OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 14 December 2021

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 14 December 2021

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DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting 2021, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Craig Hoy (South Scotland) (Con)
*Graham Simpson (Central Scotland) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sir Jonathan Jones QC (Linklaters LLP)
Professor Stephen Tierney (University of Edinburgh)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

Virtual Meeting

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 14 December 2021

[The Convener opened the meeting at 10:08]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 14th meeting in session 6 of the Delegated Powers and Law Reform Committee. The meeting is taking place virtually, following the guidance that the Presiding Officer issued last week to limit the number of people attending Holyrood and was agreed by the Scottish Parliamentary Corporate Body and the Parliamentary Bureau. The intention is to help the Parliament play its part in limiting transmission of the virus.

The first item of business is to decide whether to take items 7, 8, 9 and 10 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Made Affirmative Procedure Inquiry

10:09

The Convener: Item 2 is an evidence session for the committee's inquiry into use of the made affirmative procedure during the coronavirus pandemic. This is the second of two evidence sessions planned for this month, before the committee hears from the Scottish Government in January.

I welcome to the meeting Professor Stephen Tierney, who is professor of constitutional theory at the University of Edinburgh's school of law, and Sir Jonathan Jones QC, who is a former permanent secretary of the United Kingdom Government Legal Department and is now at Linklaters LLP. We are grateful that you are both able to attend virtually. I remind all attendees not to worry about turning on their microphones during the meeting, as they are controlled by our broadcasting staff.

I will start the questioning. Before we move to specific questions on the use of the made affirmative procedure, do the witnesses have any initial observations on the use of the procedure during the pandemic?

Sir Jonathan Jones QC (Linklaters LLP): Thank you for inviting me. I do not have much to say by way of introduction. First, as you mentioned, I was Treasury solicitor and permanent secretary of the UK Government Legal Department until last year, so I was in post at the start of the coronavirus pandemic and was involved in the early stages of the legal response to it.

Since leaving Government service later last year, I have continued to follow the issue very closely, in particular the process for legislating for Covid and the extent of parliamentary scrutiny—or lack of it. I have given a lecture about that, among other things, to the Statute Law Society, and I am a member of the advisory panel for the Hansard Society's delegated legislation review, which you heard about from Dr Ruth Fox.

I am on record as expressing some concerns about aspects of the way that the UK Government, at any rate, has legislated for Covid, including the lack of parliamentary scrutiny and the speed with which measures have been introduced. I should make clear that my experience is largely confined to the UK Government and the Westminster Parliament.

I will leave it there for now, and we can explore all that in questioning.

Professor Stephen Tierney (University of Edinburgh): It is obvious that we are in unprecedented times and that Governments are under great strain, but with my other hat on as legal adviser to the House of Lords Constitution Committee, I am aware that the use of the made affirmative procedure in London is increasing, which is a growing issue for all Governments in the United Kingdom. There is clearly an issue of principle in relation to the made affirmative measures. We appreciate that these are challenging times, but the idea that law is made initially without parliamentary scrutiny should cause pause, even in difficult times.

I advise the Westminster Parliament, but there is a particular issue for the Scottish Parliament, and for any Parliament in a multilevel system. Often, the protagonist can appear to be the central level of Government—there are good reasons for that, as a devolved legislature perhaps looks for more powers or resists interference in its competence. However, it is important that the Parliament conducts this inquiry and does not take its eye off the ball. An important task for the Scottish Parliament is controlling the devolved Government in the exercise of the powers that it has.

My final general observation is that, from my work in scrutinising legislation over many years, I have come to realise that all Governments like powers: they like to get more of them; they are very clever at expanding the powers that they have; and they are very reluctant to relinquish powers once they get them. When drafting primary legislation that gives those powers, they also like to subject them to minimum levels of scrutiny.

It seems to me that the job of the Scottish Parliament, as it is for any Parliament, is threefold: first, to be rigorous—indeed, to be reluctant in conceding those powers in the first place; secondly, to check that the powers are framed very closely and that their exercise is tightly limited; and, finally, to ensure that mechanisms for scrutiny are very robust. That is particularly the case for the made affirmative procedure. Those are the three guiding principles that I will use for the rest of my evidence.

The Convener: I have looked through the meeting papers and the *Official Report* of our meeting on Tuesday 7 December and have considered the experience that we have all had over the past nearly 20 months.

Would it be fair to say that experience has shown that Governments cannot legislate for every eventuality, whether in primary or secondary legislation? There have been a number of complications and challenges for parliamentarians when we have attempted to undertake our work.

10:15

Professor Tierney: Yes, there is no doubt about that.

The points that I made in my opening remarks are ones of general principle. Parliaments often have to make themselves unpopular. Particularly in these difficult times, the pressure to concede powers when urgency is claimed is pressing.

There is no doubt that the Scottish Government, like the UK Government and Governments throughout the world, is under intense pressure and cannot foresee every eventuality. However, that makes it all the more important that, when primary legislation is drafted, the ways that the powers are to be made and the limits on their content should be set down clearly. The real problems are not simply with the made affirmative procedure downstream but with the fact that the primary legislation that created the powers was itself drafted and passed very quickly without adequate scrutiny.

Sir Jonathan Jones: I agree. Governments necessarily had to respond at high speed to a genuine emergency and do unprecedented things in a hurry with no opportunity for prior scrutiny. That might have been justified at some stages of the pandemic, such as right at the beginning, when everybody was working out what to do to respond to the emergency, but the risk is that it becomes a habit because it is convenient for ministers to be able to legislate in that way.

We continue to see that practice, certainly at Westminster. We are 18 months or so into the pandemic and admittedly still face huge challenges. Nonetheless, the default position for the legislative response has continued to be to legislate at speed, use the made affirmative procedure or its equivalents and let any scrutiny that happens—if there is any at all—happen only after the event. That becomes a habit, and I have suggested that it is a bad one.

It might be necessary to act in that way in real emergency circumstances but it should not become the default way of legislating when there is, or should be, more time and space to consider the right policy and legal response. My fear is that it has become a habit.

The Convener: I will come back on that point, Sir Jonathan. There are three devolved Parliaments in the UK as well as the UK Parliament. I do not have a specific example, but if the UK Government brought in a made affirmative instrument to change travel restrictions to make things harder or easier, but the devolved Administrations decided not to and to keep separate arrangements, I am sure that there would be political discourse challenging the devolved Administrations on why they were not following

suit and keeping the arrangements as tightly drawn as possible to enable a four-nations approach on the issue. Do you agree?

Sir Jonathan Jones: I probably do. It is an example of a wider point. Nobody claims that it is easy to decide on the right legal or policy response in an emergency and a challenging picture that continues to unfold. As we have said, sometimes it might be necessary to act very quickly.

However, on the whole, you will end up with better policy, you will be more likely to get consensus across the different countries of the UK—that is your point, Mr McMillan—and you will be more likely to get better buy-in from businesses and other organisations that are affected by the law if you take a bit of time to get it right and to consult, and if the relevant Administrations and their Parliaments have an opportunity to consider and debate the policy.

It is easy to say that; I accept that, in practice, it is difficult to do at the height of an emergency. However, it is true that you are more likely to get a consistent, thought-through and understood policy that people buy into and will go along with if you take a bit of time to get it right. Where that does not happen, you will get disagreement, inconsistency, unintended gaps in the law and so on. You will certainly get the position in which parliamentarians, the public, businesses and the people whose job it is to enforce the law will not really understand the law and will not necessarily buy into it. That leads to problems with comprehension and enforcement, which we might come on to discuss.

