are there to try to make sure that the legislation is effective and that Parliament has proper scrutiny. As you say, if we can scrutinise it better at this stage in Parliament, it saves a lot of hassle later on.

We are not antagonistic to the Government at all. We all want better scrutiny. It is not for this committee to decide, or to decide today, but as we no longer make EU legislation and all our SIs will be uniquely United Kingdom-made, a time may come for some rebalancing of the powers on how we scrutinise statutory instruments in both our Houses. That is for another occasion.

Thank you very much, Lord President. I am very grateful for your attendance today. Colleagues from the Secondary Legislation Scrutiny Committee and from the Delegated Powers and Regulatory Reform Committee, thank you so much for your assiduous attendance today. I will take leave of you now. Thank you all very much.