OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 13 December 2022

Session 6

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DELEGATED POWERS AND LAW REFORM COMMITTEE

33rd Meeting 2022, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sir Jonathan Jones KC (Linklaters LLP)
Morag Ross KC (Faculty of Advocates)
Dr Adam Tucker (University of Liverpool)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 13 December 2022

[The Convener opened the meeting at 09:40]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 33rd meeting of 2022 of the Delegated Powers and Law Reform Committee. We have received apologies from Jeremy Balfour. I remind everyone to switch their mobile phones to silent.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take items 5 and 6 in private?

Members *indicated agreement.*

Retained EU Law (Revocation and Reform) Bill

09:41

The Convener: Under item 2, we are taking evidence on the Retained EU Law (Revocation and Reform) Bill.

I welcome Sir Jonathan Jones, senior consultant, Linklaters LLP, and Dr Adam Tucker, constitutional lawyer, University of Liverpool; they are both joining us virtually. I also welcome to the meeting Morag Ross KC, member of the Faculty of Advocates, who is joining us in person.

Morag, do not worry about turning on your microphone during the session, as it is controlled by broadcasting. If you would like to come in on a question, please raise your hand. Sir Jonathan and Dr Tucker, if you want to come in, please raise your hand or, as you are online, enter an R in the BlueJeans chat function.

I will open the questions from the committee. What is your view on the scope of the power to preserve retained European Union law? My question is for all three of you. Do you want to start, Morag?

Morag Ross KC (Faculty of Advocates): I am happy to start. I am here on behalf of the Faculty of Advocates. I am aware that at least one of my colleagues has already given evidence on the bill to the lead committee. What I say about delegated powers should be seen in the context of what has already been said and submitted in writing to the lead committee. As the committee will be fully aware, the bill is unusual because, in one way, it is all about delegated powers, which means that the Delegated Powers and Law Reform Committee has a different role from the one that it would normally play.

In answer to your question, the scope is extremely broad. The bill cannot really be compared with other primary legislation. There is nothing quite like the bill, given that its whole purpose is to give the Government the power to introduce legislation that is extremely wide ranging, which will modify—to put it tamely—the law across a whole range of areas, and which will, if the law is to be retained, have to be implemented at some speed to escape the sunset provisions. Those are things that have caused concern to the lead committee of the Scottish Parliament and to many others elsewhere.

Sir Jonathan Jones KC (Linklaters LLP): I agree with what has just been said. It is an extraordinary bill, and is unlike any other so far. On the specific question of powers, without knowing how the powers will be exercised, one

cannot know what the effect of the bill will be or what the law will be by, say, the end of 2023. The whole effect of the bill is dependent on the exercise of the powers, so if none of the powers is exercised, virtually all retained EU law will fall away. That is an extraordinary proposition. In the absence of something positive happening, such as positively deciding to retain or amend existing retained EU law, that whole body of law will drop away automatically. The combination of the automatic expiry—the sunsetting—and the wide set of powers to retain, change and replace things, produces a huge amount of uncertainty about what the law will be, because at the moment we do not know which powers will be exercised in which ways and in relation to which bits of retained EU law.

09:45

Dr Adam Tucker (University of Liverpool): I start by agreeing with what Morag Ross and Sir Jonathan Jones have said. Morag drew attention to the breadth of the powers and Sir Jonathan drew attention to the incredible uncertainty that they introduce. I will add two things, one of which flows directly from what Sir Jonathan has just said.

The nature of the cliff edge is that the powers will have to be exercised. Even though we are describing them as powers, there will be almost an obligation on Governments and legislatures to exercise them. The creation of the powers, with a cliff edge on the other side of them, imposes quite a remarkable legislative burden, which is worth noting.

The second thing that I will say is about where the legislative burden will fall. Because the bill allocates the powers to the United Kingdom Government and the devolved Governments and to those Governments working in co-operation, part of the uncertainty is about how the division of labour will unfold in the exercise of the powers. It is an absolute certainty that a significant amount of the burden will fall on the institutions of devolved government.

That is what I have to add to Morag's point about breadth and Sir Jonathan's point about uncertainty.

The Convener: As we have already touched on, the bill sets the date by which retained EU law will be automatically removed from the statute book—Dr Tucker just spoke about the cliff edge. What is your understanding of the number of pieces of legislation that will potentially be affected? Do you have any further comment to make on that? We and other committees have heard various figures bandied about—perhaps 2,400 pieces of legislation, potentially another 1,400 and then, potentially, others. We have also picked up on a figure of 5,000 that was used at one point. Do you have any clarity on how many pieces of legislation should be included in the figure?

Morag Ross: I cannot add to the information that you already have. I do not work in the Government and I have no access to information that you do not already have. I am already aware of the figures that you have stated.

To pick up the point that Dr Tucker made a moment ago about where the burden will fall, the other difficulty is not just looking at the global figures but understanding where the devolved Administrations and Parliaments will have competence to look at the pieces of legislation and what proportion of them—whether the total is 2,400, 1,400, 5,000 or however many—will fall within devolved competence. There is no clear dividing line that allows a clear and absolute distinction between them.

On your primary question, I cannot assist with any further accurate clarification on the numbers.

Adam Tucker: The reality is that the precise number is unknown, because of the way in which the bill is structured—it picks out a category, rather than specifying.

The precise number is unknown, but I agree with the scale of the numbers that the convener has given. The number is plainly in the thousands, even if we cannot be more precise than that. The significance of that number is that every single one of those pieces of legislation has to be engaged with—that is why it matters. There is uncertainty. The number is somewhere in the thousands and every single one has to be engaged with in some way, so that regulations persist in whatever area they cover.

Sir Jonathan Jones: I am afraid that I have no more inside information, either. All that we have are the figures that the Government gives. We also hear stories of new laws being discovered, which is a bit unnerving. In any event, there is a question as to what a piece of law is and how laws are counted—does a whole set of regulations count as one law or as many? I do not know the answer to that.

That underlines the point about uncertainty that I made before, and the risk that, as Dr Tucker has said, if particular bits of legislation are missed and therefore not engaged with—if no conscious decision is made about a particular law simply because it has not been spotted or has dropped off the list, the consequence will be that it will fall away over the edge of the cliff by accident. That is one of the other risks and uncertainties. Because we do not have a certain number or we do not know the precise universe of the law that is affected, there must be a risk that some laws will

be missed altogether, with the consequence that I have described.

The Convener: Given the comments that he has already made, the next question is probably more for Dr Tucker, but the other two witnesses are welcome to respond, too.

Could you give us your reflections on the extent to which Parliament, as opposed to ministers, will be able to influence what the statute book will look like as a result of the bill?

Dr Tucker: That topic is one of my research interests. It is to do with the scrutiny of delegated legislation, which, of course, is a primary interest of the committee.

