HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

Corrected oral evidence: The delegation of legislative power

Wednesday 26 May 2021

10.15 am

Watch the meeting

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

Evidence Session No. 1 Virtual Proceeding Questions 1 - 10

Witness

I: Elizabeth Gardiner, First Parliamentary Counsel.

Examination of witness

Elizabeth Gardiner.

Q1 **The Chair:** Good morning and welcome to this evidence session from the Lords Select Committee, the Delegated Powers and Regulatory Reform Committee. This morning, we shall be hearing evidence from Elizabeth Gardiner, the First Parliamentary Counsel at the Office of the Parliamentary Counsel. Our inquiry is based on the issue of delegated powers and considering whether any delegated powers have increased over the last 30 years and the use to which they are put in legislation.

The meeting will be broadcast and is a formal evidence session. Elizabeth, you will be sent a transcript in due course, which will be put on the parliamentary website, and given an opportunity to see the transcript and propose any minor corrections. Do colleagues on the committee have any declarations of interest to declare? No. In that case, thank you very much.

Elizabeth, do you wish to make an opening statement or get straight into questions?

Elizabeth Gardiner: No, I am happy to go straight to questions. Thank you.

The Chair: How would you sum up the role and responsibilities of the Office of the Parliamentary Counsel? To what extent can you and your team influence the volume and breadth of delegations of power in a Bill? For example, when you see a framework Bill or a skeleton Bill with very little in it but lots of powers to make regulations, can you, or do you, go back to the Bill team and say, "This is not quite democratic; it is far too skeletal"? If you see a Bill with lots of Henry VIII clauses, can you go back and remonstrate with the Bill team, perhaps saying "This is a bit over the top if you even make those considerations"?

Elizabeth Gardiner: I will start at the basic level. I am sure many of you will be quite familiar with my office. Perhaps I will just explain that the Office of the Parliamentary Counsel is a group of government lawyers who sit in the Cabinet Office and specialise in the drafting of primary legislation. As such, we work very closely with policy departments to translate their policy into clear, effective and readable law. That is our aim. Our role will often begin when legislation is first considered, just as a bright idea. We will remain involved right through the parliamentary process and sometimes beyond that.

The drafting of any Bill is an iterative process, with parliamentary counsel receiving instructions, perhaps initially in writing, and then, increasingly, orally as the Bill proceeds. Those instructions will be added to and refined throughout the drafting process. We deal primarily with departmental lawyers, who are subject experts in the particular Bill that we are dealing with, but also with a wider range of policy and Bill officials in departments.

The iterative process will, for example, involve parliamentary counsel testing whether what is being asked for will actually deliver the desired policy and whether there might be better—for example, more direct or simpler—ways to achieve the desired result. That would include being aware of how a particular approach might be received in Parliament and suggesting ways that parliamentary concerns might be addressed. We test whether what is being asked for has policy or legal gaps, or whether there are or should be knock-on effects for the rest of the statute book, as a result of what the Bill is doing.

In our published OPC *Drafting Guidance*, which I think we might get on to a little later, chapter 1 deals with clarity, which is one of the primary aims of the legislative drafter. It tells the drafter to take the reader by the hand and lead them through the story they have to tell. Sometimes the drafting instructions will ask parliamentary counsel to leave elements of that story to be dealt with in secondary legislation, and so require the conferring of new executive powers in the Bill.

These may be very specific, narrow powers of a kind frequently found in Bills and unlikely to be much of a concern to us, or indeed to your committee, for example the ability to specify the form in which a notice is to be given or to enable a penalty to rise in line with inflation. These may provoke very little discussion in the course of the preparation of the Bill. But where the powers asked for are more wide-ranging or unexpected, the drafter will have in mind the fact that they are trying to tell that story—a story that the Government are asking Parliament to approve, so it needs to be able to understand it.

Their starting position will be to try to ensure that there is sufficient policy on the face of the Bill for the story to be told in a meaningful way. The drafter will also be explaining to the department why, to enable proper parliamentary scrutiny, it is important to have that story in the Bill. They will be working with them throughout to help them understand the nature of the detail that we think needs to be in the Bill to tell that story. We are looking for a beginning, middle and end, not a synopsis.

For example, if the Bill is about widgets and the instructions say, "Could you please draft us a Bill about widgets that requires a statutory instrument to set out the definition of a widget and then confers on the Secretary of State a power to regulate widgets?", we might go back and say, "That does not seem to us to be a proper piece of legislation. You are neither telling Parliament what it is that you are regulating, nor giving it any idea of how that thing is going to be regulated in future".

We would be pushing for enough of that framework, of the detail, to be in the Bill. For example, we might want the basic definition of a widget to be set out in primary legislation, recognising that there might be powers to tinker round the edges with that definition to deal with exceptional circumstances that might arise in future and cannot be anticipated. That is the sort of conversation that we will be having.

In addition to the desirability of Parliament being able to scrutinise the Bill properly, there is a very practical reason why parliamentary counsel prefer the policy to be set out on the face of the Bill. Our aim is to draft effective legislation that is legally and operationally effective. A drafter would say that it is extremely difficult to draft an effective power if we do not know exactly what sort of provision the Minister will wish to make with that power down the line.

From a drafting point of view, the danger is that, if we do not know enough about the parameters of how the power is to be exercised, the department may, in due course, find that we have given it the wrong power—and it cannot in fact make the provision that it then decides it wants to make. It is far better to understand how you are going to use your powers from the outset. That should also allow you to develop your policy for more of that to go in the Bill.

One upshot of that is that the drafter may end up drafting a wider power than turns out to be necessary because they do not know enough about what is going to be done to narrow that power down. We are always pushing and discussing, in that iterative process, to try to get more detail of how the department thinks it is going to exercise that power, so we can make sure the power is matched with what it is trying to do.