The Convener: Thank you. I will bring in Craig Hoy.

Craig Hoy (South Scotland) (Con): Thank you, and good morning, Sir Jonathan and Professor Tierney.

Last week, the committee heard from Dr Ruth Fox, who talked about the impact of repeated urgent delegated legislation on the clarity and therefore the accessibility of the law. She said:

> "One problem with the made affirmative procedure is that, due to the pressure of urgency, legislation is pushed through quickly; therefore, the scrutiny and the technical legal checks ... are missing. Therefore, the drafting problems get through, and you have to either amend the regulations, which adds to their complexity, or revoke them."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 7 December 2021; c 10.]

Sir Jonathan, in light of those concerns and the potential risks of using the made affirmative procedure, do you think that, when it comes to the technical drafting of instruments, there is a tension between drafting at speed and the clarity of the instrument that is produced? In your experience, what can be done to mitigate the risks that are associated with drafting potentially quite complex legislation at speed?

Sir Jonathan Jones: There is a danger of everyone agreeing with everyone else when it comes to analysing the problem. The Hansard Society has analysed in great detail the patterns around the use of different procedures. I agree that one of the problems with legislating at speed is that the drafting will contain mistakes or will not be as clear as it would have been had more time been allowed.

Whenever I talk about this, I am careful to express a lot of sympathy with the drafters, because I used to be a drafter and to be responsible for drafters. It is a tough job. To be asked to draft complex legislation when a policy is still being developed or finalised days or hours before the changes are due to come into force is a tough call for any drafter.

Over time, what we have seen is multiple layers of amendment. A complicated instrument gets amended two, three or four times, and inevitably the instrument becomes more complex and difficult to understand and there is the risk that errors creep in, as we said and as Dr Fox said. There are plenty of examples of that; the Hansard Society has identified many examples of amending instruments needing to be brought forward very quickly. None of that is good for the law's comprehensibility and clarity or for its enforcement.

It is easy to identify the problem. It is inevitable that it will happen when policy responses are finalised very quickly and law has to be drafted very quickly.

It continues to happen. The most recent regulations at Westminster, which deal with the so-called Covid pass, were made and laid yesterday and come into force tomorrow. The latest regulations on face coverings were laid at 5 pm on 9 December and came into force the following day. I have talked about the risk of forming bad habits, and a pattern of speed continues to be evident.

It is easy to identify the problem, but what is the solution? The solution has to be to allow more time, where possible, for development and testing of a policy, and for the drafting of legislation and—ideally—for its scrutiny by the relevant Parliaments.

I accept that there is a difficult question of judgment as to how long is long enough. In balancing the need for more time with the need to legislate quickly, the question is how quickly legislation is needed. Not everything is an absolute emergency. Nonetheless, we are balancing the need to legislate relatively quickly

with the need to get the legislation right in both policy and drafting terms. Easy though it is to say this, I feel that we have too often got the balance wrong. In recent times, over the course of the pandemic, we have prioritised, and we are continuing to prioritise, extreme urgency over the quality and comprehensibility of legislation.

Craig Hoy: Should it be accepted that, on some occasions, the urgency of the situation and the need to have legislation in place should take precedence over clarity? The legislation can be revised later on. Can you think of any recent examples where that has been the case, and where it has been better to have an unclear law than no law at all?

Sir Jonathan Jones: Those are difficult policy judgments, and it is not for me to second guess the policy. To go right back to the beginning of the pandemic, the introduction of a very tight lockdown, which is the highest level of emergency that one can imagine, needs to be done pretty quickly, possibly within hours, or within a day. I accept that, at the height of an emergency, that may be the case, as it possibly was then.

Ironically, it is probably true to say that it is easier to legislate for a lockdown with very tight controls and only minimal exceptions, by drafting very tight and clear laws, than it is to legislate—as we saw later in the pandemic—for partial closures and multiple exceptions. Given that the latter involves making distinctions between hair salons and chiropodists and so on, there are multiple policy judgments to be made. I would suggest that, when we enter that phase of the pandemic, it is probably not quite so urgent to legislate today or tomorrow, and we should take a bit longer to get it right.

Craig Hoy: I appreciate that.

Professor Tierney, we heard last week from Morag Ross QC, who expressed fears about the repeated use of delegated legislation and the accessibility of the law. She said:

> "The more instruments are made and the more they add to, qualify, revoke in whole or in part or update existing regulations, the more complex the picture becomes."

She went on to say:

> "Repeated cycles of changing this or that are not conducive to accessibility."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 7 December 2021; c 9.]

In the light of the fact that, when delegated legislation is made urgently, it comes into force before being considered by Parliament, does that lead to challenges involving the accessibility of the law? What specific concerns do you have in that regard?

Professor Tierney: I think that it does lead to challenges. However, the made affirmative procedure can, to some extent, become a bit of a straw man. As Sir Jonathan Jones elucidated earlier, the issue is much broader. It is really about executive power constantly expanding through the use of wider delegated powers; the increased use of Henry VIII powers, or powers to amend primary legislation; and the use, which we are now seeing, of what we could call super-Henry VIII powers, which involve the power to amend the parent statute itself. We also see the use of powers through regulation to create guidance, rather than regulations themselves, which are very difficult to enforce legally.

The real problem with the made affirmative procedure is one of principle, in that the law is being made with no scrutiny. At least it is subject to affirmative procedure somewhere down the line, so Parliament has to actively engage with it within a certain time period; the problem with a lot of the other powers is that they are made through negative procedure or guidance, which are often not subject to any parliamentary scrutiny after the event.

10:30

When the Constitution Committee in the House of Lords conducted a long inquiry into the legislative process, we talked a lot about the need for proper policy making, which Sir Jonathan Jones touched on, and the need for pre-legislative scrutiny in the making of primary legislation, when the powers are first created. Without that, the problems emerge.

I do not want to take too long, but I will give one example. I am looking at the Nationality and Borders Bill at the moment. Immigration law in the United Kingdom is a minefield of complexity. The problem is lack of accessibility and an incomprehensible combination of primary and secondary legislation. Immigration law often affects the most vulnerable people in society, who may not have English as a first language. Legal practitioners tear their hair out trying to make sense of it. Most of it was made with no urgency whatever, but it is very difficult for consumers to use.

The made affirmative procedure is certainly an issue, and the speed, if not the urgency, with which a lot of the powers are made is a problem. Parliament needs to have a wider purview of the general problem, which is the habit that Sir Jonathan talked about of Governments throughout the UK acting in that way—very quickly. Often, it is because they have not got their act together to draft things properly on time and they use urgency as an excuse. It is often late drafting rather than urgency that is the real issue.

Craig Hoy: There is probably not a formula that can be applied to this, but would it be your general impression that the more a law is amended, the less accessible and understandable it is?

Professor Tierney: That is certainly the case. A lawyer should be able to go into a current statute and find the amendments, and technology has made it much easier to identify the recent revisions of a statute, but another risk arises when they have to look at statutory instruments as well. That can be problematic. A big problem is that a number of different parent statutes are now being used to make the instruments. The Coronavirus Act 2020 is being used, but the Scottish coronavirus acts are also being used, as well as other public health-related statutes. The danger is that there is inconsistency among the different regulations, and a lack of clarity can creep in simply because people have to look across a number of different instruments to find out what the law is. It becomes entirely byzantine, adding layer upon layer of complexity. Coronavirus and Brexit have both brought to a head a much longer-term problem in the different Parliaments that is to do with the growing complexity of law.