I will talk about the Westminster Parliament to start with. Members of the committee will be more familiar than I am with how well my comments transfer to the Scottish context, but I think that there are similarities. The reality is that Parliament will have minimal influence over the issue that you asked about. The nature and the practices of scrutiny of delegated legislation in the UK are such that, once the power is delegated—especially in the context that we are in now, which is one of anticipation—it is best to anticipate that Parliament will have minimal levels of impact over how that power is ultimately used.

One thing that I always say in discussions such as the one that we are having today and in my written work is that I advocate changing that situation, but that is not realistic at the moment. One way in which I often advocate changing it is by saying that there should be a move towards scrutiny of the merits of such instruments. The committee will be familiar with this, as I think that it is in its terms of reference—there is a distinction between technical or legal scrutiny and substantive or merit scrutiny.

My advocacy of a shift towards merit scrutiny is always resisted, for reasons that I understand, but it is worth stressing that, to the extent that Parliament will have an impact, the kind of scrutiny that Parliament will do, under current practices, will be limited to technical or legal scrutiny and will not extend to merits-based scrutiny, which would be particularly significant when we are talking about the power to make alternative provisions, which is a policy change power.

Under current practices, the impact that Parliament will be able to have will be minimal.

The Convener: Does Morag Ross want to come in?

Morag Ross: Yes. This is probably an appropriate point at which to make a couple of observations about the extent of Parliament’s ability to scrutinise the secondary legislation that it is anticipated will made following the bill, if it is enacted. There is a big-picture question, as well as a technical question.

First, I will address the big-picture question, which is associated with the volume of anticipated legislation. Sir Jonathan Jones is right to point out that, if a law is not retained, it will fall. Therefore, there will be an obligation to retain certain laws if there is thought to be a danger that whole areas of life and work will be unregulated after the sunset provisions have come into effect.

If a need or obligation means that a premium is placed on retaining things, the volume of work that is likely to be required will impose a burden not only on those who are responsible for the preliminary stages—identifying the law in question and doing the necessary drafting—but on those in Parliament who are required to scrutinise it. That is the answer to the big-picture question.

I will come to the technical point in a moment, but that brings us to a distinction. Where existing law is retained as is, with a simple measure that preserves the law without making any modifications, it might be acceptable for scrutiny to be relatively light touch if the law stays as it was, with no change needed. However, if ministers seek to modify, update, develop or make changes—whichever is appropriate—that is exactly the sort of area that calls out for at least some measure of analysis. It is important to distinguish between simple retention and retention with either a bit of updating or something more than that.

Forgive me if this is something that you are going to come to anyway—I do not want to take you out of the order of your questions. You asked about the extent to which Parliament, as opposed to ministers, influences legislation. One of the interesting features of the bill is that it distinguishes, in terms of procedure, between what would happen here and what would happen in Westminster, or in the Welsh Senedd. There is a proposal to introduce into part 3 of schedule 3 the ability to sift proposed legislation, which means that there would be an opportunity for Parliament to see proposals in draft form. Measures that are introduced will have to be laid in draft for a period of 10 sitting days. That gives the Westminster Parliament and the Senedd the opportunity to say that something should not be done by using negative procedure but should be done through the affirmative procedure. That sifting power does not exist for measures that come before the Scottish Parliament.

There is a memorandum from the Cabinet Office to the Delegated Powers Committee in Westminster that explains that the Scottish Government was content that the sifting power is not necessary. I must confess that I have not dug into the reasons for that. It is conceivable that the

power exists elsewhere, perhaps in the Interpretation and Legislative Reform (Scotland) Act 2010, but it seems to me that that distinction ought to be of interest to this committee. It may well be on your list of things to look at. In answer to your question about the extent of Parliament's powers, it is important to bear in mind that—in that fairly narrow but important respect—the powers of this Parliament are different from the powers that exist elsewhere.

I should say that Northern Ireland does not have those powers either. I think that that happened for practical reasons, because it was not possible to identify a need for them. I understand that it is anticipated that it would be possible to introduce those powers at a later stage in the bill.

The Convener: Sir Jonathan Jones, do you want to come in?

Sir Jonathan Jones: Only very briefly. There is an unusual combination. The scope of the bill, and therefore the range and number of instruments likely to be made under it, means that the capacity for parliamentary scrutiny will inevitably be limited and will clearly be much less than would be the case if the Government were to bring forward individual bills covering particular topics. The fact that all this is being done by secondary legislation inevitably means that scrutiny will be limited.

That is coupled with a fabulously quick timetable. We know that the 2023 deadline can be extended in relation to individual instruments, but the existing deadline gives a year for everything to happen. I am most familiar with the Westminster Parliament, but I think that it must also be true for the devolved Parliaments—it is a practical fact of life—that capacity for members to scrutinise the volume of legislation that we can expect within the space of a year must inevitably be limited, whichever procedure is used. I just wanted to put that into context.

10:00

The Convener: To come on to that particular point, and others that were raised earlier, irrespective of what the figure for pieces of legislation might be, we know that it will be in the thousands. Does the Parliaments' capacity to scrutinise relate to officials' ability to engage with each piece of law before a decision is taken on whether it should be extended? That question is probably more for Sir Jonathan Jones, given his experience.

Sir Jonathan Jones: I was an official, but I am not one any more, so I do not have first-hand inside knowledge. It will be a huge challenge for the civil service. It could be said that it has had some time to prepare for it since we left the EU, and some work will have been done to assess the range and number of instruments or laws affected, but we have noted that that number might be uncertain and seems to be growing. No doubt some preparatory work will have been done and civil servants will do their best to go through the process that we have described, which is to analyse the instruments and make proposals to ministers as to what should be kept and what should change.

The scale of that process will be hugely challenging. The comparison that I would make is with the process that was gone through under the European Union (Withdrawal) Act 2018. That statute created the concept of retained EU law and conferred on ministers wide powers to make relatively technical changes to retained EU law to cure "deficiencies"—to use the language of the act—in order that the law would work after we had left. That was a big enough exercise. I was in the civil service for at least part of that time and engaged with every corner of Whitehall. Certainly, large parts of my department, the Government Legal Department, worked through that body of retained EU law and worked out what technical changes—they were mainly those—were necessary to make the laws work. Many thousands of statutory instruments were produced to do just that. That process took about two years. Difficult though it was, it was a much more technical exercise than what is being proposed now, where the whole point of the exercise is the potential for wide-ranging, fundamental policy change to the very content of EU law.

This exercise should also have a much shorter timescale than the one at Westminster—it should be about half as long—but it will be much more difficult. It will not just be an issue for the civil service, and it will not just be about technical capacity to list the instruments and draft the legislation. The challenge will be for politicians—ministers and parliamentarians—to do a proper job, analyse the policy options, decide which laws should be changed and which not and, ideally, consult affected sectors. The bill contains no obligation to consult, and I do not know whether there will be any meaningful consultation. For all those reasons, I think that the whole political system—not just the technical, civil service bit of it—will be massively challenged because of the combination of the scale of the bill and the very tight timescale.