I do not want to give you the impression that it is some sort of battle between the department and us. Rather, we are all in the same game of trying to produce effective legislation to lay before Parliament and discussing that together. If departments do not understand the issues with delegated powers, we are trying to explain those issues to them and come up with a successful conclusion to lay something before Parliament. I like to think that we have a very significant impact on the formation of legislation in lots of ways through that iterative process.

The Chair: Thank you very much for that full answer. I think many of my committee would suggest that we have seen quite a few Bills where the widgets, or an equivalent, have not been defined in the Bill but have been left to secondary legislation. I would like to make a quick follow-up. You say in chapter 1 of the guidance that clarity is the key point. We will be looking at a Bill this morning, the Professional Qualifications Bill, which is an empty framework Bill. The clarity will come when 10, 20, 30, 40 or 50 regulations are made afterwards; those will give the real clarity, which is not in the Bill itself. Surely that is wrong in principle.

Elizabeth Gardiner: I am not very close to the detail of that Bill, but the approach is very similar to that taken in the Health Act 1999, which is also about regulating professions. The issue there is that you need to make bespoke provision for the profession you are regulating at the time you are regulating it. The choice is bringing 40, 50 or 60 Bills before Parliament, one about each profession, or Parliament providing a framework under which you can exercise a power to regulate in each area, subject to whatever scrutiny Parliament thinks is appropriate down the line.

That is a choice. It could be done either way. Obviously, the Government have chosen to bring forward the legislation in this way and think it a more appropriate balance in this particular case.

The Chair: It may be more convenient, certainly. The committee will consider later whether it is appropriate.

Q2 **Baroness Browning:** Good morning, Elizabeth. You have given a very full explanation. I want to probe a little more about the relationship between the OPC, departmental lawyers and the policy and Bill teams. You said you all work together. You like to work collegiately, but who actually is the final arbiter when there is disagreement specifically on delegated powers? Would you see the OPC as the final arbiter?

Elizabeth Gardiner: No, I would not perceive it like that. OPC sits in the Cabinet Office for good reason. We have always been separate from the policy department instructing on a Bill, because that is thought to give us a certain degree of independence in coming to a piece of legislation, to work with the department and challenge what is being done. We are obviously working with the department and the departmental Ministers.

At the end of the day, any legislation has to have collective political agreement and be signed off by the PBL Committee before going into Parliament. The officials are there to advise on the content of the legislation. The political decision about the content of the legislation is for Ministers.

Baroness Browning: Specifically, for example, when the Delegated Powers Committee produces a report on a Bill, very often it is after that Bill has progressed all the way through the House of Commons and is in the Lords. Time is getting quite tight towards government wanting to conclude the Bill. When our report arrives, who takes the lead to decide how to deal with the recommendations made in it?

Elizabeth Gardiner: The department would lead, but the parliamentary counsel who is drafting the Bill will most definitely read your report as well. They will discuss with the officials in the department they are working with what sorts of amendments might be required to respond to any particular aspect of the report, whether that would be easy to achieve or would not work for whatever reason, or whether an alternative approach might be offered. The response to the committee's report is a policy decision for the responsible department, but parliamentary counsel will be involved in that discussion with the department about the recommendations made in the report.

Baroness Browning: When you say you will be involved, in what way? Is it if you are asked, or when that report is published do you automatically take a view on the points the committee has made?

Elizabeth Gardiner: We will read the report and be discussing those recommendations with the Bill team. Say there is a DPRRC recommendation that you want more detail in the Bill; we would go back to the department and say, "This is the recommendation of the

committee. Can you consider whether this would be possible? These are the sorts of things it might be possible to do. Please give that consideration. We think the committee has a point here. It has come up in debate", or whatever it is.

In some cases, we may not agree with your recommendation, but I would like to think those are rare occasions. We might explain to the department why we do not think that is quite right in a particular instance. That would then be reflected in any response that came back from the Government. Sometimes the Government's response to the committee explains why they do not agree with a particular recommendation. We would not go to the department saying, "The committee has made these recommendations. We are telling you to comply with them", because that is not our role.

The Chair: Do you detect any ministerial or official push-back if we make recommendations in the Lords, on the basis that Ministers and officials may say or imply, "This has gone through the Commons. We have drafted this legislation over the last six months. Who do these Lords think they are, trying to change it at the last possible minute?"

Elizabeth Gardiner: No, honestly, I can say that I do not recognise that at all. It is recognised that the Lords take a particular interest in this aspect of the legislation and those recommendations are taken seriously. I would like to assure you that they are. It is not dismissed. There are many amending stages in the Lords, so it is unlikely that a lack of time would be the issue.

Q3 **Baroness Andrews:** Good morning, Elizabeth, and thank you for such a comprehensive introduction. How do you get Bill teams, in particular, to understand the issues around delegated legislation and how they are going to play out? You said to the SLSC that you had run some training courses and were going to run some more. What prompted that and do you think it is sufficient? Surely part of the challenge—it may be one of changing culture as well—is how you create an institutional memory so a Bill team leader can say, either to the lawyer or to their junior staff, "That is not appropriate. It is not going to be easy to get that through and it is not necessary". How do you create that permanent response, as it were?

Elizabeth Gardiner: A lot of work goes on with individual Bills, obviously, but we are running training. We ran training back at the end of 2019 in response to the concerns being raised in Parliament, by your committee but also on the Floor of the House. We wanted departments to better understand that, to stop us putting legislation before Parliament that we felt was just going to get that response, because we were trying to respond to the concerns.

We are now running that training again, in the run-up to the second Session and as that starts. In fact, we have recently run two sessions. One of the advantages of this virtual world is that we can get to an awful lot more officials more quickly. We have done two sessions, which were attended by 120 officials, who are likely to be lawyers, policy officials and

Bill team officials in departments who are working on current legislation or expecting to do so.