Sir Jonathan Jones: Boringly, I broadly agree with what Professor Tierney said. For a start, complex policy will make complex law. Only so much of the responsibility rests with the drafters. At various stages of the pandemic, we have seen very complex policies. In England, we have had tiers, with different rules applying to different tiers and exception upon exception, all of which were probably for understandable policy reasons. However, as the law has got more complicated, we have seen different judgments as to what types of organisation need to apply what rules, who is exempt from them and so.

That is complex policy and it produces complex law. It is also capable of producing controversial and sometimes rather inconsistent law. I jokingly referred to the rules on face coverings being different for chiropodists as compared with hair salons. There may be good reasons for that—it may be a bad example—but you get the point. As policy gets complex and difficult judgments are being made about who is in and who is out, that inevitably leads to complex drafting—there have to be exceptions, schedules and so on, which is what we have ended up with. The additional problem, which we keep coming back to, is that when that is produced at speed, there is a greater risk of drafting errors slipping in or of the legislation being more complicated and more difficult to follow, which we have also seen.

The final point is that, as we said, where you have multiple layers of instruments that amend one another, it can be very difficult to follow the cumulative effect of the amendments. One solution that I and others have suggested—it is not a new idea—is that, when you are amending an instrument, you should at the same time produce a consolidated amended version of the whole instrument so that people can see what the law as amended now looks like in one place.

That means extra work, and there might be good administrative reasons not to do it, but there is no doubt that an approach of that kind will make it easier at least to follow the effect of cumulative repeated amendment. The gov.uk website does that, in time; it can happen, and it helps. However, if drafters are working at speed, it can take a while for that to be done. The other day, I was looking at the amendments to the face coverings regulations, and all that we had to go on was a very complicated instrument that amended an instrument that had been made a few days earlier and so on. Such an approach makes the law difficult to follow.

Craig Hoy: Thank you, Sir Jonathan. You have made a complex situation very clear.

Graham Simpson (Central Scotland) (Con): It is good to see you, Professor Tierney and Sir Jonathan.

The figures highlight the scale of the issue with which we are dealing. Between 2011 and 2019, there were nine made affirmative instruments in Scotland; between 20 March 2020 and 2 December 2021, there were 132. The use of the procedure has exploded. The vast majority of those instruments were Covid related.

You both talked about the complexity of the law. I agree that the law becomes extremely difficult for people to follow unless it is consolidated, which it generally is not; it is certainly not consolidated here, and I suspect that it is not consolidated in Westminster either. I agree with Sir Jonathan that we should move in the direction of consolidation. The law needs to be understandable. It is okay for you guys: you are experts who can probably work things out, but most of us are not in that position. The law needs to be easily understood, particularly when it is made at speed and we are expecting the public and businesses to know what is going on.

Sir Jonathan, I enjoyed reading your comments to the Statute Law Society on the rule of law and subordinate legislation. There was a good deal of humour in them. You seemed to accept many of the reservations that some of us have about the instruments that we are talking about, and you called for

"a reset of our use of subordinate legislation"—

as you have done today. However, on whether that will happen, you rather gloomily concluded:

"I won't hold my breath."

I have to agree with you on that. My question for you and Professor Tierney is this: if you give Government an inch, will it take a mile?

Sir Jonathan Jones: Thank you for your remarks about what I said to the Statute Law Society.

I am just one voice, but I am not the only voice. You heard from the Hansard Society about the review that it established. We have seen the beginnings of a debate. You are obviously having this debate in Scotland, and it is also happening in London—you have seen the reports of the House of Lords Secondary Legislation Scrutiny Committee.

The exercise that the Hansard Society is leading has input from members of both Houses of Parliament. Interestingly, those people come from all parts of the policy debate on Covid. Some think that the Government has gone too far and others think that it has not gone far enough. The one thing that they agree on is that there needs to be a proper debate and better scrutiny. We are seeing what I think is at least the beginning of a healthy conversation about it.

As I have said, the feeling is probably that the Government has gone too far and has taken a mile, and that all the Governments have done that. Both Covid and Brexit, for good or ill, have placed exceptional demands on Governments, and that has led them to do exceptional things at exceptional speed. That is understandable. It is also understandable from a political and human view. When it is easier for an Administration to legislate in that way, why would it not do so? That is what has happened. That comes back to my point about the convenience of bad habits. All of that is understandable.

Change will need a whole combination of things: political leadership, behavioural change and members of all the Parliaments—if I can put it in this way without being patronising—asserting themselves, as parliamentarians are starting to do and as scrutiny committees are doing. It will take all those things.

I am not saying that that will be easy—because, in the end, we are up against Government. Certainly, the Westminster Government has a strong majority. It may now be under challenge on some of those things. At least there is a debate, whatever people might think about the merits of the measures on Covid. That is a good thing.

It will take all those things to happen for the situation to change. Some of them are starting to happen. That is why I think that the debate is a good one and why I welcome this session, what the Lords committees have done and what the Hansard Society is doing.

Nobody is saying that it is easy or that there is a quick fix; it will require the kind of debate and process that are in hand.

Graham Simpson: Professor Tierney, I suspect that you would agree with that, so I will ask you a slightly different question about something that both you and Sir Jonathan have touched on.

Do you think that, right now, we are in an emergency whereby we have to legislate at such speed? I will give an example. In the Scottish Parliament, we have legislation to deal with vaccination passports. This committee pushed back on that, but eventually, it was put through under the made affirmative procedure. Westminster is at least getting a vote on the issue—we did not have that luxury. The legislation was pushed through at speed, yet it had been planned for weeks. Are we in an emergency of the sort that was clear at the start of the pandemic, which might justify the use of the made affirmative procedure?

Professor Tierney: I am sorry that I did not get to answer the point about the Government being given an inch and taking a mile.

Graham Simpson: I am not stopping you—go for it.

Professor Tierney: I was going to say that it does not just take a mile; it defines a mile in regulations and then sets up a public body to change it into a kilometre. That is what Governments do.

To make a serious point, when any Parliament gives such powers, it has to be remembered that they are being given to very clever civil servants, who then interpret them very broadly. Quite often, it was they who drafted them in the first place, so they know exactly what they intend to do with them.

To respond to your question, Parliaments have to be very robust in such situations. It is very easy to make a claim of an emergency or a natural disaster. There was a famous case during the second world war in which the Court of Appeal said:

> "amid the clash of arms, the laws are not silent."

Parliament should remember that, amid any pandemic or urgent process such as Brexit, Parliaments cannot remain silent. They continue to have a job to do to scrutinise the Executive. In fact, that job is more important during such situations, because the powers that are being given are more significant than in normal times.

10:45

Two questions arise as to urgency. First, what is an urgent or emergency situation? We have

tended to leave that to the Executive. Article 15 of the European convention on human rights talks about emergencies. In the post-September 11 situation, it was left to the UK Government to define what an emergency was and that was challenged robustly. Parliaments should be strong in asking whether a situation really is urgent or whether it is urgent because the Government has taken so long to draft measures or has sat on the policy for a long time. Once Governments know that they can legislate in that way, what is to stop them introducing measures late and claiming that it is an emergency?

The second question is who defines what an emergency is. The issue is not just the objective test of what an emergency is but who gets to define it. The Coronavirus Act 2020 set out in very vague terms what the test was for the use of the powers. Parliaments need to pin down much more rigorously what an urgent situation is.