The Convener: You have just touched on our next area of discussion, which is about consultation with and consent by the Scottish ministers and the Scottish Parliament. That has come up at meetings of the lead committee, but for quite some time it has also regularly come up as an area of concern or frustration for Scotland as regards the UK Parliament. The bill allows the UK ministers to use the power to preserve REUL

in devolved areas without the consent of, or without consulting, the Scottish ministers or the Scottish Parliament. Do the witnesses have any comments about what that will mean for dialogue and respecting devolution?

Dr Tucker: The constitutional version of that is that the Sewel convention does not apply to delegated legislation. The bill takes substantial policy areas that would otherwise need to be dealt with in primary legislation and, therefore, come under the protection of the Sewel convention and effects a wholesale delegation of them into delegated legislation, where the protection of the Sewel convention does not apply.

That means that there is a serious risk that the integrity of the devolution settlements will come under pressure. That, of course, depends on practice under the bill, which is yet another issue that there is radical uncertainty about. There is definitely a risk that, because the bill removes a range of policy areas in their entirety from the Sewel convention's protection, there will be an increase in the imposition of legislation on the devolved nations by the centre, but there is a lot of uncertainty about that.

Sir Jonathan Jones: I have little to add apart from the point that I keep coming back to about the time constraints, which, even with a will, will prevent deep and meaningful consultation across the wide range of affected policy areas. Earlier, I referred to wider consultation not just with devolved Parliaments or Administrations but with business, affected sectors and society—I do not know whether we will come back to that—and pointed out that the bill contains no provision for that. I do not know whether there will be scope for some of that to happen ad hoc. I hope so, but time is limited.

Morag Ross: I agree with the points that have just been made. There are two categories of concern. One is simply pragmatic, which is not to downplay it. With some force, Sir Jonathan made points about the volume of work that is required, no matter where that falls. I already referred to the difficulties that might arise in understanding piece by piece and instrument by instrument what is within devolved competence. Having to carry out that exercise, even if everybody agreed that it should all happen, would be challenging.

That is probably the primary challenge, but you are asking about challenges to do with the absence of consultation or difficulties with consultation, convener. The primary issue is when people will have time to do that. I agree with the point that it is not just about politicians or Governments talking to each other but about understanding what interests there are out in the world about whether a particular set of regulations should be retained as they are or modified.

To take a pure view, the bill creates a system that, given time, can be made to work. Questions about tension or disagreements about policy choices are, in essence, political issues. Committee members will be well familiar with the challenges that those present. However, from a legal perspective, if there are divergent approaches on policy in areas that fall within devolved competence—if the Scottish ministers choose to implement proposals or bring to the Parliament legislation that will retain certain regulations while they are allowed to fall in, say, England—and there are diverging means of regulating important areas that affect trade or business operations, it is not too difficult to see that bumping into internal markets problems if those divergences are likely to lead to unequal treatment in regulation.

The Convener: My final question is on the negative procedure, which has been touched on. Regulations to preserve REUL are subject to the negative procedure whether they are made by the UK Parliament or the Scottish Parliament. Is the negative procedure appropriate for regulations that preserve REUL?

Morag Ross: Well, it depends. In relation to important areas of regulation that have been carefully thought through historically—perhaps decades ago or perhaps recently—at a European level and then have been implemented with a great deal of care whether in the United Kingdom as a whole or specifically in Scotland, it is challenging to look at modification of those done at speed and say, "Yes, the negative procedure will be just fine." That seems to be a little difficult.

For some things that can be put into the category of the very purely technical, one could look at things in a different way. This is probably more a matter for this committee than a strictly legal question, but I do not want to repeat the point that was made earlier. The bill recognises that there perhaps ought to be scope for building in some protection. I have referred to the sifting provisions, but I am not suggesting that they cure all problems. There would be those who would look at that and say, "That is hardly good enough. It is just a brief opportunity to shift it into the affirmative procedure." It might be thought that at least having that protection brings some advantage, but combined with the time pressures, it is hard to see that as allowing good-quality scrutiny.

Sir Jonathan Jones: If your question is whether the negative procedure would be acceptable if a regulation was purely retaining an existing piece of retained EU law without changing it, the answer is probably yes. If the intention is not to change the law at all and to keep it as it is, that relatively light-touch—or very light-touch—form of

scrutiny might be sufficient, but we would get into more difficulties where an alternative change is proposed.

You have to look at the bill in the round. We have talked about its problems. The combination of the powers with the cliff edge—whereby, if the powers are not exercised, a piece of legislation will fall away automatically—rings alarm bells more generally. One hopes that lots of regulations retain the existing law, but it may be that the volume of those is a problem in itself. From the technical point of view, if you are asking whether the negative procedure is enough if no change is being made, the answer to that is probably yes. Whether that works in the context of the whole bill and the volume of legislation that might be forthcoming is still potentially a problem.

Dr Tucker: My views on the issue are very similar to Sir Jonathan’s. In general, I tend to be critical of the negative procedure in a lot of contexts, so that is the context of my answer. I understood your question as being about regulations under the bill that would be intended to revive the status quo, and even in principle the answer to that is, yes, the negative procedure would be appropriate. However, especially in the context of the sheer volume that will be done, the answer is that the negative procedure is probably unavoidably the only scrutiny process that will work for the regulations that revive the status quo under the bill.

10:15

Morag Ross: Perhaps I misunderstood the question. For pure retention as is—no change—I completely agree. I was thinking more of the modifying, amending and updating sorts of changes.

Bill Kidd (Glasgow Anniesland) (SNP): I thank our guests. They are covering a wide range of areas extremely well. Much is uncertain or even unknown, as was said earlier. However, if they do not mind, I have a couple of quick questions on the sunset date, a year from now. The power to extend that date is granted only to UK ministers. The Scottish Cabinet Secretary for the Constitution, External Affairs and Culture, Angus Robertson, has said that the Scottish Government has already requested that the extension power be conferred on devolved ministers, as it does not consider it appropriate that only UK ministers have the power to extend the sunset for devolved REUL. There is a bit of debate, obviously. If UK ministers wish to extend the sunset date, including in devolved areas, neither consent nor consultation is required. That is contentious. Does anyone have any points to bring forward on the sunset date?

Morag Ross: Clearly, it is contentious for political reasons. However, there is a legal point. If there were different powers to extend the sunset provisions, and if those powers were exercised at a high level to extend all regulations that fall within devolved competence, that would leave open the question of interpretation as to what exactly was covered.

If a legislature is able, as Westminster is, to say, “This is the sunset provision for absolutely everything”—albeit that some things might get lost, because they have not been identified—that is one thing. However, if the sunset provisions are extended as a block, the burden of construing that may fall on other people down the line. That may just increase the uncertainty. I mention that as a possible outcome of choosing to regulate in such a way.