We go through all the sorts of issues that would concern your committee and that impact on the drafting of the Bill. There is also other training for Bill teams during the year. This is a recurring theme that comes up. I have other networks within government on Bills and legislation, and it comes up all the time in the context of those. Trying to continually reinforce those messages is like painting the Forth Road Bridge, up to a point.

I am not saying that every official in each department will have a good understanding of this, but there is an understanding now in departments. It is a case of reinforcing that and making sure that those messages are getting down to everybody dealing with the Bills. That is something we work hard to do.

Baroness Andrews: You picked up points in your opening statement about the bandwidth of the powers, and how sometimes you have to put too broad powers in because you simply do not have enough clarity from Ministers as to what the powers would be used for. Is there some way that you can stiffen policy and lawyers at departmental level to go back to the Minister and say, "Sorry, we really need more focus on this"? That would be a real improvement, as would be a strict instruction to all officials not to use sloppy arguments that can be very easily demolished, such as saying, "It is time; we have done it because it is quicker". If you could get rid of some of that language, it would be wonderful.

Elizabeth Gardiner: That is the sort of thing that comes up in our training courses. We are trying to get that over. The other one would be saying, "We are taking this power just in case we might need it", which does not find favour with the committee.

The Chair: In these training courses, no doubt you tell them what the Delegated Powers Committee likes and dislikes. Would it not be helpful if, in future courses there was a little slot for members of the committee, or our officials or lawyers, to tell the officials directly what we like and dislike? Would you bear that in consideration?

Elizabeth Gardiner: I certainly will. I will regard that as an offer, so I shall come back to you on that.

Q4 **Lord Hendy:** You have dealt with part of the question that I was going to ask you in your comprehensive introduction. It is about the iterative process that you describe. The Lord President, when he gave us evidence last week, said that the OPC will always be questioning whether powers are suitable. The question that we had originally formulated was to whom such questions are directed: the Public Bill Committee, the PBL Committee, departmental Ministers, policy and Bill teams, or who else?

Elizabeth Gardiner: I would say it is all of the above, depending on what stage we are at in the process. We can have involvement at all those levels. Indeed, there will be discussions going on in the

department, separate from us, on the same sorts of areas. As I said in my opening, the policy is being continually refined in the process of a Bill. It is not the case that we deliver the instructions and immediately produce the Bill. It is very much a back-and-forth process. A question about the appropriateness of powers could come up at any stage, from the department coming to us with just a very general policy idea and wanting to discuss how it might frame its legislation, right through to when we are tabling amendments at the final stages of the Bill in Parliament.

Our primary relationship is with the departmental lawyers and the policy officials on the Bill, but our advice can find its way into briefing going up to Ministers within departments. Occasionally, we will attend meetings with Ministers to discuss drafting issues in the Bill, which could include the breadth of powers being taken in the Bill. We also have a close relationship with the PBL Committee. That is not just at meetings when the parliamentary counsel is present, but in advance of meetings we would want to flag up to the committee secretariat anything that we were concerned about in Bills that might be coming forward, so they are not unsighted.

Lord Hendy: You may also have answered my second question. Where does the suggestion for delegated powers come from: from the Ministers, the civil servants or, indeed, the OPC? You may have answered because in your comprehensive introduction, you referred to the powers asked for, which seems to suggest that it would have come from the Ministers and is not the suggestion, for example, of the OPC. Would that be right?

Elizabeth Gardiner: It can vary. Ministers will, in discussion with their policy officials, be framing their general policy around the Bill. It may be that within that policy officials are saying, "We will do this; this is the only way we can achieve this bit over here" or, "You will need flexibility here going forward. We should ask for a power". When it comes to parliamentary counsel, I am not saying that we would never suggest powers being the answer. For example, if they have instructed on putting a fine level in the Bill, we might ask them why they are not asking to be able to uprate that power in accordance with inflation. They are otherwise setting their Bill up to have a level of fine in it that would be completely outdated in 10 to 15 years' time, and would have to come back to Parliament. Have they given any consideration to that?

There will certainly be times when parliamentary counsel suggest that something is better achieved in delegated legislation. Similarly, for some matters of excruciating detail, which Parliament might not be that interested in and which will have to change on a frequent basis, we might say, "Should this not be taken off the face of the Bill and be put in delegated legislation to enable Parliament to see better the main proposals of your scheme and to scrutinise that? You do not need to be having all this detail in the Bill, because you are going to need to change it frequently". That will be a discussion.

It is not that we never suggest a power, but we are very aware of the concerns around delegated powers and share them. We very much discuss that with the department.

Lord Hendy: When the suggestion comes from the OPC, is that a rarity?

Elizabeth Gardiner: It is hard to say whether it is a rarity. We would not be saying, "Here is some lovely policy. Don't worry about putting any of it in the Bill—just give your Minister a big power to make a regulatory regime". It would never be like that, but from our experience of how legislation is generally crafted, there may be suggestions from time to time.

Say the department said, "Here is a list of bodies"; we might go back and say, "Do you not think that in time you will need to change this list? If you think you will, how are you going to do that?" We might suggest that one way of changing the list might be to take a delegated power. It is that sort of thing. It is teasing out from the department how it thinks its regime is going to be robust in the future and still give effect to its policy. That is the sort of process we go through.

Lord Hendy: My final question arises from something you said in discussing these matters with the Secondary Legislation Scrutiny Committee. For the record, it was question 4 on page 5. You said "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".

The context of this discussion was the accepted fact that delegated powers have been used more frequently over the last 20 years than previously. But the implication of your answer is that, because of the increased pressure of time, what would have been in primary legislation—and hence subject to full parliamentary scrutiny—in the past is nowadays to be found in secondary legislation, with, of course, less parliamentary scrutiny. Is that a fair assessment?