I am sure that you will come on to other measures, such as sunset clauses and the areas that are expressly excluded from the use of the powers. There is a raft of things that Parliaments can do to curtail the use of the powers, but it is important that they develop codes of practice for that at this stage.

Graham Simpson: That is useful.

I will now ask you about the possibility of introducing sunset provisions. The convener might want to explore later the question about whether situations are urgent, so I will leave it to him to ask about that.

Would it be good to introduce sunset clauses? Do you have any other ideas that might improve transparency?

Professor Tierney: Sunset clauses can serve two purposes. You can have in the primary legislation a sunset clause that relates to the use of the powers. We see that in the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020—so much so that the Scottish Parliament has recently passed another primary extension act. That is all good.

The fact that the powers under the primary legislation run out is important. You have to be careful of extensions. If you put in any room for extension it will be used—you see that in the Brexit legislation as well. When you put in an extension power, you might as well say that the sunset clause is the end of that extension power, because it will almost certainly be used.

The second way in which a sunset power can be used is in relation to the instruments themselves after they are made. That is an important consideration. It might also deal with the complexity that we are talking about. If you really need a made affirmative measure, why not bind it in time to run out at a certain point, so that not only the power but the instrument that has been made runs out? I see no reason not to include that in legislation.

Do not allow those powers to be reused. If a situation is so urgent that the made affirmative procedure has to be used on the first occasion that a power is used, there is absolutely no excuse to use the same procedure again 40 days or six months down the line.

Those three qualifications would help.

Graham Simpson: Would you specify a time period in sunset clauses or should it depend on the instrument?

Professor Tierney: There is the 40-day or 28-day period, depending on which Parliament we are talking about, in which a made affirmative instrument has to be approved. It would depend on the circumstances, but I might suggest a six-month period, not unlike the period that is put in on the use of the power itself.

Sir Jonathan Jones: I do not have much to add to that. Sunset clauses should certainly be part of the armoury by which we control the use of these extreme powers. We are talking about striking the right balance and ensuring that, in situations where there really is an emergency and ministers therefore need to act very quickly, there is some kind of proper scrutiny or a later opportunity for Parliament to revisit the issue. I think that sunset clauses achieve that.

Maybe we will come back to this but, on the question of who defines what an emergency is, I agree with Professor Tierney that that question arises first of all in relation to the enabling legislation. Secondly, assuming that, in the end, somebody has to be able to decide when something is an emergency and therefore when procedures are short-circuited, and that that will probably end up being the minister, you need to get the test as tight as you can. Therefore, as I think Dr Fox suggested to the committee, you should make provision requiring the minister in some way to explain the decision and to be held accountable for relying on that test.

As I say, we might come on to that issue, but those are all examples of ways in which you can balance very wide powers with some kind of constraint and accountability. Sunset clauses are definitely part of that.

Graham Simpson: Thank you. That takes us seamlessly back to the convener.

The Convener: Yes, it does. My question is on the matter of urgency, which Jonathan Jones has touched on and which Dr Fox commented on last week. My question is for both witnesses. Do you

have any recommendations on the definition of urgency or the mechanisms that should be put in place that Governments would have to follow before using the made affirmative procedure?

Sir Jonathan Jones: I do not have a draft sitting in front of me. Let us be honest: any definition will have to allow some kind of margin of interpretation and judgment for the person who makes the decision. However, no doubt there are ways in which one can confine the definition of emergency so that it hits the things that you are worried about. There are only so many ways that one can define a public health emergency.

The more important point is about how you hold the minister accountable for the judgment that he has made that there is indeed such an emergency. Much of that was touched on by Dr Fox at last week's meeting. It is about requiring a public explanation of the reasons, rather than just a statement that there is an emergency. Those reasons and the evidence should be set out, within reason. Even in conditions of real emergency, you could require the minister to make a statement in Parliament there and then. If ministers can give press conferences, they can go to Parliament. Even at that stage, there could be provision for a debate or questioning in which ministers can be held to account for the judgment that they have made, even if it cannot be overturned at that point.

Those are all salutary mechanisms that are about achieving balance. When you are giving very wide powers and potentially wide discretion to a minister to decide that something is an emergency, the least that you should require that minister to do is to come to the elected assembly and explain the reasons why they have reached the decision and to be held accountable for that. Some version of that could help to reset the balance.

The Convener: I will come back to that in a moment. Professor Tierney, do you want to add to that?

Professor Tierney: I agree that it is difficult to take the decision on what is an emergency or urgency away from the Government. Let us be clear that this is a very difficult issue. No one is suggesting any impropriety on the part of Governments in the response to the health crisis—everybody is trying to do their best, I am sure.

The issue is much more of a downstream one. We saw that with article 15 of the ECHR, which says that an emergency has to be

"threatening the life of the nation".

Governments use that provision—we accepted it in some of the anti-terrorism legislation. It is difficult to imagine that being second-guessed by a court, for example. I do not see any role for that.

The real issue is about what powers you are giving to Government in that situation and what it can do with the powers. The Government has to be accountable for that. You can restrict the Government by restricting the length of time for which it can use the powers. You can specifically exclude certain things and say that it cannot do them. For example, you could say that the Government cannot create criminal offences, deny people citizenship or fundamentally violate the European convention on human rights. You can also build in scrutiny after the event.

Those are the really important dimensions. It is not so much that there is an emergency; it is about the broader question of what powers you give to Government and how robust Parliament is in checking what the Government is doing with those powers.

The Convener: We have lost your sound, Professor Tierney.

Professor Tierney: Can you hear me now, convener?

The Convener: Yes.

Professor Tierney: Sorry—I think that I had finished. I was simply saying that the crucial thing is that the Parliament scrutinises what the Government is doing with those powers.

Another big issue—I come back to this point—is that we can take our eye off the ball in thinking about the made affirmative procedure. As a mark of principle, that procedure is problematic but, in many ways, Parliament has longer to scrutinise made affirmative instruments after the event than it often has to scrutinise the primary legislation that created the powers. Such legislation often passes through Parliament in a day or two.

That is where the really hard questions have to be asked. Parliament has to ask whether such legislation should pass so quickly, and whether whole acts should be brought back quickly for thorough post-legislative scrutiny. We should think about that with major pieces of legislation.

The Convener: We have lost sound again, Professor Tierney.

Professor Tierney: Sorry—I had finished there.

The Convener: Okay. Sir Jonathan—[*Interruption*.]

Sorry, Professor Tierney—I think that you are still talking, but no sound is coming through. Are you finished?

Professor Tierney: Sorry—I was not talking. I will remute myself.

The Convener: Okay—no problem.

Sir Jonathan, you spoke a moment ago about some things that could happen to try to provide more scrutiny. Graham Simpson gave the example of the Covid passport instrument. I am not sure whether you are aware of this but, prior to the final instrument coming to the Parliament, a statement was given in the chamber, and there were questions to the relevant minister. The Minister for Parliamentary Business also came before our committee and took questions from us.

There was some pre-scrutiny in that instance. I accept that there was not so much scrutiny of the instrument itself, but there were opportunities for dialogue and scrutiny with the relevant ministers. Clearly, colleagues might not have been happy with some of the responses from the minister, but that happens in every Parliament. However, that approach has not been taken with every made affirmative instrument that has come to the Parliament. I cannot comment about what happens elsewhere. I wanted to make you aware of the actions that took place, because that instrument clearly had a lot more public and political interest to it than many of the other made affirmatives that have come into the committee and the Parliament.