Sir Jonathan Jones: I do not have anything to add on the specific political debate. However, more generally, a sunset clause is a pretty appalling way to legislate. It sets an artificially tight timescale and, as we have described, it risks either system overload or laws just being missed and therefore falling away by accident. It is a very poor way to legislate. If I could make one change to the bill, it would be to remove the sunset.

Dr Tucker: I do not have anything to add to what the other two witnesses just said, because I agree with them.

Bill Kidd: That is very useful—thank you. If there is broad agreement, I do not want to labour the point too much. However, should UK ministers wish to extend the sunset beyond the present date, they would need to specify individual pieces or categories of legislation to which the extension was to apply. I assume that they would not just do it carte blanche. Would that mean that there might be different sunset dates for different legislation? That would be very complicated, I imagine.

Morag Ross: It would potentially give rise to the same sort of uncertainty. The complication that you have referred to would arise slightly differently, but trying to distinguish between different blocks and categories in advance, in a way that gives those people who need to know the clarity that they need, would be really challenging.

Bill Kidd: Yes, it would be. Do you have anything further to add, Sir Jonathan?

Sir Jonathan Jones: I agree with your analysis, Mr Kidd, that the power to extend can be exercised only in relation to individual, identified pieces of legislation. There is no option to just say that the whole sunset date is postponed—it has to be done individually, which definitely therefore creates the risk that we could have different dates for different bits of legislation or different sectors.

Bill Kidd: That is helpful, thank you. Do you have anything to add, Dr Tucker?

Dr Tucker: I have a mild disagreement with Sir Jonathan, but the thrust of my answer is the same. The legislation, as drafted, plainly creates a situation where multiple sunset dates might exist for different legislation. I speculate that it is a likely outcome rather than a mere possibility, because of how the extension power is structured. The sunset is very short—too short—so a sensible prediction is that the extension power will be exercised in some fashion. As soon as it is exercised, it will create a situation where different sunset dates exist for different regulations, unless some way can be found to use the extension power to cover everything.

The power allows specific legislation or a "specified description of legislation", so it could be possible to try to use that power to describe all retained—or, by that point, assimilated—EU law, but the underlying problem is that it is clearly structured to allow different sunset dates. That is a reasonably likely outcome, because the initial sunset date is so short that it must be extended in some fashion.

Bill Kidd: Thank you very much indeed. That opens up new areas of debate, but it is useful now, so I thank everyone for their answers.

Oliver Mundell (Dumfriesshire) (Con): We have touched on this point already in relation to the appropriateness of the negative procedure, to which I will come back in a second. When it comes to restating REUL or assimilating law, the power to use different "words or concepts" does not go as far as making

"substantive change to the policy effect of legislation."

Morag Ross mentioned substantive change in one of her answers. What is the threshold for substantive change? Where does that sit?

Morag Ross: It is almost impossible to answer that in the abstract. It is not unknown to find that one word of difference in a section of an act makes a substantive difference. Similarly, one can use an awful lot of words to say more or less exactly the same thing in different legislative contexts.

Clearly, there is a spectrum of modification. I cannot provide concrete examples, but one can conceive of something that is totally uncontroversial updating, in which changes are easy to accept, minor and within scope. However, the bill anticipates not just that modest type of change and updating; it allows ministers power to modify more substantively. There are references to ministers taking account of technological or scientific developments in a particular context, which clearly anticipates that substantive change of some kind will take place. That then leads to questions about the level of scrutiny that is demanded of such changes.

In short, it is not possible in advance to say, "This category of changes is okay but that one isn't," because that will turn on what people are trying to do at a particular time and what words they are using.

Oliver Mundell: If there is disagreement on whether a change is substantive, what does that mean for the parliamentary process?

Morag Ross: That presents a challenge—I appreciate that, for you, that is not necessarily a very helpful way to look at it.

Perhaps the concern, though, from out there in the world is that, if there is disagreement or if it is unclear as to what legislation means—if substantive changes are made that are untested and have not received adequate scrutiny—those changes can cause uncertainty because people are unclear about the extent to which regulations apply to them. Those are more likely to have more lasting consequences.

Oliver Mundell: So, if such changes were subject to the negative procedure, that would be too low a bar, as was outlined earlier?

Morag Ross: I think that I would agree. Earlier, Sir Jonathan made a point about distinguishing between different changes. If you are just preserving as is and the measure is about the retention of things as they are, the negative procedure is likely to be fine.

I appreciate that you are asking me whether the negative procedure is okay for a minor change. It could be, but then, step by step, it might not take too long before some people would take the view that something is a relatively minor change while others disagree—perhaps for reasons that are not anticipated, for example, when introducing a new condition to a set of regulations. It is quite difficult, especially against the background of time pressure, to say, "Wait a minute, this should be taken out, be given more extensive scrutiny and should be made subject to the affirmative procedure," or whatever.

Oliver Mundell: Do the other two witnesses have any further comments to make on that point?

Sir Jonathan Jones: I would again draw an analogy with the exercise that was done under the 2018 act to cure deficiencies in EU law. I described that as being a relatively technical exercise—it was not about making big policy changes but rather about ensuring that the law worked. However, in truth, some of those changes are more substantial than others so there is a sifting process of deciding what level of scrutiny those instruments should have.

To underline the point that was just made, even relatively technical changes can involve policy choices. With updating or technical adjustments, you have to make important choices about how laws will be enforced, who enforces them and so on. Even something that may look like a relatively minor piece of updating can be significant. That is before you get into the more substantial powers in clause 15, for example, to make new law. I agree that it is very difficult to talk about the issue in the abstract without seeing exactly what changes are proposed.

Oliver Mundell: Thank you for that. The power to restate can be used to consolidate REUL or assimilated law into a single instrument. What are the implications of that? What are your views on that? That question is open to all three witnesses.

Dr Tucker: I do not have a view on that. That is not because it is an unimportant question but because of the uncertainty that swirls around this and the fact that these things will be happening against a background of an extremely high workload. Therefore, I do not have a view to put forward on the significance of that possibility—sorry.

Oliver Mundell: That is okay. As no one else has a view on that, I will move on.

My final question is on regulations that reinstate REUL or assimilated law and that are subject to the negative procedure except when they amend primary legislation, in which case the draft affirmative procedure is to be used. What is your view on the appropriateness of that procedure? Obviously, that is slightly different to other parts of the bill.

10:30

Morag Ross: I am not sure that I have got anything to add to what we have already said about the distinction between straightforward retention and innovation.

Oliver Mundell: Do neither of the other witnesses have a view on that?

The Convener: Jonathan Jones or Dr Tucker, do either of you have a view on that?

Sir Jonathan Jones: I think that the same problem applies, which is working out, in the abstract, what a minor change is. In principle, we might expect—and the bill recognises—that regulations that amend primary legislation should get greater scrutiny, but beyond that it is very difficult to say more than what we have said already.