Elizabeth Gardiner: I am sure you could find examples in the past where we have taken wide powers. One of the areas where we would generally have a power these days, where I am not sure we would have always done in the past, would be at the back of a Bill. You will very frequently see a power to make consequential amendments across the statute book. The aim is that the core policy is set out in the Bill, so Parliament completely understands what it is signing up to, and that the tidying-up exercise across the entire statute book that might result from that can be done in delegated instruments at the time when the legislation has commenced.

It would be fair to say that, 30 years ago, a lot of those consequential amendments would be in the Bill. There would be a schedule at the back of the Bill, several pages long, making those minor, tinkering

amendments across the statute book. The time and the volume of legislation, and the volume of the statute book now, means that that is very often left over to secondary legislation in a way that it was not in the past.

I am going to be very interested in the empirical research that you are doing on absolute numbers of powers then, as compared to now. In preparation for this session, I have been looking back at some of the Bills I have worked on over the years. There are certainly examples of significant powers being taken 30 years ago, but it may be the case that there are more of those in recent years, for various reasons.

Lord Hendy: Supposing the empirical research shows that a greater use of delegated powers in current times is not simply about eliminating tidying-up provisions at the end of Bills. Where does the impetus for more delegated legislation come from, over the last 20 years?

Elizabeth Gardiner: I imagine that there is a certain growth in that if you have done it once, you are aware that it has been done like that once, and so might do it like that again. I am sure that plays into the whole system. The pace at which things are produced now, with the need to take action and be seen to be taking action, puts pressure on the whole system to be enacting stuff early. Maybe, in the past, greater time would have been taken in developing the policy to a greater level of detail before it was brought before Parliament. Perhaps now the pressure is to get on and legislate, in order to be able to implement. Therefore, some of that policy development and legislating is happening in parallel, effectively.

The Chair: That was an interesting point: that departments see what another department has done legislatively and think, "That is a jolly good idea. We can try that on as well". We might explore that in a bit more detail when Lord Janvrin asks about Henry VIII powers.

The only other observation I would make is that we are not averse to the detailed minutiae—"excruciating detail", I think you said—being in secondary legislation. At least Parliament might have a chance to see that. Where we are very concerned is when we find the detail going into codes of practice and new concepts called protocols, which never ever come before Parliament.

Q5 **Lord Haselhurst:** Good morning, Elizabeth. Thank you for your helpful answers. You may recall that the Lord President, when he gave evidence to us, said that the Parliamentary Business and Legislation Committee knew the angle that our committee would be coming from and recognises the importance of this. Is that divine power shared by the OPC?

Elizabeth Gardiner: Sorry, I am not quite sure I understand.

Lord Haselhurst: He said that that the committee knew how the Delegated Powers Committee would be likely to react to every Bill that contained these delegated powers and therefore took account of that before it came to us. That seems unlikely on the basis of the evidence of

the last few months and years. The volume of things likely to annoy us or produce varying degrees of restrictive comment has been increasing. I understand the pressures that Governments increasingly are under and the demand for more and more legislation. If you know where we are likely to come from, can there not somehow be better evidence of that, other than the level of rejection that our recommendations have been attracting in recent times?

Elizabeth Gardiner: We certainly take a close interest in the recommendations of the committee. In our office, we track those recommendations and identify themes that are coming out over time as well. As well as on individual Bills, we are aware when a recurring issue is coming up on Bills. That is something we will discuss internally and make sure that we raise with departments. We are certainly very aware of the reports to date and, from that, will try to extrapolate what the likely response will be on future proposals. We will have that discussion with departments.

I think the Leader, in his evidence, said that this has an impact; if you like, I can give you some examples of where it has. In generic terms, the starting point within government for Henry VIII powers is that we would expect those to be subject to the affirmative resolution procedure. That is very much the message we have had from the committee for many years. We accept that and it will be the starting point in the drafting discussion.

Similarly, on criminal offences, we understand the very good reasons why the committee would be very concerned about powers to create criminal offences, so we would test the need for those powers with the department if they are proposed. If the Government think they can justify those powers, we are also then pushing for some of the parameters of the offence, for example the maximum penalty, to be set out in the Bill to restrict it as much as possible. Those are things that we do in response to understanding where the committee is likely to come from.

I am not for a moment saying that we always get it right, because otherwise the committee would never have a report to make. Having said that, we also get it wrong the other way. It is not unknown for parliamentary counsel to read the riot act to a department and say , "This is not going to go down well with the Delegated Powers Committee", and then for us to find the power sails through Parliament without a blip. We do not always judge it completely right. We certainly are taking account of your reports and trying to reflect that back to the departments and, similarly, to the PBL Committee.

To take some recent Bills, I think the Financial Services Bill, for example, got a clean bill of health from your committee, and I know the Treasury took very close interest in recent committee reports. It produced a comprehensive memorandum for you, drawing on those reports. That has been reflected in the way the Bill was drafted and the response from the committee when it arrived.

The Chair: I get the impression you say to departments, "You must not do this because that pesky mob in the Lords, the Delegated Powers Committee, will not like it and will oppose it". Surely, as lawyers and as a department signed up to the good law initiative, you have a moral responsibility to say to the department, "You should not put in all these negative resolutions because it is not democratically right. You are depriving Parliament of an opportunity to discuss it". Surely there is a moral input there, rather than just saying, "Do not do this because the Delegated Powers Committee will react".

Elizabeth Gardiner: I agree with that. There are areas where that is definitely the conversation we are having. We want to produce good law. As I say, we want a Bill that is legally effective and readable. That is absolutely the angle that professional drafters are coming from. We also recognise that part of the balance of primary and secondary legislation, and of the argument there, is taking account of how Parliament is likely to react. It is not one or the other; both are feeding in. As professional drafters, we are having that conversation on the basis that this is what we think makes good law or not good law.