I have a question for both Professor Tierney and Sir Jonathan on the issue of legislation and the legal requirement to provide evidence of urgency. From what you have both said, it is clear that more information should be presented. Should that requirement be put on a legal footing? If that is the case, do you have any examples of existing legislation that could help with the situation that we currently face? Clearly, Covid is not going away any time soon and we will be living with it for some time, whether in an emergency situation, as at present, or further down the line when society has returned to a more normal state.

11:00

Professor Tierney: It is difficult to think of other legislation in which Governments have had to define precisely what they mean by “emergency”. The problem is not so much about defining an emergency—the health crisis is what it is—as it is about what you do in response to it. That is what requires justification. Yes, we have a pandemic, but if we are going to pass these instruments, which of them genuinely need to be passed without any parliamentary scrutiny and why? Why do they have to be made into law without any level of parliamentary scrutiny and why could they not have been brought forward earlier?

It would be possible for the Parliament to draw up a rigorous checklist—the equivalent of the delegated powers or human rights memorandums that Governments have to submit ahead of legislation to show that they have done due diligence on those fronts. The pandemic has been with us long enough that we are now at a stage at which a Government introducing legislation without parliamentary process could explain that the situation is so extremely exceptional that the Parliament cannot even get a few days or a couple of weeks to look at it. There should be a checklist to explain exactly what the power is to be used for, why it is so urgent and why it could not be introduced earlier.

Some form of pre-legislative memorandum accompanying each instrument to explain clearly why it so urgent is one way for the Parliament to get some initial scrutiny. If the Parliament is unhappy, there should be a process to call the measure in for proper scrutiny.

Sir Jonathan Jones: I cannot think of a specific example, but I do not see why you could not have a combination of a legal requirement and a parliamentary procedure that requires the minister to explain why he is relying on very urgent powers.

The parent statute could include a requirement that says that, when the minister has determined that a situation is particularly urgent, he must set out and publish an explanation of the reasons for his decision—why he thinks that it is necessary to legislate in reliance on that urgent procedure. That might be backed up by a method of parliamentary accountability that would mean that the minister had to come to the Parliament to explain the reasons for that decision. There are mechanisms that one could have in place for that.

This is recognising that the existence of an emergency, or at least the extent of it, might itself be politically controversial. Everybody might have accepted at the beginning that we were in a coronavirus emergency and that all Governments needed to act quickly, but we are having this conversation because views have differed down the road at various stages—they differ today—as to, first, how grave the emergency is and, secondly, whether it really justifies relying on urgent procedures for particular measures. That is the debate that will happen in the Westminster Parliament about whether the omicron variant has heightened the emergency to such an extent that we need to introduce new measures such as Covid passports and further restrictions in relation to face coverings.

The very fact or the extent of the emergency is politically contentious, which creates all the more reason why, if ministers are being given powers to make such decisions, they should be accountable for those decisions and there should be at least some opportunity—however urgent the situation is—to debate that. I do not have a template, but it would be possible to devise a combination of legal and parliamentary procedures for that.

The Convener: Professor Tierney touched on September 11. As I prepared for today, I was struck by the events of 9/11 and by the situation when mad cow disease came into the UK. Are you aware of measures that were brought in at that time regarding the made affirmative procedure? Was any other scrutiny brought in with that? Those two huge events have had an impact on life ever since.

Sir Jonathan Jones: I agree that those situations were huge emergencies, which led to extensive legislative responses. To go back to a point that Professor Tierney made, the debate about the made affirmative procedure is just one example of the wider debate about how Governments legislate in an emergency and what a Parliament's role is in that. Off hand, I cannot think of particular procedures that were used in response to 9/11, mad cow disease or other things.

The legal response to 9/11—not least the treatment of suspected terrorists and what is done about people who cannot be tried—was intensely controversial. Control orders, terrorism prevention and investigation measures and other measures were intensely controversial and all needed primary legislation. The reliance on pre-existing emergency legislation was not to anything like the same extent. I am not saying that that did not happen and I do not have the details in front of me, but the main legislative responses—controversial though they were and in many ways remain—were done by primary legislation, sometimes at speed, but nonetheless in a way that allowed a measure of parliamentary debate and scrutiny.

Such responses are an example of the same thing as we have discussed, but the issue was less about the use of secondary legislation and the made affirmative procedure. For good measure, many of the legal responses to 9/11 ended up being challenged in the courts and some were successfully challenged, precisely because they involved delicate and controversial balances between responding to an emergency and the effect on an individual's liberties, which require difficult judgments. Legislation was needed, but it was often challenged.

Professor Tierney: I have a couple of reflections. To go back to 2001, the Anti-terrorism, Crime and Security Act 2001 introduced a power that was largely to detain people without trial. Mercifully, the Human Rights Act 1998 and other civil liberties law were in place to allow individuals to bring challenges before the courts.

Jonathan Jones is right that delegated powers and lawmaking powers were not a big issue in the 2001 act, but they have become such a banality now that we almost take for granted wide Henry VIII powers and guidance-making powers that are subject to no scrutiny by the courts. They have crept into our legislation, and that has been exacerbated by the need for an urgent response to Brexit and to the coronavirus. Some wide civil liberties issues potentially emerge from those powers that are not being properly addressed. The closing of churches, for example, has been challenged in court cases, and there are restrictions on people's liberty in the lockdown measures, although those are not typically being challenged now under human rights legislation with any success.

We need to take the broader picture into account: over 20 years—and exacerbated by those two huge events in our country's history—there has been an accrual of extensive executive powers, which would have seemed breathtaking powers in 2001 in many ways. This inquiry and related inquiries present an opportunity to sit back and reflect that the issue is not just about made affirmative procedures. Perhaps the Scottish Parliament needs to hold a thorough inquiry into the broad use of delegated powers and into the extent to which Brexit legislation and now coronavirus legislation are empowering the Executive far too much at the expense of Parliament.

The Convener: I will comment on one thing before I hand over to Graham Simpson. Last week, Dr Fox indicated to the committee that this type of debate has been going on since the early 1930s. It is obviously not a new debate, and it is clear that nobody has managed to reach a successful outcome since that time. I would imagine that, even if a successful outcome had been found at some point in the past or were to be found, different events will happen and different solutions will be required for them, too.

Professor Tierney: I want to qualify what we are saying. The reason why this has been an issue since the 1930s is that we have had bigger government since the 1930s, much of which has been a great thing—we have a welfare system and a health service, which require big government. I do not think that anyone is arguing that Government should not be given power; Government should be given power, and we need Governments to do things. What you are focusing on is Government being given lawmaking power that is not subject to scrutiny. I very much wish to confine my remarks to the constitutional issue. I am not entering into an ideological criticism of big government, as there are very good reasons why we have big government.

Sir Jonathan Jones: I share the reflection that this is not a new debate; it has been going on for as long as we have had secondary legislation, and it is not going to go away. The use of secondary

legislation is now well established and, in many ways, it is a perfectly sensible part of our system of making law. We could not go back to the day when every minor change of the law had to be done by primary legislation.

The debate will go on for ever; it is a matter of what the right balance is and of what the checks are when you confer powers on ministers. That is the debate that we are having and, as everybody accepts, that debate has been thrown into new relief. You gave the stats from Scotland yourself, Mr Simpson, regarding the demands of Brexit and of Covid. That is why it is a good thing to have the debate again. It is not a new debate, but we should have it again, as it has become more salient because of those things.

The Convener: Graham Simpson wishes to ask a supplementary question.

