

Consultation Response

Call for Views on
Framework Legislation
and Henry VIII Powers

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Delegated Powers and Law Reform Committee's Call for Views on Framework Legislation and Henry VIII Powers: *Share your experiences and views of framework legislation*.¹ We have the following comments to put forward for consideration.

Questions

1. What is your understanding of what framework legislation?

There is no settled definition of framework or skeletal (the terms are used interchangeably) legislation instead this approach to subordinate legislation is described in a number of ways. The Cabinet Office Guide to Making Legislation provides a slightly wider definition of a framework or skeleton bill as: A bill or provision that consists primarily of powers and leaves the substance of the policy, or significant aspects of it, to delegated legislation.²

The DPLR Committee website states that framework (or skeleton) legislation “sets out the principles for new law, but without much of the detail as to how it will be given practical effect. Instead, broad powers to fill in the detail at a later point are given to ministers, and occasionally other bodies.”.³ On some occasions the distinction has been made between a “true framework” bill where policy context and direction is provided and a skeletal bill where policy detail is completely lacking: The UK [Medicines and Medical Devices Act 2021](#).

In the UK Parliament the category of “Hyper-skeletal” bills has been used by the Delegated Powers and Regulatory Reform Committee, [25th Report of Session 2022-23](#), HL Paper 147, 2 February 2023, for the Retained EU Law (Revocation and

¹ [Share your experiences and views of framework legislation](#)

² [Guide to making legislation - GOV.UK](#)

³ [Committee seeking views on framework legislation and Henry VIII powers | Scottish Parliament Website](#)

Reform) Bill. The committee took the view that the Bill “had no policy content by delegating extensive powers to Ministers.”⁴

Drafting Matters! does not focus on this distinction but rather on the form of subordinate legislation: *A power in a Bill for the Scottish Ministers to make subordinate legislation exercisable by Scottish statutory instrument should be expressed as a power to make regulations rather than as a power to make an order, rules or any other form of instrument. This applies to powers which are amended into existing Acts of the Scottish Parliament or UK Acts as well as to stand-alone powers in Bills.*⁵

In summation however framework bills leave the content of policy to be decided through secondary legislation (usually made by ministers or by the Scottish senior judiciary) rather than by Acts of Parliament (made by either the UK or Scottish Parliaments).

The Scotland Act 1998 (which is not framework legislation) gives the Scottish Parliament the power to pass primary legislation, Acts of the Scottish Parliament (Section 28 [Scotland Act 1998](#)).

Provisions in such legislation can delegate devolved powers, whether to devolved ministers or to other persons or bodies. Delegated powers include powers given to Scottish Ministers in an Act of Parliament or an Act of the Scottish Parliament to make subordinate legislation or change existing law, without this needing another Bill – for example section 104 [Scotland Act 1998](#) (which is not framework legislation) provides:

(1) Subordinate legislation may make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament or made by legislation mentioned in subsection (2).

(2) The legislation is subordinate legislation under an Act of Parliament made by—

(a) a member of the Scottish Government.

(b) a Scottish public authority with mixed functions or no reserved functions,

or

(c) any other person (not being a Minister of the Crown) if the function of making the legislation is exercisable within devolved competence.

It is worth noting that subordinate legislation is subject to competence provisions in the same way a primary legislation is.

⁴ House of Commons Library Research Briefing: Delegated powers and framework legislation, 17 July 2024, accessible here: [CBP-10046.pdf](#)

⁵ [Drafting Matters! Second Edition](#)



Section 54 [Scotland Act 1998](#) provides:

It is outside devolved competence—

(a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or

(b) to confirm or approve any subordinate legislation containing such provision.

2. What, in your view, is the appropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation appropriate?

The UK Cabinet Office Guide to Making Legislation gives advice on when the UK Government has seen the delegation of powers as appropriate.

These circumstances include:

- *Filling in the detail of minor, technical or administrative matters.*
- *Situations when amendments to legislation might be needed more frequently than could reasonably be carried out by Parliament through the primary legislation process.*
- *When consultation is needed on the detail of a policy such as the level of a fee.*
- *When operating in a new area of policy to give ministers “an acceptable level of flexibility” to make changes in the light of experience.*
- *To allow flexibility for policy to be made differently for different groups or areas.*
- *Where there are precedents for using delegated powers and where it is uncontroversial to do so.⁶*

We are cognisant of the potential benefits of framework legislation, for example, allowing greater flexibility in designing and implementing the underlying policy proposals, particularly should these evolve over time. We nonetheless highlight the need for flexibility to be appropriately balanced against ensuring there is clarity in the law, appropriate levels of parliamentary scrutiny underpinning legislative and policy developments, and meaningful stakeholder consultation.