Q6 **Lord Tope:** Good morning, Elizabeth. Can we move now to the guidance, particularly the Cabinet Office *Guide to Making Legislation* and the OPC *Drafting Guidance*? I wonder if you could describe the purposes of each guide and perhaps contrast between them. While you think about that, I attended your session with the SLSC. You said there, in effect, that the former, the Cabinet Office guide, was to do with policy decision and the *Drafting Guidance* was about how legislation should be drafted. That is a fairly clear contrast, but surely there is an overlap between policy and drafting in deciding about issues relating to the delegation of powers. Could you say a little bit more about that?

Elizabeth Gardiner: If I start with the OPC *Drafting Guidance*, it was produced by an internal group in the office that looks at drafting techniques. The guidance is aimed at members of the office, although it is published on the internet. It is meant to help members of the office to make it as easy as possible for readers to understand the Bills we are producing. It is tailored to our particular needs as an office. It is not meant to be a comprehensive guide to legislative drafting or to the clarity of legal writing.

For example, some things that would aid clarity, such as layout or typography, are not covered by the guide at all, because they are not within our control; nor is it meant to be a guide to statutory interpretation or past drafting practice. Members of our office are asked to have regard to the guidance, but legislative drafting is an art, not a science. People have regard to it and there may be any particular case where it is not appropriate to follow the guidance in some respects. Drafters have the ability to depart from it in appropriate cases.

It is trying to impose a level of consistency on the drafting practice in the office, because we think that will aid readers out there to understand our legislation. If we have very strict rules in our *Drafting Guidance*, it

effectively ossifies practice. Then you do not get more modern practices developing in drafting, which would not be a good thing overall, so there is always a balance there.

On the other hand, the *Guide to Making Legislation* is a document aimed at the whole of government. It is not really aimed at parliamentary counsel at all. In fact, we contribute to it: there are chapters in there that help departments understand what they need to do when they instruct us. It is meant to be a process guide to the whole of the legislative process for people out in departments, who often have not worked on legislation before, to get to grips with what is a fairly complex process in government and in Parliament.

When I said in front of the SLSC that it reflected policy, I meant that it brings together various policy decisions that are cross-government. For example, there is stuff in there about better regulation, which would be owned by the Department for Business, Energy and Industrial Strategy. Whatever policy exists is then reflected in the guide. The guide does not set policy itself. It rather reflects policy that already exists and which people working on Bills need to be aware of when going through the process.

It is a very comprehensive document. It is the Bible for those who are working on Bills. Some of what we have in there is some guidance about this committee and about the approach when considering the division between primary and secondary legislation.

Lord Tope: That was a very helpful answer. You know that our committee has frequently voiced particular concerns about Henry VIII powers in clauses, the use of skeleton Bills and so on. In your comprehensive guidance, I do not think there is any mention of either of those. Do you think it would be helpful if there was?

Elizabeth Gardiner: I do not have the guide right in front of me at the moment. I will check after this and write if this is not the case, but I am pretty sure it does mention Henry VIII powers.

Lord Tope: Is that the *Drafting Guide*? I want to be sure we are talking about the same one.

Elizabeth Gardiner: I was talking about the *Guide to Making Legislation*. In any particular case, there is a policy to be enacted. While we have views on the primary and secondary division, in how that is achieved (as the Chair was saying) based on what makes good legal policy, and we would explain that to departments, at the end of the day it is a policy decision for the departmental Minister, as I think the Leader said in his evidence. That is not really something that is suitable for our *Drafting Guidance*. That is not the sort of issue that we would be dealing with in it, it is much more about choices of words or of structure when you come to reflect that policy on the page.

Lord Tope: You are saying it is not appropriate to the *Drafting Guidance*

and its purpose. We may want to reflect on that, but that is helpful.

Baroness Meacher: Hello, Elizabeth. In all your answers, you have indicated that the OPC plays a pretty important role in guiding and advising on the way that Bills are produced and the extent to which powers are delegated. I am quite bemused that you say that your *Drafting Guidance* does not really deal with those sorts of things. The Lord President was very interested to hear our views about amending the Cabinet Office *Guide to Making Legislation*. I wonder whether you might be interested also in some views from this committee about your *Drafting Guidance*, albeit I understand you are saying it has a different role. In view of the huge importance of the OPC in this work on the development of Bills, would you find that helpful? Would you consider elaborating on one or two points in your *Drafting Guidance*?

Elizabeth Gardiner: Of course, I will consider any recommendation that the committee wishes to make. The OPC *Drafting Guidance* is aimed at our internal audience. You may conclude differently as a result of this inquiry, but my impression is that we have a pretty good understanding of our role and a pretty consistent approach with our departments. Really, the *Guide to Making Legislation*, which has that wider audience out in the Bill-making world across government, is the more appropriate home for this sort of material. I will of course look at any recommendation that the committee might wish to make.

The Chair: Do you find that there may be a bit of confusion in the Bill-making world relating to the Cabinet Office guidelines on what the Delegated Powers Committee wants? Looking at that very large Cabinet Office document, it has bits saying, "When you are preparing a memorandum, the Delegated Powers Committee wants this, but, to get all the details, log on to our website." At various points throughout, it is quoting the delegated powers guidance and, at the same time, giving a reference to "our website" where you can get the full picture.

I know this is not your guidance, but might it be helpful if the whole shooting match of the delegated powers guidance was put somewhere verbatim into the Cabinet Office guidelines, so that the Bill teams can see where we are coming from and what they need to do as far as the process side is concerned to satisfy our requirements?

Elizabeth Gardiner: Yes, that might be helpful. If people have to look in six places, they might end up looking in four and then not look at the full picture.