Graham Simpson: I want to ask a quick question on the subject of urgency. If we were to develop—[*Interruption*.] I am sorry, but my camera keeps going; I will have to hold it in position.

If we were to develop a procedure whereby a minister has to justify why something is urgent, we could imagine any minister considering the process as just something that they have to do, or a bit of a tick-box exercise. They might have to go along to some bothersome committee, but they will just get through it and, at the end of the day, if they decide that something is urgent, then it is urgent. Should we build into any system the power of veto for Parliament and/or a committee?

11:15

Professor Tierney: With respect, Parliament has a veto in not giving the power in the first place in the primary legislation. I appreciate that it is a bit more attenuated in this case as the initial power was given by Westminster in the Coronavirus Act 2020, but I think that the first step is really for the Parliament, when such powers are being given, to question how they are drafted, how the definition of an emergency is drafted, and whether it is possible simply not to pass legislation on that basis.

We have both touched on the fact that the issue is not so much the definition of an emergency but what happens pursuant to it. It is important to note, by virtue of having a set of principles, what does not go into those powers. For example, they cannot be used to create criminal offences, to impinge on the Human Rights Act 1998 or convention rights under the Scotland Act 1998, to change primary legislation, or to create public bodies. They also cannot operate retrospectively.

It is possible to have a series of very quick qualifications in relation to any power that is claimed in relation to an emergency, or a power that is going to be exercised by made affirmative procedure, so that a whole range of possible abuses are immediately excluded. That would probably be more useful than trying to second guess what "emergency" means because, as a number of people have said, that is a test that the Government will assert and, as we now know, the courts will be very reluctant to second guess it.

Sir Jonathan Jones: You mentioned the risk of any test being a tick-box exercise. I think that what Professor Tierney and I have suggested is that there could be something that is more demanding than what we have at present, which is basically just assertion—something that requires some explanation, evidence and debate. There is a risk that even that could become a sort of charade, but we have to hold out some hope that accountability means something, even if it does not involve a veto.

It is worth while for ministers to be held properly to account for the judgments that they have made. It tends to concentrate minds and ultimately, over time, it will create better decision making and policy making. I am trying to hold on to that truth. That kind of control would be better than a tick-box exercise and it would be better than what we have at present.

I am probably with Professor Tierney on whether you could then build in, as it were, a veto. We are in a system where ministers, in the end, sometimes need to act very quickly, and there is simply not enough parliamentary time to allow a full debate and a vote on every single instrument, so we have to decide which things we need a heightened level of control over, with Parliament voting for or against. Professor Tierney suggested a list, and the list that I suggested in my lecture is not so dissimilar, but there will be some things that we just do not allow ministers to do on the nod and on which there has to be a debate or some kind of heightened scrutiny.

As Professor Tierney said, we then have a debate at the stage when powers are conferred as to where we draw the line and how much leeway we give ministers. I would suggest that we have some combination of those things.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you to both our guests. I will not take you back over everything that you have said, you will be pleased to hear. However, when Morag Ross QC spoke to us recently, she emphasised the importance of parliamentary democracy and the rule of law, and she said that there is a perceived increase in executive power.

Do you have any observations, not specifically about the impact of Covid, but about whether there is a more general shift away from legislative power

towards executive power, and if so, why that might be the case?

In general terms, Covid notwithstanding, do you think that, among Governments in the UK, there has been a shift away from legislation being passed through parliamentary debate and the committee system towards executive power? Perhaps Professor Tierney could take that one first.

Professor Tierney: I do not think that there is any doubt about that. My principal experience is at Westminster, in advising the House of Lords Constitution Committee, but obviously I take a close interest in the Scottish Parliament's lawmaking too. There is no doubt that there are now more delegated instruments than there ever were, and far more Henry VIII powers in legislation than there used to be. I have seen an increase even in the six years that I have been doing the committee adviser job.

As I said earlier, there are now super Henry VIII powers that allow for the amendment of the parent statute. There are also the giving-of-guidance powers whereby ministers can, in effect, create rules that, while they are not necessarily legally enforceable, are very restrictive on, for example, local authorities. We see that in the immigration rules in relation to nationality law. There are also powers to set up public bodies, which we now see all the time in Brexit legislation.

There are all kinds of reasons for that. We talked about urgency, and the fact that, after Brexit, there has been a need to deal with 20,000 instruments—or however many there are—that address retained European Union law. All those matters are undoubtedly pressing concerns. However, in many other respects, it is simply convenient for Government to kick the can down the road with regard to the rules that it will need. Putting rules in delegated legislation is much more convenient for Government, because it is not subjected to scrutiny and headlines at the time when a bill is passed. It also suits civil servants, who can draft the rules that will take effect at their leisure, later on, in response to issues as they arise. There are all kinds of reasons why it is happening, but the very fact of it is irrefutable, and it is potentially very dangerous.

Bill Kidd: Do you believe that the systems that we have in place, and scrutiny by committees such as this one and the COVID-19 Recovery Committee, are sufficient? Could committees potentially be afforded an opportunity to progress their scrutiny in a fuller parliamentary debate? That would circumvent, to some degree, executive domination with regard to such powers.

Professor Tierney: The Scottish Parliament is already in a slightly difficult situation because of its unicameral nature. At Westminster, the House of Lords—for all its faults, which I am sure many members would acknowledge—is a check, and it operates as such. It has specialist committees and it will conduct reviews of delegated powers. There is a dedicated Delegated Powers Committee, which the Scottish Parliament also has, but there is also the Constitution Committee, and the Lords and Commons Joint Committee on Human Rights, which oversee those powers regularly and provide a second level of legislative scrutiny. The Scottish Parliament's situation is already difficult, and I am sure that your committee, like every other committee, is now overwhelmed by the volume of work that you face.

I am not inclined to blame Parliaments for the current situation at all; they are doing the best job that they can. There may well be measures that committees can introduce to try to draw matters more fully to the attention of the plenary Parliament. There is a need for a broader inquiry into the growth—the executive creep, if you like—in the granting and exercise of such powers. I am sure that there are procedural mechanisms that the committee can use to draw those matters to the attention of the Parliament. However, the overwhelming issue is that the need for resources will get in the way; I am sure that you must be overwhelmed by the volume of the work.

Bill Kidd: Thank you. Sir Jonathan, do you have anything to add?

Sir Jonathan Jones: I agree with Professor Tierney's analysis of the trend—I think that that is irrefutable. Part of this is simply the politics: in Westminster we have a Government with a strong majority that has hitherto shown that it can control the House of Commons and therefore limit scrutiny. That is what Governments tend to do when they can.

I agree that the scrutiny committees play an important role when scrutiny cannot be done on the floor of the House, because there is not time or things just do not allow for it. Some of the scrutiny committees have done first-class work, both in the Lords, as we have mentioned, and the Commons; I gave evidence to the Justice Committee not long ago. Valuable scrutiny is being done there, but it is not the same as requiring ministers to come and justify what they are doing, let alone having a vote on it.

The other point, which is why we are having this conversation, is that it is very difficult to go backwards. I have been a civil servant for many years and I have seen trends like this. Someone develops a clever new way of conferring powers, so there is then a precedent for Henry VIII powers. The next time a bill comes along, they cleverly devise a yet more extensive Henry VIII power, the Government gets it through because it has a

majority, and then it has a precedent for that and it might be very convenient to use it again. The direction tends always to be one way—it is like a ratchet. What Government will ever give up that kind of control and go backwards by actively choosing more scrutiny?