It is crucial to upholding the rule of law that the law is clear, comprehensible, and transparent so that requirements can be understood by those affected. We highlight that a framework made up of primary and significant volumes of secondary

⁶ Paragraph 3.1, [CBP-10046.pdf](#)



legislation can be challenging for those directly affected by the law to access and fully understand.

Individuals and organisations must be able to guide their conduct based on clear and understandable legal standards. It is necessary, therefore, that sufficient information and detail is available during the legislative process (for both primary and secondary legislation) to understand how proposals will operate in practice. Without this, it can be difficult for stakeholders to fully understand and assess their likely impacts. We particularly stress the importance of robust consultation on secondary legislation, to provide an opportunity for scrutiny and comment from stakeholders on the details of the measures.

3. What, in your view, is inappropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation inappropriate?

It is inappropriate to use framework legislation when this results in limitations on policy information where MSPs or other legislators have insufficient information on which to decide the fate of the legislation, the need for mandatory guidance and tertiary legislation.⁷ This is particularly the case where the use of delegated powers may raise problems such as interference with convention rights or engage the market access principles, thus raising questions about whether the powers to be conferred can in fact be used effectively.

4. Do you consider there to be any challenges associated with scrutinising or engaging with a piece of framework legislation? Any specific or real-life examples would be helpful if you can refer to them.

The challenges associated with scrutinising framework legislation are quite clear. If the policy is not reflected in the bill and the measure contains a list of delegated powers which are being lent to Ministers, the Executive is simply being provided with the capability to make law without adequate parliamentary scrutiny of what that law may be. Scrutiny of secondary legislation is generally considered to be inadequate. This calls the law-making process into disrepute. The UK Parliament has considered this on a number of occasions, see: Delegated Powers and Regulatory Reform Committee, [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#), 12th report of Session 2021-22, HL Paper 106, 24 November 2021, paras 91-95; Secondary Legislation Scrutiny Committee, [Government by Diktat: A call to return power to Parliament](#), 20th report of session 2021-22, HL Paper 105, 24 November 2021, para 56.

⁷ Paragraph 3.2, [CBP-10046.pdf](#)

5. Thinking of the scrutiny of framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles?

There are already supportive documents provided when a bill is introduced. The Policy Memorandum and Explanatory Notes are frequently relied on by MSPs and stakeholders when analysing a bill. Nevertheless, the Government could provide enhanced materials, for example draft regulations to indicate what the Government intends to do with the powers being granted to them in the bill. That would enable MSPs to assess the impact of the delegation in advance of the bill being passed.

6. Thinking of the scrutiny of secondary legislation resulting from framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles scrutinising and engaging with legislation?

The regulations should be consulted upon in advance and be subject to super affirmative procedure. Consideration should be given to changes in Parliamentary Standing Orders to permit the amendment of such regulations during their passage.

7. What views do you have on Henry VIII powers? In particular, are there any contexts in which you consider their use to be particularly appropriate or inappropriate?

Regulations with Henry VIII powers include the power to amend primary legislation by subordinate legislation. We disagree generally with the provision of Henry VIII powers. If Ministers require to amend legislation regulations (other than remedial orders where there is a constitutional imperative to amend legislation quickly) are not the way to do it. We should point out that Expedited or Emergency legislation have scrutiny methods which are better than that accorded to regulations. In addition, those procedures allow the measure under consideration to be amended.

8. What, if any, additional safeguards might alleviate any concerns you have about the granting and / or use of Henry VIII powers?

We have no comment to make.



9. Do you have any general comments or views on framework legislation or Henry VIII powers? The Committee would be particularly interested in any evidence you have on the prevalence of framework legislation (in any jurisdictions you are familiar with), whether this has changed over time, and any views you have on the definition of framework legislation.

We accept that framework legislation is a necessary aspect of law-making today especially where Government policy is in the course of development and the subject matter of the legislation concerned is technical in nature. However, Government should act with restraint when planning to use such a mechanism and should be more open to the use of enhanced supplementary materials to explain what the bill intends to do.

Henry VIII powers should only be enacted in extremis.



For further information, please contact:

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