The Chair: Thank you very much. We are coming on to Henry VIII powers, a vitally important question.

Q7 **Lord Janvrin:** Good morning, Elizabeth. You have explained that the OPC *Drafting Guidance* does not contain guidance on the Henry VIII powers, yet the Lord President told us that departments are given guidance by the OPC as to how to use Henry VIII powers as a Bill is being drafted. Could you say what form that guidance takes and what is the

guidance that you are giving?

Elizabeth Gardiner: Our own guidance is not the home for that because it is the internal-facing document, but we will ensure that departments are aware of the principled concern about Henry VIII powers and about recent decisions, say, of the DPRRC on particular powers that have caused it concern. It would be fair to say that the whole idea of Henry VIII powers has not passed many people by now. It has been very controversial for a very long time, and that has permeated into departments and Bill teams. Most Bill teams have a certain awareness that Henry VIII powers are controversial things, so it is a case of discussing with them the nature of the things that are likely to be controversial and why, and thinking of ways that they could mitigate the concerns or, indeed, avoid taking the powers.

That will be done on a case-by-case basis on individual sets of instructions, but also done in all these other training opportunities that we have. One of the things we talk about in our training on delegated powers is not just assuming that you should take Henry VIII powers "just in case", for example, but only where you might need them. We also cover other areas where they are likely to be controversial, and the things that you could do to avoid them.

I have been in a situation where we took a power at the back of a Bill to make consequential amendments. When pressed by the committee to say where the consequential amendments that we might want to make were, it was noticed that, in fact, we only needed this power for a very limited part of the Bill, so we had to fess up that that was the case and restrict the power. It would have been much better had we known that from the outset. We have been having those sorts of discussions with departments on individual projects, but also at any other opportunity we get. Whether it is our delegated powers training, the Bill training we do for Bill teams, or the training that the PBL secretariat or Bill managers do, there are lots of opportunities to reinforce that message during the process.

Lord Janvrin: You have mentioned that there is recognition that Henry VIII powers are very controversial, and I accept that. Given the controversy, there are occasions where Henry VIII powers are necessary. Could you explain to us where and in what circumstances the OPC advises that Henry VIII powers are justified, as opposed to merely being nice to have? In other words, how do you explain where they are justified? Could you tell us what kind of guidance you give on that specific point?

Elizabeth Gardiner: It will always be a case of looking at the individual project and every project is different. I will give you some examples. Let us say that you are setting up a very large new regime that is perhaps being refined constantly before it goes into Parliament, and expected to be further refined when it is in Parliament. A decision might be taken that this thing is going to be implemented in 18 months' time and that the work required to make the consequential amendments across the statute book would be better left until later, because we want to concentrate on

getting the detail about the main policy propositions into the Bill. In those circumstances, parliamentary counsel might be advising that it would be better to take a power to make those consequential amendments.

There is also a form-over-substance argument for Henry VIII powers. An example would be that you have a list of bodies in a provision and you need to be able to change that list going forward. It is not a good use of parliamentary time to come back with a new Bill every time you want to change the name of the body, because it has been changed in the real world, or you want to add a new body. If you have made the case to Parliament that you should be able to change that legislation, the best way, in my view, of making the change to the list is to go in and amend the list, because then the reader who is looking at it on the Government's website for the legislation sees the updated legislation all in one place. It goes back to what the Chairman was talking about in terms of your own guidance being in several different places. The alternative is that you have a list on the face of the Bill and then you confer a power on a Minister, which is not a Henry VIII power, to go off and add to that list in a set of regulations. Then, the reader has to find both the regulations and the Bill to understand the full picture. In those circumstances, I think a Henry VIII power is fully justified.

Similarly, if you have a level of fine or another financial limit that you want to uprate over time, it seems much more helpful for the reader to be able to read the actual amount that is now the law in the primary legislation. Rather than having to go off and look at regulations, it would be better for that amount to be in the Bill. The danger, from my point of view, is that departments just see Henry VIII powers as bad and try to avoid them when, in fact, sometimes, those Henry VIII powers would produce the best-quality product for the end reader, which is what we are trying to achieve. It is a balance.

Lord Janvrin: As you have given these two examples where there is justification, whether it is a question of timing or, as you say, form over substance, could you consider whether there should be more guidance around those specific examples, if only to try to limit the unacceptable use of Henry VIII powers? Is there not a case for trying to spell out the good and the bad, if you like, in this?

Elizabeth Gardiner: Yes, I take that point. It is always about looking at it in the context of any particular legislation. I agree that setting out examples such as that helps people understand where the boundaries lie and where concerns are likely to be, and to focus on those areas. I will take that away. Thank you.

The Chair: I have a final point on Henry VIII clauses. Three years ago, when we dealt with the EU withdrawal Bill, rightly, it had Henry VIII clauses and we understood the necessity for them. We may have quibbled a bit about the extent of them or a lack of sunset clause provisions, but they were necessary. Those of who have been on the committee over the last three years seem to think that departments then had this lightbulb moment: "What a jolly good ruse. We can tack Henry

VIII clauses on to every Bill willy-nilly and we won't have to come back to Parliament again for primary legislation". That is our perception. Our statistics may prove it right or wrong in due course. Is it your perception as well that departments are tacking or are trying to tack on Henry VIII clauses a bit willy-nilly?

Elizabeth Gardiner: I do not think that is my perception, no. Since that period, we have also had a general election and a Government with a new agenda. At the beginning of a new Parliament, if we look back, there is often a period where legislation has to be prepared quickly and that can drive a certain sort of legislation. Departments are quite well aware of the likely response to lots of delegated powers.

Looking at the Childcare Bill, for example, if we thought that that was a quick way to get something easily through Parliament, we were soon disabused of that. The whole thing ground to a halt for months while the policy caught up with the legislation and was put into the Bill. We did not save any time by putting it in early. That is a salutary lesson for us and one that we can repeat to departments when similar proposals might be thought a way forward - they do not necessarily save time in the long run.