Paul Sweeney (Glasgow) (Lab): I thank the witnesses for their helpful contributions.

The powers in clause 15 allow UK ministers and devolved ministers to revoke retained EU law until the end of 2023, or assimilated law from 1 January 2024, and replace it. That power will be available to ministers until 23 June 2026. Where provision is made to replace retained or assimilated law, the replacement provision can implement different policy objectives. I am keen to get your collective views on the scope of the power to revoke and replace retained EU law and assimilated law.

Morag Ross: That takes the committee deep into policy territory, and there is a limit to what I can say about the political aspects of that.

Clearly, clause 15 is where one finds some of the most challenging provisions in the bill. The clause deals with the extent to which ministers are enabled to innovate and introduce policy changes of quite a substantial kind using powers that they could normally only exercise by introducing primary legislation, and for that to be tested in the normal way. That is where you find the heart of the very broad powers to replace, develop and bring in new law.

A great deal more could be said about clause 15, but it is probably best for me to hand over to the other witnesses.

Dr Tucker: Clause 15 is extremely constitutionally problematic, because it involves a massive transfer of legislative power to the executive, which is always problematic in a sense, because it downgrades the scrutiny that that power receives. However, the transfer is happening—this exacerbates the problematic element—in circumstances in which the scrutiny will be even less intense than normal because of the sheer volume of scrutiny that needs to be done. So, one reason that clause 15 is constitutionally problematic is because it transfers legislative power to the executive at the same time as it sets up a process whereby things will not be scrutinised as well as they normally would.

The second way in which it is problematic is in the context of devolution, as I mentioned. One ramification of the transfer is that it removes policy areas from the protection of the Sewel convention, which means that those powers can be exercised in devolved matters without any consent from the devolved administrations.

Those are the two reasons I find clause 15 extremely problematic.

Paul Sweeney: Thank you very much, Dr Tucker. That is really helpful with regard to understanding the broader political concerns. Do you have any further comments in relation to the broad scope of that clause, Sir Jonathan?

Sir Jonathan Jones: Yet again, I underline the fact that these are broad powers, and the heart of

the power in the bill is to make new law and policy, as has been said. That power is not limited by reference to particular areas of policy, as a bill normally would be—even in a bill with wide powers, you would normally have some kind of policy context and constraint. The only constraint here is that we are talking about retained EU law, but we all know that that covers a vast range of topics and legal and policy areas. The sheer breadth of policy and legal areas that that power covers is another feature that is unusual about it.

As far as I am aware, the Government has given very little indication of what it intends to do with those powers—I do not think that the explanatory notes to the bill give examples of the laws or policy areas that it wishes to amend or adapt through using those powers, and I have not seen anything else that does that. Again, those powers are broad in themselves, but the range of areas that they cover is unprecedentedly broad, so then we get into all the other issues that Dr Tucker and others have mentioned—the timescale and, therefore, the lack of scrutiny around the size of the powers.

Paul Sweeney: To verify your position, would you regard the use of secondary legislation for the purpose of the revocation and replacement of REUL as completely inappropriate? Based on the need for scrutiny, should the emphasis, or at least the general presumption, be on using primary legislation rather than on using secondary legislation?

Morag Ross: Again, it comes back to that spectrum. I am mixing a couple of metaphors here, but Sir Jonathan is quite right to emphasise that the uncertainty around and unknown nature of what is involved—due to the breadth of policy areas and the unlimited nature of the power, albeit in the context of retained EU law—presents the problem.

On one end of the spectrum, it would be legitimate to say that modest levels of replacement and making minor changes are clearly appropriate for secondary legislation. However, if a change would ordinarily require proper consultation, consideration and opportunities for scrutiny at primary legislation level, it seems extraordinary that it should happen at a level where it would not receive the same level of scrutiny than if it were properly the subject of primary legislation, whether that situation happened repeatedly or once.

One sees that problem in bits and pieces in some other acts where one finds surprisingly broad powers. However, those powers are normally confined to the subject matter of a particular piece of legislation and concerns are expressed about the use of Henry VIII powers in a limited context. The bill provides those sorts of powers, and then some, in an unconfined way. At this stage, the problem is the uncertainty around what they look like.

Paul Sweeney: It seems as though the power of determining that is entirely with the executive, and therein lies the risk of democratic overreach.

I emphasise that the UK Government's position is—this is stated in the note from the Cabinet Office—that

> "the power is required as there are approximately 2000 pieces of secondary retained EU law, including RDEUL, that the Government may wish to replace with legislation more suited to the UK's needs. Doing so purely through sector specific primary legislation would take a significant amount of Parliamentary time."

Its justification is that there is not enough capacity in the Parliament to handle that process. I assume, and you might agree, that that is an overly generalised position and that there probably is more capacity and a bit more nuance to it all. Do you agree, Sir Jonathan?

Sir Jonathan Jones: I do. That is prioritising speed against quality of legislation. The Government has made a judgment that because things need to be done quickly, they need to be done in that way. I do not agree with that.

You would normally expect a Government that wants to reform the law in many of these areas—which it is entitled to do—will introduce bills on, for example, employment law, product safety or environmental protection. Those individual bills would set out some policy parameters, which Parliament could debate. Yes, there would be powers contained in those bills, but they would be set in the context of a particular policy direction that Parliament would have the opportunity to consider. That would take some time—as we have said, that might involve consultation with the relevant sectors and so on. I would say that good legislation takes time.

With this bill, the Government has prioritised speed. It is doing it all in one big lump and in a year. Inevitably—yet again, I am repeating myself—that limits the opportunity for consultation or scrutiny. It also means that the powers that are in the bill are inevitably very wide and they are not constrained in the way that they would be in a normal bill that sets out a policy framework and all sorts of limitations and constraints on those powers, which this bill does not contain.

Paul Sweeney: On the issue of the general powers, the Cabinet Office's response says:

> "The Retained EU Law Substance review has indicated a distinct lack of subordinate legislation making powers to remove REUL from the UK statute book where appropriate, and if required replace that provision with legislation that is more fit for purpose for the UK."

It gives a reason for that:

"Had the UK never been a member of the EU, many of the areas identified by the substance review would likely already have similar powers to comparable non EU policy areas to amend. The lack of powers is therefore an oddity created by our EU membership".

That seems to be saying that the extraordinary situation is that the retained EU law does not provide the same provisions in secondary legislation. Would you agree with that assessment, Sir Jonathan, or perhaps Dr Tucker?

Sir Jonathan Jones: Let me come in quickly, if I may. You have to take the law as you find it. Government and Parliament are entitled to change the law, and I think that the way of doing that would be to introduce specific policy-focused bills. Those bills could contain the powers that the Government is now talking about. However, the scope of those powers would be constrained by the overall policy, as I have said, they would be debated by Parliament and they might have all sorts of other limits on what they could be used for. Therefore, if the Government wanted to create that kind of power, it could do so.