That is the truth—it tends to go in one direction. That is all the more reason to have this conversation and ask whether this is to the wider benefit of good governance under any political party. Does it make for good law and good governance and public confidence in the law? I think that we are saying that, on the whole, it does not.

Bill Kidd: Thanks very much to both witnesses.

The Convener: I hand over to Paul Sweeney.

Paul Sweeney (Glasgow) (Lab): Thank you to our witnesses for giving such comprehensive and expert evidence. It seems to me that perhaps this is all a function of the lack of a codified constitution, but perhaps that is a more fundamental debate that we need to have.

I was intrigued by the idea of introducing a definition of urgency as a check. Could that be a lever for stopping the ratchet from tightening? What practical impact might that have on the future exercise of executive power? I direct that question, in the first instance, to Sir Jonathan.

Sir Jonathan Jones: We have talked about what form an urgency test might take. There is also scope for doing something wider, which could include such a test as well as other constraints on the exercise of those powers—ways to impose controls on them and greater levels of scrutiny; there is a shopping list that either of us could have suggested. The Lords committees have simply recommended revising the guidance on legislation that is developed by the Cabinet Office in Whitehall, so that we just have a change of behaviour on the part of the civil service. Some of that could be done relatively informally.

I have suggested that we should go further and have a new statutory instruments act. We have the very outdated Statutory Instruments Act 1946, which basically sets out a framework for statutory instruments. I have suggested that we could make a statute that contains many more controls on how secondary legislation is made, what procedures apply to it and even how it is published and printed and so on. Such an act would not be a written constitution and, under our system, it could later be changed and overridden, but, if it were what I suggest, it would certainly be a reset. Talking from a Westminster perspective, I think that that would be worth doing.

Paul Sweeney: Professor Tierney, do you have any thoughts on that?

11:30

Professor Tierney: Yes, just briefly. One option would be some kind of legislative code. There is a ministerial code that regulates ministerial conduct. There is sufficient agreement among people as to what is good and bad practice in how delegated powers, such as Henry VIII clauses, are drafted. We could have a legislative code for drafters that would point out that certain approaches can be used only in very exceptional situations and must constantly be justified. We have that already in delegated powers memorandums, but such a code would really show certain things to be unacceptable except in very exceptional circumstances. That is the way to go.

Civil servants draft things based on what people have done previously. They try to do things quickly and to carry out the will of the minister. In conversations that we have behind the scenes with drafting teams, I often find that they do not see anything wrong with such stuff—it is not as though they are trying to pull the wool over Parliament's eyes. A clear and transparent legislative code that sets out, from a constitutional perspective, what good and bad drafting is would at least set the tenor. It would allow Parliament, when such measures come before it, to say, "This goes against the code, so go back and do it again—we are not passing this."

Paul Sweeney: That is helpful. I suppose that necessity is sometimes the mother of invention. You have described the time constraints that might drive behaviours that are not necessarily malicious or malign in intent but that are simply a by-product of other pressures in the system. Your suggestions are helpful and could assist.

Dr Fox, in her evidence to the committee, described the trend towards drafting "skeleton bills" that are, because of their architecture, prone to be massively expanded on by secondary legislation. That trend in the design of legislation might be why the propensity to use delegated powers in such a way has expanded significantly in recent years. What might recent primary legislation and the nature of the powers that have been given to ministers mean for the exercise of executive powers in future? Do you agree with the observation about skeleton bills and that the architecture of bills has substantially changed in recent years, which has perhaps driven some of the behaviours that we have talked about and expanded the use of secondary legislation?

That could tie into your points about a code, Professor Tierney, or even legislation to tighten up the design of bills.

Professor Tierney: I will answer that, since it flows on from what I was saying.

I can think of three examples just off the top of my head. As well as skeleton bills, which are common, there is fast-track legislation. Some legislation goes through so quickly. A code might provide that any bill that was being fast-tracked was not the place for certain measures, or that even more intense scrutiny of any delegated powers would be required if there had been no scrutiny of the primary legislation.

A third example that I have come across recently is placeholder clauses. That is where a clause is simply named in a bill, with no detail. The bill can go through part of its parliamentary process before the clause is then added at committee.

New things are emerging all the time, and one is constantly amazed by what Governments try to get away with. As Sir Jonathan said, it is a one-directional process. Governments never relinquish powers, unless they are made to do so. Those are three areas where we see trends towards fast legislation and very thin legislation that is packed with delegated powers downstream, which are then potentially subject to no scrutiny. That is deeply problematic from a constitutional perspective, and it applies throughout the UK.

Paul Sweeney: It is certainly a cause for concern. Sir Jonathan, do you have any thoughts on that question?

Sir Jonathan Jones: Again, I do not have much to add. I was a civil servant for a long time, so I saw examples of all those things. However, I agree that we are seeing more of them. That is just another example of the one-way trend that we have talked about. I agree that it is mostly not malign; it is simply a feature of our structure, and often our politics, that ministers want to introduce a bill on a particular topic to show that they are active on it, or because a convenient time has come in the parliamentary cycle for them to introduce a bill, although the policy is not fully developed.

That is the other incentive for these skeleton bills. It is about the political and practical demands of being seen to legislate on a topic before policy is truly developed. That is another reason why we get these very thin skeleton bills. As Paul Sweeney rightly says, that tends to mean that the detail has to be fleshed out later in secondary legislation, which inevitably gets less scrutiny than would have been the case if the detail had been in the bill. That is just another example of the same trend.

Paul Sweeney: I appreciate those answers.

The Convener: We are about to close but, before we do so, I ask the witnesses whether they have any additional comments or points that they would like to highlight that they feel have not been covered.

Sir Jonathan Jones: I do not think that I do. We have covered all the issues. You will have detected a high degree of agreement as to what the problem is. As I have said, it is healthy that there is now a debate about the issue, and there is agreement that there is a problem, here and in Westminster. I think that the Hansard Society process will help, and I am sure that this committee's report will help. We need to take advantage of that momentum and come up with some solutions, which I hope that we have started to do.

Professor Tierney: I echo that. I welcome what the committee is doing. I make a plea for interparliamentary co-operation, which I know is going on. The Parliaments of the UK have much to learn from one another on how to regulate Government.

The Convener: I thank Professor Tierney and Sir Jonathan Jones for their helpful evidence. The committee might wish to follow up by letter any additional questions stemming from the meeting—we will discuss that later on this morning. Thank you very much to you both, gentlemen.

I briefly suspend the meeting to let the witnesses leave BlueJeans.

11:38

Meeting suspended.

11:43

On resuming—

Instruments subject to Made Affirmative Procedure

The Convener: Before our consideration of Scottish statutory instruments, I suggest to members that, as we are meeting online, you will find it more challenging to indicate agreement to the instruments under discussion. I therefore ask you to raise your hand if you are not content with the question being put or if you wish to talk about an instrument.

Agenda item 3 is consideration of made affirmative instruments, on which no points have been raised.

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/454)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 12) Regulations 2021 (SSI 2021/455)

The Convener: Is the committee content with the regulations?

No member has indicated that they are not content or that they wish to speak, so we are agreed.

Instruments subject to Affirmative Procedure

11:44

The Convener: Agenda item 4 is consideration of affirmative instruments.

Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (Miscellaneous Amendments) Regulations 2022 [Draft]

The Convener: An issue has been raised on the draft regulations, which are made as part of a wider legislative framework for the administration of social security assistance in Scotland provided for by the Social Security (Scotland) Act 2018. Section 97(9) of that act includes a requirement on Scottish ministers at the time of laying the instrument to lay a response to the Scottish Commission on Social Security's report on the proposals for the regulations or a statement explaining why ministers consider it appropriate to lay the draft instrument before the commission has submitted its report on the proposals for the regulations.