The Chair: I can understand that, immediately after an election, the Government have to move quickly on legislation. Now that we have had the Government in post for 18 months, we will have a lot of Bills without unnecessary panic Henry VIII measures, I assume.

Q8 **Lord Goddard of Stockport:** Good morning, Elizabeth. We fall from Henry VIII into skeleton Bills, which is quite apt. We had a long discussion with the Lord President last week and, eventually, he told us that the Childcare Bill was too skeletal but the Cities and Local Government Devolution Bill was an appropriate skeleton Bill. We could not tease out of him, though, at the end of the day, what skeleton Bills are justified. We understand pandemics and Brexit but when those national emergencies are not there, what is the justification for skeleton Bills?

Elizabeth Gardiner: At the end of the day, the Government put forward their legislation and have to justify it to Parliament. The Leader might say that about the Childcare Bill; I am not sure I am in a position to say that. The Cities Bill is quite a good illustration of when a framework Bill is probably the only possible solution. In that case, if these local devolution settlements are bottom-up promoted settlements at a local level, each one is quite distinct and needs quite detailed specific provision. It is not possible to legislate for all that in advance and put a straitjacket on it, because different areas decide to devolve powers and join up in different ways.

The legislation provided the framework under which each of those settlements could be given legislative effect as and when they came to life. Short of coming back to Parliament every time there were such local arrangements and passing a separate Bill, there was no alternative

approach. That would be an example in any time when something that is more of a framework is appropriate.

Lord Goddard of Stockport: On that particular point, I was part of the first ever combined authority in Greater Manchester and the first ever city deal. The deal we asked for, broadly, we got from government. I do not see the difference between the Manchester deal, for instance, and other regions' deals. There may be some refinement there, but the principles of devolution for health, transport and those budgets are broadly similar, and quite a number of those devolution regions have done the business already. Therefore, I find it difficult to justify using of a skeleton Bill for that.

Elizabeth Gardiner: You are probably far more expert in this area than I am. As I understood it, in some areas, the things that were the subject of the deal were different. Some areas, for example, might include health and others might not. The nature and level of the local authorities that were joining up might be different in different areas. That sort of detail can be dealt with in a secondary legislation instrument, where it is not possible to impose one-size-fits-all from the top, which is my understanding of why the legislation is crafted like that.

Sometimes, when things play out, you realise in retrospect that you could have had some generic solution, but, possibly, at the point at which you are legislating, you expect things to be more different such that you think that secondary legislation is the better vehicle. I am not really close enough to the detail to comment on that.

Lord Goddard of Stockport: Your introduction this morning was quite informative. You said that one of your priorities at the OPC is to work with colleagues within and without government to promote good law. One of the principles of good law is accessibility. Is that principle not in conflict with skeleton legislation because there is no accessibility there?

Elizabeth Gardiner: Yes, it may be in conflict. Obviously, the secondary legislation itself needs to be well drafted and accessible to the reader, but that is definitely one of the concerns about skeletal Bills. It is always a balancing act between the various things that are going on. Whether it is about timing, future unknown policy issues or waiting for some consultation to close, whatever it is, there will be a whole load of things that need to be balanced. Unfortunately, it is a counsel of perfection to think that we can always produce the clearest or most accessible legislation possible because there may be other factors pulling in other directions.

It is hard to set out in advance when the Government might think that they are going to use a skeletal framework Bill, but I would say that every other possibility will have been explored before we ever get to that stage and every attempt made to avoid it. If, at the end of the day, the Government decide that is how they want to proceed, it is for them to justify that approach when they bring it before Parliament. It will not have been the instrument of choice for anybody in the process and

everything will have been done to try to make sure that the Bill is a fuller story when it comes before Parliament.

The Chair: We have a couple of questions left—three at most—but we have already taken over an hour of your time. This has been an exceptionally good evidence session. I understand if you need to go but if you have another 10 or 12 minutes to spare, we will crack on. Thank you so much.

Q9 **Lord Rowlands:** Good morning. I was fascinated, in the Lord President's evidence, by the claims and observations he was making upon the impact that repealing Section 2(2) of the European Communities Act would have on the whole process of parliamentary scrutiny. He is quoted as saying, "Even our most skeletal Bills will not be as skeletal as the Section 2(2) power was." He went on to say that there would be now a "fundamental improvement in parliamentary scrutiny" as a result of the repeal. I wonder if you could elaborate on the ways in which this is going to happen as a result of the repeal. What impact is this going to have on the volume, nature and, indeed, the handling of secondary legislation?

Elizabeth Gardiner: Section 2(2) was obviously an extremely broad power, enabling a Minister to enact regulations to give effect to the content of a European legislative instrument. The instrument had gone through the legislation process at the European level and then the Minister was given power to give effect to that, on the basis that, really, Parliament had no choice because it had voted to join the European Union 40 years ago. Therefore, this is what flowed from that. Great swathes of legislation were bought into the domestic statute book through these Section 2(2) powers.

Obviously, we do not have those powers any more because we are not taking that legislation from the European level in that way. Now, if we want to legislate in those areas, we are going to have to enact new legislation. The Agriculture Bill would be a good example of that where the regime has been set out in primary legislation and, in doing that, inevitably, decisions have to be made about what new powers to make secondary legislation that regime might include.

We are starting from scratch and saying, "We have a new regime, so how much can we set out in the primary and where do we need powers or flexibility going forward?" Parliament then gets the ability to scrutinise that choice. We will not be having something like a Section 2(2) power, which, effectively, pointed to a regime at another level, as that has gone away. Inevitably, there will be more of the regime brought before Parliament, whether as primary legislation or powers to make secondary legislation.