What I think is objectionable about the bill is that it seeks to do everything in one go, for every area hitherto covered by EU law, and within the absurd timescales that we have been talking about.

I think that the answer to that is that, if the Government wants powers, it should create powers, but it should do so in a thoughtful way, policy area by policy area.

Paul Sweeney: Thanks for that. There is—

The Convener: Dr Tucker wants to come in.

Paul Sweeney: Before he does, I will add a supplementary question. If ministers were to choose not to bring forward replacement legislation, would there be any opportunity at all for Parliament to scrutinise their decision? Please also feel free to make a general comment in relation to the discussion so far.

Dr Tucker: The reason why I asked to come in was that I wanted to mention another justification that the Government has put forward for the power in question. I agree with everything that Sir Jonathan said about the time and capacity justification. The other justification that I have seen offered is the argument that, because these matters were dealt with in secondary legislation then, it is appropriate to deal with them through secondary legislation now. That justification has been run alongside the one about time and capacity.

I do not think that that second justification is true, either. The appropriate way to tackle these matters depends on the substance of what is being tackled and how it is being tackled, not on how that has been done in the past. That possibility is wiped out by the wholesale nature of the bill. That is what I wanted to say: the fact that these things are in secondary legislation now does not mean that that is the appropriate way to deal with them in future.

10:45

Morag Ross: I agree with what has been said. The Cabinet Office justification that Mr Sweeney referred to starts with the phrase,

"Had the UK never been a member of the EU".

Dr Tucker's point is that, simply because these things have been done in secondary legislation before now in implementing EU law, should they be done in a particular way hereafter? I agree with Sir Jonathan that it does not matter how we got to where we are. We are looking at the law from this point onwards, and we should be considering the best way to ensure that the law from this point onwards works. In order to do that, Parliament and the Executive must respect each other's powers and strengths, and it is important to scrutinise the law in the proper way.

Paul Sweeney: Thank you. I want to probe further on the scenario in which the Government did not introduce replacement legislation. As far as I can see, the Parliament would have no capacity whatever to influence that, and it would not be able to perform any form of scrutiny on the revocation of legislation. There might be a difference if the Government were to introduce replacement legislation, which would perhaps provide a mechanism, but if it were simply to revoke laws through secondary measures, there are no means whatever to scrutinise the impacts.

Do you have a view on that, Sir Jonathan?

Sir Jonathan Jones: The effect of the sunset clause is that, if ministers do nothing, including if they consciously decide to do nothing, a given piece of EU law will fall away and, yes, that is right: none of the Parliaments will have any opportunity to influence that decision, once the bill is passed, because the sunset will be the sunset. Then, either by ministers accidentally doing nothing or by ministers deliberately deciding that they are happy for a particular piece of legislation to expire, Parliament will have no opportunity to scrutinise it at all. That would be the automatic effect of the bill.

Paul Sweeney: That is quite an alarming realisation—that there could potentially be wholesale destruction of legislation in that way.

Morag Ross: That is the premise of the bill. That is the foundation of it.

Paul Sweeney: To hear it put as starkly as that—that Parliament will have no capacity to scrutinise that—was powerful.

There is also the point that ministers will not be able to use the revocation replacement powers to increase regulatory burdens. The Hansard Society has stated that that

"is tantamount, with just a few caveats, to a 'do anything we want' power for Ministers",

and that clause 15(5)

"imposes what amounts to a regulatory ceiling. This is contrary to previous claims from UK Ministers that in some areas REUL might be amended to enhance regulatory requirements (e.g., in the field of animal welfare)."

In your view, Sir Jonathan, will that preclude ministers from improving the standards, rights and protections that are currently enshrined in retained EU law?

Sir Jonathan Jones: I am sorry to have to say this again, but that is very difficult to answer in the abstract. The power is subject to some constraints, including the constraint of not increasing regulatory burdens. However, without having the text at hand, we have to make an assessment of the overall effect of the power. Within that, there could be changes to one aspect of a provision that tighten it up, while at the same time other aspects might be loosened, and the minister might conclude that the overall effect was not to increase regulatory burdens. It is quite a subtle provision in that way. Again, without looking at a specific example, it is difficult to say whether it would be within the overall power.

I suppose that the overall intention is to be reassuring—the bill is not intended to increase regulatory burdens, but one person's regulatory burden is another person's protection. Therefore, if that means that we cannot increase protections, that is a political constraint on the power. It is difficult to predict what that adds up to in practice until we see a particular use of the power.

Paul Sweeney: I appreciate that, Sir Jonathan. Dr Tucker, do you have a view on the ratcheting effect, which can move only in one direction if the use of secondary powers for enhancements is not available?

Dr Tucker: That limit on the power gives it a clear deregulatory bias—that is our starting point. It is a power that does not have many limits on it, but one of the explicit limits is that it is a deregulatory power rather than a power to increase regulation. However, as Sir Jonathan said, what counts as an increasing regulatory burden is hard to understand, especially in the abstract. There are two issues, neither of which I can say anything about, other than to draw attention to them. I think that your question was actually about the conformity of that subsection with previous Government promises.

Paul Sweeney: Yes.

Dr Tucker: I think that it probably contradicts previous promises to use the mechanism to increase regulatory protections in some circumstances. However, it is also an issue outside the previous promises about how the power would be used, because it sets the boundaries for how it can be used, even if that was not promised in the past. The issue goes beyond the fact that it is a breach of the previous representations of what the bill would look like.

Paul Sweeney: Thank you for that, Dr Tucker.

Morag Ross: I am not sure that I have a particular additional point to make. If you were expecting to see very significant, thoroughgoing regulatory change, you would expect it to be introduced in primary legislation anyway. On the issue of the limits that are placed around increasing burdens, it is quite difficult to offer meaningful analysis without seeing what they actually look like in substance.

Paul Sweeney: That is fair enough. Thank you.

The Convener: I will bring in Bill Kidd, who has a question about clause 16.

Bill Kidd: I will take the point slightly further on. The power to update in clause 16 is described by the Hansard Society as "very open-ended". On the issue of

"whether a change in technology or a development in scientific understanding has occurred—for example with respect to Artificial Intelligence, Genetically Modified Organisms, or Net Zero",

the Hansard Society questioned whether it should be within the scope of that ministerial power to update REUL in those areas and assimilated law

"to take account of changes in technology or in developments in scientific understanding",

in which areas, these days, we see large movements. Is it reasonable for ministers to be left with such ministerial discretion in those instances?

Morag Ross: Again, this is possibly just an example of quite broad drafting that could cover at the entirely mundane level something relatively straightforward. It is possible to think of the examples that you mentioned as introducing something rather more significant. There is a breadth built into that power, and all will depend on how it is exercised.