One set of amendments in this instrument was not reported on by the commission prior to the instrument being laid. A statement under section 97(9)(b) of the 2018 act was sent to the Social Justice and Social Security Committee on 1 December but the statement was not laid until 3 December. In a written response to a question from the committee, which can be found in the public papers for this meeting, the Scottish Government has apologised for that administrative oversight.

Does the committee agree to report the instrument on the general reporting ground in respect of a failure to lay the necessary statement when laying the draft instrument on 29 November 2021 as required under section 97(9)(b) of the 2018 act?

Although the committee might wish to welcome the Scottish Government's apology for the administrative oversight and to acknowledge that it related only to one set of minor technical amendments and was corrected within four days, it was still a clear breach of the laying requirements. Does the committee also wish to write to the Minister for Parliamentary Business, highlighting its desire for all instruments to be laid correctly?

No member has indicated that they are not content or that they wish to speak, so we are agreed.

Also under this agenda item is another set of draft regulations, on which no points have been raised.

Redress for Survivors (Historical Child Abuse in Care) (Reconsideration and Review of Determinations) (Scotland) Regulations 2022 [Draft]

The Convener: Is the committee content with the draft regulations?

No member has indicated that they are not content or that they wish to speak, so we are agreed.

Instrument subject to Negative Procedure

11:47

The Convener: Agenda item 5 is consideration of a negative instrument.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (SSI 2021/446)

The Convener: An issue has been raised on this instrument, which amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011. As it was laid before the Parliament on 30 November and came into force on 13 December 2021, it does not respect the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2021 that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.

Before I invite comments from members on whether the breach of the 28-day rule was appropriate, does the committee agree to report the instrument on reporting ground (j) for failure to lay it in accordance with laying requirements under the Interpretation and Legislative Reform (Scotland) Act 2010?

No member has indicated that they are not content, so we are agreed.

As well as the explanation provided by the Scottish Government for the breach, members will have seen the correspondence from the Scottish Centre for Crime and Justice Research. Although the letter probably focuses more on wider policy concerns instead of issues that fall within our technical remit, it also refers to the speed with which the changes have been implemented.

Do members have any comments?

Graham Simpson: With our previous evidence session in mind, I think that this instrument highlights why scrutiny is important. Indeed, the reason for the 28-day rule is to allow some form of scrutiny.

On the face of it, a lot of people will think that the Scottish Government has done the right thing by pushing the instrument through. However, you mentioned the letter that the Parliament has received from the Scottish Centre for Crime and Justice Research, which puts forward a counterargument. That shows why we need to have scrutiny.

We need to tell the Government in no uncertain terms that breaching that 28-day rule, whatever one thinks of the policy, is really not acceptable.

Craig Hoy: We need to look at how we got here, in light of Mr Simpson's remarks and the evidence that we took earlier about the Government getting into bad habits, drafting and laying instruments too late even though it knew the policy intent earlier.

I think that my colleague Russell Findlay first raised the issue with Keith Brown at the Criminal Justice Committee on 1 September. The issue was raised again with Keith Brown in the chamber on 15 September. Russell Findlay wrote to the justice secretary on 16 September, and raised the issue again with the Minister for Drugs Policy on 29 September in the chamber and in a further letter on 26 October. The intent to introduce the policy was then announced on 2 November.

The Government's reason for bringing the policy forward is that a major incident occurred at the end of November. We are perhaps seeing that ministers had been asleep at the wheel to some degree and were only really awoken by Russell Findlay. The 28-day rule could have been adequately covered had the Government introduced the policy earlier.

We could have what I think is potentially a good piece of legislation that introduces a proportionate, timely and practical policy, provided that it does what it says on the tin. However, the situation exposes the fact that we do not have adequate scrutiny if the Government does not plan properly for the introduction of that kind of legislation. For such legislation to have public confidence, the public expect us to have had due time for consultation and that all-important scrutiny.

I support the intent of the policy but there are concerns that it might not do what it sets out to do. I am very much in favour of the principle behind it, but I share Mr Simpson's concerns that how we got here is not sufficient or adequate.

Paul Sweeney: I have significant concerns with the policy, which I think represents abuse of power and Executive overreach; I also think that there has been insufficient scrutiny and insufficient evidence that it will achieve its desired effects. For all those reasons, this is an inappropriate use of the procedure and should be resisted.

I am inclined at the very least to write to the lead committee on justice policy and to the minister dealing with the drug deaths emergency. The instrument flies in the face of public health approaches to management of the issue, particularly given that no evidence exists that illicit substances have been responsible for any deaths in prison in Scotland—the primary driver of drug-related deaths in prison is prescribed medications. We need to make greater efforts to understand the nature of the problem, rather than jumping the gun, particularly given that the Scottish Prison Service has a problematic issue with deaths in custody at the hands of prison officers.

Bill Kidd: I believe that we have to take the matter further. I would like the Criminal Justice Committee to be informed of the evidence that has been put in front of us in relation to the failure to bring the instrument into force properly.

I am concerned to read about psychoactive substances arriving, via different formats, for prisoners from outside. However, prisoners have human rights, and I do not believe that all their communications from loved ones outside should be treated in the manner that has been suggested. The matter requires further investigation.

I take on board the points from the SCCJR. At the same time, I think that we need to be able to see, following proper investigation through the Scottish Government, the actual circumstances. I do not think that we have been given that opportunity, so that needs to be looked at.

The Convener: Colleagues have made a number of points there, for which I thank them.

First, does the committee wish to report that it is not content with the explanation that the Scottish Government has provided for a breach of the requirement in section 28(2) of the 2010 act? As the committee has done previously, I emphasise that the Scottish Government should normally comply with laying requirements to facilitate timely parliamentary scrutiny of such important policy choices.

Secondly, does the committee agree to highlight to the lead committee the correspondence that has been received from the Scottish Centre for Crime and Justice Research?

Finally, does the committee wish to highlight concerns about the speed of change in policy to the Cabinet Secretary for Justice and Veterans, who is responsible for prison reform and policy, and to the Minister for Drugs Policy?

Graham Simpson: Convener, you might already have covered this, but I think that it is important that we write a quite strongly worded letter to the Government and relevant minister to reflect the committee's thoughts on the matter. We will report to the lead committee, as is entirely right, but we need to get what has just been said down on paper and send it to the Government.

The Convener: The final point that I raised was about writing to the Cabinet Secretary for Justice and Veterans, and we will certainly incorporate members' thoughts.

Is the committee content with those actions?

No member has indicated that they are not content or that they wish to speak, so we are agreed.

Instruments not subject to Parliamentary Procedure

11:57

The Convener: Item 6 is consideration of instruments that are not subject to parliamentary procedure and on which no points have been raised.

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Miscellaneous) (No 2) 2021 (SSI 2021/434)

Avian Influenza (H5N1 in Birds etc) (Miscellaneous Amendment and Revocation) (Scotland) Order 2021 (SSI 2021/444)

Age of Criminal Responsibility (Scotland) Act 2019 (Commencement No 4) Regulations 2021 (SSI 2021/449 (C 32))

The Convener: Is the committee content with the instruments?

No member has indicated that they are not content or that they wish to speak, so we are agreed.

11:57

Meeting continued in private until 12:35.

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