As to what impact it will have on volume, we are already seeing that the Government have an appetite to bring in new regimes to replace or supplement things that were previously implemented through Section 2(2) regulations. I think there will be areas where the domestic Parliament has really not legislated at the primary legislation level much

over the last 40 years because it has been governed by the EU, but it will legislate on them in future. Agriculture would be a good example of that. On each of those, it will be for Parliament to decide whether the Government have got the breakdown between primary and secondary legislation right in what they are proposing.

As to parliamentary scrutiny, I feel that is not for me. How Parliament now chooses to scrutinise primary and secondary legislation is very much a matter for it. I would say that we are great fans of scrutiny. We might give the impression otherwise. I would not wish that to be the committee's view. In fact, parliamentary counsel very much appreciate when their legislation is carefully scrutinised. It very often improves the legislation and throws up issues that maybe we have not properly considered or that might be dealt with in a different way. We would not shy away from increased scrutiny. In fact, we would appreciate it as a contributor to the quality of our output.

Lord Rowlands: I appreciate that this might not be for you personally, but may I also remind you of what the Lord President went on to say and a further claim he made? He said that SIs can now be more routinely challenged as "I think that both Houses are beginning to recognise that their scrutiny … really matters, because the rejection of a piece of secondary legislation affects domestic law." You have to go back in the mists of parliamentary time to find when last there was a rejection of an SI; perhaps you might even know when it was. After this legislation, post Brexit and everything else, SIs are still unamendable. Is this a pointer, in some ways, to the fact that we might start to think that we could amend these SIs, because they are in effect legislation?

Elizabeth Gardiner: I do not want to speak for the Lord President.

Lord Rowlands: No, but as a parliamentary counsel.

Elizabeth Gardiner: The current procedures do not allow them to be amended. They allow them to be scrutinised. My observation is that not a great deal of scrutiny goes on, particularly in the House of Commons, on many statutory instruments. That is where we are starting from and maybe we will see that changed.

Lord Rowlands: Am I right in saying that there has been almost no rejection of SIs down through the ages? I cannot recall one and I have been around since 1966.

Elizabeth Gardiner: There has been a very small number, but you would also find ones that were withdrawn over the years because of the reaction that they had before they ever got to the point of being approved. It is not just influenced through rejection.

Lord Rowlands: The case for them being unamendable is the argument that legislation is an executive act, as I understand it. Frankly, every time I now look at a major SI, which often has policy in it, it looks and smells like a piece of legislation. Would you admit that there is possibly a case

for making them amendable?

Elizabeth Gardiner: They are exercised under powers provided by Parliament to the Executive, so the Executive are doing only what Parliament has authorised them to do. If you start making them amendable, you start introducing the whole process of primary legislation on those secondary instruments. That seems to run counter to the fact that Parliament has previously decided that the Minister should have the discretion to exercise the power. It seems to me that there is a contradiction there and that, if we went down that road, it would have very serious implications for the process and delivery of legislation, because we would get sucked into what are effectively primary legislative procedures for secondary legislation.

Q10 **The Chair:** There is an interesting philosophical debate to be had there and it is something that Parliament will continue to address over the next few years. I can understand it is not for the OPC to rule on at the present moment. Elizabeth, in evidence to the SLSC, you said, "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."

While this is theoretically true, it seems to imply that the balance between the Executive and Parliament is principally the responsibility of Parliament rather than the Executive. How realistic is that since, in most circumstances, Governments will almost always have a majority? Certainly for the whole of this Parliament, it is likely that the Government will continue with their large majority and the Executive will get their way, irrespective of what Parliament wants.

Elizabeth Gardiner: That is the constitutional position. The Government come to Parliament and ask for powers to be delegated to them, and it is Parliament's role to decide whether it is willing to delegate those powers. That is not to say that there is not a whole process within government, and an understanding of what makes good legislation and of the concerns over delegation of powers. The Government want their legislation to run smoothly through Parliament and a major consideration when bringing legislation before Parliament is how it will handle the Bill there. That has a significant impact on how the legislation is drafted.

All of that goes into the mix when deciding what is going to be put forward. At the end of the day, it is for the Government to put forward their justification for what they are asking Parliament to approve and it is Parliament's decision as to whether it grants that.

The Chair: Thank you very much. Again, I get the impression that part of the consideration, not necessarily by you but by PBL, is, "Can we have this power and get it through Parliament or will the Lords and others object to it?" rather than, "Should we have this power? Is this power morally and democratically right to have?" That seems to be less

important than this balance of, "Can we get away with it or will the Lords object?".

Elizabeth Gardiner: We might see the two as aligned, in that the things that their Lordships object to align with the things that possibly we should not be proposing. I do not think that we would see them as two separate things.

The Chair: Thank you very much. I rather like that last answer. We may quote it against you in due course.

Lord Haselhurst: I would add that we should bear in mind that there has been a centuries-long tension between Parliament and the Executive. It is encouraging to know that the Government and the experts may be prepared to listen more closely to what our committee says in examining the extent of delegated power.

The Chair: Thank you, Lord Haselhurst. Elizabeth, thank you so much for giving us an hour and a quarter of your time this morning, which is much more time than we originally asked for. We are very grateful for that. We have had a very good exchange. It is trite to say a full and frank exchange, but it has been. It has been very worth while and will help guide and influence our report.

I would take you up on the point that, many years ago, when I was on the JCSI, there was a training course for departmental lawyers. We spoke at it and they apparently found it quite helpful to see where the JCSI was coming from. I am not advancing myself to talk at your training courses, but perhaps some of our officials or lawyers could because, rather than you trying to tell them what you think the Delegated Powers Committee wants, they may as well hear it from the horse's mouth itself. You may find that beneficial. Thank you once again for your time this morning. I am very grateful. This session will now conclude.