I am sorry that that is probably an unilluminating answer to your question, but what we see here is a broad scope. If we are shown the detail, we will be able to understand what that actually looks like.

Bill Kidd: Sure—thank you very much. Sir Jonathan, do you have anything to add?

Sir Jonathan Jones: Not really. I will simply make the same point: it is a very broad power that spans a huge range of existing law and there is no certainty about how it will be exercised; it could be exercised for minor things or for much bigger ones.

Bill Kidd: Thank you. Dr Tucker, do you have anything to add?

Dr Tucker: I have nothing to add, but the reason that I have nothing to add is because of the uncertainty.

Bill Kidd: I thank everyone for making a brave attempt at answering that question.

Paul Sweeney: I will come back in on the point around clause 8 and legislative hierarchy. Clause 8 relates to the removal of the principle of supremacy of EU law. Clause 4 reverses the principle that retained EU law takes precedence over incompatible domestic law. The power in clause 8 will enable ministers to specify that the reversal of the principle does not apply to specific pieces of domestic law and retained EU law and, therefore, that retained EU law continues to take precedence. That will allow ministers to retain the existing hierarchy where that is desirable in order to avoid unintended consequences or to ensure continuity.

The power in clause 8 is exercisable by Scottish and UK ministers in areas of devolved competence. UK ministers are therefore given the power to set the interpretative hierarchy that applies to legislation in devolved areas—bearing in mind that the devolution settlement was never designed with the presumption that we would end up being outside the EU, which has caused disruption.

Do you have any comments to offer on that? I will start with Dr Tucker.

Dr Tucker: I doubt that the UK Government will be enthusiastic about using that power, even though it is giving it to itself. The background—which is the background to a lot of the bill—is that the bill undoes some of the things that were done in previous legislation, in particular in the European Union (Withdrawal) Act 2018. I think that the clause is intended to be a safety net in situations in which there is interaction between different enactments—between domestic enactments and enactments that are made under the bill.

On the one hand, it is an eye-catching provision because it is about supremacy and changing hierarchies. On the other hand, the effect of exercising the power under the clause would be only to maintain the status quo before the bill was enacted. Because the EUWA maintains the supremacy principle, the clause is designed to let ministers maintain that status quo rather than have the reversal that would happen as the default position under the new bill. Therefore, although it is eye-catching, it is about the status quo.

Paul Sweeney: That is helpful—thank you, Dr Tucker. Sir Jonathan, do you have anything further to add?

Sir Jonathan Jones: I feel that I am becoming very repetitive but, again, the real problem with the combination of provisions is the uncertainty that it creates. The abolition of supremacy is being done in the abstract. You have an existing set of rules about interpretation that were preserved by the EU withdrawal act, because the whole aim of that act was to—as far as possible—secure continuity and certainty in the law. You do not arbitrarily change how the law is going to be interpreted; rather, you keep the same rules, which included the rule of supremacy. However, that is politically anathema to some, including, apparently, the Government, so it changed the rule to take away the doctrine of supremacy, but without giving any real indication of what that might mean in practice for particular areas of the law.

That creates uncertainty, because if you deliberately change the way in which the law is to be interpreted, it is open to people to argue that settled interpretations from the past should now be changed and that previous court decisions should be reopened and so on. We have no idea what will happen as a result of any of that. That is the big uncertainty point.

The Government then creates a power in the bill that says, “Well, in case we don’t like the results of that provision, we will reverse it to restore the pre-existing provision.” You may think that that is okay, but—yet again—we have no idea whether the Government will, in fact, do that. Dr Tucker may be right that the Government may be very loath to do that, because the headline is to get rid of the doctrine of supremacy.

The end result is that we simply do not know what the effect will be in any particular area of law. It may take litigation—it may be in the interests of big corporate entities to seek to relitigate some of those issues. It may take litigation to work out whether, and if so how, the law has changed as a result of the reversal of the hierarchy. On top of that, we have the question of whether the Government will exercise the power to restore the status quo. We simply do not know whether it will.

11:00

Paul Sweeney: Morag Ross, do you have any points to add?

Morag Ross: I do not have anything to add. The critical thing is that the situation is unclear. Possibilities are opened up as to how that will be implemented, but we just do not know how it will happen.

Paul Sweeney: That is certainly helpful. It begs more questions than answers, but I guess that that is just a sign of the constitutional immaturity of the way in which the UK Government is proceeding.

The Convener: Sir Jonathan, you mentioned the word litigation. Paul Sweeney's question was about clause 8, but it made me think about the bill as a whole.

The word "uncertainty" has been used a lot by witnesses today, about what may or may not happen. Do witnesses expect litigation to take place because of the lack of clarity that is caused by the number of regulations and the volume of legislation that will be covered by the bill? There are 2,400 pieces of retained EU legislation and potentially another 1,400—possibly up to 5,000. I dare say that, at some point in the future, some organisations will operate and take decisions on the basis of what they think is the law, but potentially, because of the sunset clause, the initial law might not exist any more, because it will have fallen off the statute book. Do you expect an increase in litigation as a consequence of this legislation from the UK Government?

Morag Ross: At least two different categories of situation might arise. The first category is circumstances in which a group of people who understood that they were subject to a particular set of regulations are no longer subject to them, that is to their disadvantage and it has happened by accident because something has fallen off a cliff edge—it ought to have been caught but has tumbled down and has caused a problem. I cannot rule out somebody wanting to raise proceedings if that happened but, if there is a general acceptance that something has been missed that ought not to have been missed, and so it comes under an "accidental" category, the way to deal with it would be by using emergency legislation to plug the gap. It is hard to see what taking a situation of that type through the courts would add. If it were raised in the courts here, you might conceivably look for a declarator. However, instinctively, that seems unlikely.

It would be more difficult to call if people whose interests were adversely affected by a change in a regulatory position took the view that they disagreed with what was done and the way in which it was done, and if they perceived that their interests were unlawfully affected. Again, it is really difficult to say, in the abstract, what that might look like, where they might raise proceedings or on what grounds.

An increase in litigation cannot be ruled out, but it is important to distinguish between those two categories. There are probably other categories as well.

The Convener: Before I bring in the other witnesses, I will make a point regarding your first category. Certainly, it could be quite time consuming to pull something together in order to bring in emergency legislation. On the issue of capacity, which was raised earlier, as I asked Sir Jonathan, does the civil service actually have the capacity to look at all the legislation that is currently there? Dr Tucker indicated that officials would have to engage with all the legislation that is there. Given the short time that we have, there is a possibility that not every piece of legislation will be engaged with in order to make an active decision before a sunsetting happens or does not happen on each particular piece of legislation. I suggest that, given the capacity issue and the short timescale—notwithstanding the potential to extend the sunsetting—litigation could be a regular occurrence if businesses or trade sectors ended up being caught in something that was not fully considered beforehand.

Morag Ross: If it is uncontroversial emergency legislation, it might be as simple as saying, "We meant to retain this in its entirety. We did not want to modify or amend it in any way—we just wanted to preserve it and it got missed." It is likely that that could be done pretty swiftly, and that would be the more efficient way of solving that particular problem.

Again, it is quite difficult in the abstract. With regard to repeated litigation, litigation carries its own uncertainties. Very few people go to court on the advice that they are bound to succeed. It is not something that even big corporations embark on lightly. In areas of policy uncertainty, where there are also likely to be political pressures, it is a fairly significant undertaking. At this stage, all that I can say is that it might be something that people with interests in those areas will contemplate. Will there be a slew of cases? I do not know, but, as I said, uncertainty often puts people off taking that route.

Sir Jonathan Jones: I think that there is a significant risk of litigation. To go back—yet again—to the point about certainty, businesses, including clients of my firm, Linklaters, like a tolerable level of legal certainty and they have ordered their affairs on the basis of the existing law. As I have said, the purpose of the withdrawal act was, as far as possible, to preserve that law with as much certainty and continuity as possible, and, broadly speaking, I think that that has succeeded. There was not much litigation immediately following our withdrawal because the law continued more or less as before.

However, there is now a huge disruption to legal certainty in all the ways that we have described—first of all, because we simply do not know what is going to happen under this bill and, therefore, what the law will actually be by the end of 2023. That is very disruptive for business. Many business groups have said this, so I do not need to say it for them, but the uncertainty as to what the law will be makes it very difficult for businesses and all sorts of other organisations. Every user of the law needs to order their affairs in such a way as to comply with the law and undertake their dealings with their counterparties in accordance with the law. All of that is thrown into doubt. Of course, the law can change at any time. Businesses are used to the law changing, but not in that way—across that huge spectrum of areas, entirely by secondary legislation and within the space of a year. The risk is that the law gets changed in ways that are unclear and that certainly disadvantage particular interests.

To go back to the point about the hierarchies, it is about not just uses of power but what the bill says about, for example, the abolition of doctrine of supremacy. That changes the meaning of the law in some way that means that it is in the interests of the businesses to litigate. That must be a significant risk. This disruption of certainty and of business might very well prompt disputes. Nobody wants to go to litigation—obviously, clients try to avoid litigation where possible—but I think that there must be a risk that that will happen.

Dr Tucker: I defer to the other two witnesses on the question of the practical likelihood of litigation.

I reinforce what Sir Jonathan said about uncertainty. The reason that I worry about uncertainty—I suspect that it is a similar reason to why the other two witnesses worry about uncertainty—is to do with the rule of law and the ability to plan one's affairs and one's life. When there is radical uncertainty, it is not possible to plan one's affairs, and the reaction is either not to make decisions or to make decisions that turn out to be wrong as the law changes. That is the problem with radical legal uncertainty. It destabilises the lives of individuals as well as organisations, businesses and public authorities, because they do not know what the outcome of the decisions before them will be, so they cannot plan their affairs.

The theoretical side, which I am familiar with, says that one consequence of that is litigation, but I will defer to the other two witnesses on the practical likelihood of that in this case.

The Convener: The final area of questioning is on the issue of Henry VIII powers, which tend to bring some controversy any time they are spoken about.

Prior to the publication of the bill, the Public Law Project, in written evidence to the House of Commons European Scrutiny Committee's inquiry into retained EU law, stated:

> "A broad Henry VIII power for the UK Executive to make law in any area of former EU competence would be constitutionally inappropriate."

The Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee, in its recent report titled "The Impact of Brexit on Devolution", stated:

> "The Committee's view is that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works."

Do the witnesses have any comment about the Henry VIII nature of many of the powers contained in the bill?

Dr Tucker: Henry VIII powers are always slightly problematic because of the way that they disturb a settled understanding of the hierarchy of the different institutions that can legislate. An attempt is made in the bill to manage that risk mainly by the powers in the bill that extend to being Henry VIII powers being restricted, if I understand the bill correctly, to making changes to primary legislation into which the provisions were originally put by the previous exercise of a Henry VIII power. So, there is a strange constraint over many of the powers in the bill.

Nevertheless, I worry about repeating the error that I mentioned earlier, because we are invited to judge the appropriate way to do something now by looking at how it was done in the past. If that thing was done by secondary legislation in the past, it is seen as being appropriate to do it in that way now. That is an extension of the idea that, if a thing is in primary legislation but it was inserted into that legislation by secondary legislation, it is okay to go right back to the start of the process and revisit the original secondary legislation. I think that that perpetuates the error of doing things now in the way that they were done previously, when the focus should be on the substance of the policy area concerned and the nature of the change that is being made.

11:15

Sir Jonathan Jones: I agree with that point. The origin of the provision ought not to be the test. The test should be the substance of the change that is being made. I try to avoid using words such as "unconstitutional". In the end, Parliament can pass the bill, and, if it does, the powers will be what they are. That is how our constitution works.

However, undoubtedly, the powers are very wide. Again, it is about the combination of the factors in the bill. Henry VIII powers are very wide by definition, and these powers are widest of all because they include the power to amend the bill itself and they apply across the huge range that the bill covers, as I keep saying. To me, that rings alarm bells about the scope of the powers. Then we come back to the scope, either in principle or in practice, for any of the parliaments to scrutinise the exercise of those powers. For the reasons that we have given, that scope is very limited.

Taking all those things in combination, even while avoiding the term “unconstitutional”, I would say that that is a bad way to legislate.

Morag Ross: I have nothing to add to that. We have discussed and identified the issues that arise when powers are of such breadth and scope.

The Convener: Colleagues have no further questions. Do panel members have anything to put on the record that they have not already highlighted?

Morag Ross: No, thank you. I reiterate my thanks for the invitation to the faculty and to me.

Sir Jonathan Jones: No, and I will say the same thing. We have covered a lot of ground. Thank you for asking me.

Dr Tucker: I have exactly the same answer. I have nothing to add, but thanks for inviting and listening to me.

The Convener: No problem.

I thank Sir Jonathan Jones, Dr Adam Tucker and Morag Ross KC for their extremely helpful evidence. The committee may follow up by letter any additional questions that stem from the meeting.

I suspend the meeting briefly to allow Morag Ross to leave the room and the other witnesses to leave BlueJeans.

11:17

Meeting suspended.

11:20

On resuming—

Instrument subject to Affirmative Procedure

The Convener: Under agenda item 3, we are considering an instrument on which no points have been raised.

Dentists, Dental Care Professionals, Nurses, Nursing Associates and Midwives (International Registrations) Order 2022 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument subject to Negative Procedure

11:20

The Convener: Under agenda item 4, we are considering an instrument on which no points have been raised.

Public Service Vehicles (Registration of Local Services) (Provision of Service Information) (Scotland) Regulations 2022 (SSI 2022/358)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

11:20

Meeting continued in private until 11:41.

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