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18 April 2024

Dear Convener,

## **DELEGATED POWERS AND LAW REFORM COMMITTEE MEETING – 19 MARCH**

Thank you for your letter of 21 March 2024 requesting information on specific points and following up on matters raised when I attended the Committee's meeting of 19 March.

At that meeting I indicated that the Scottish Government strives to ensure a high quality of drafting. In the event that any minor drafting errors are identified, the Scottish Government always tries to rectify these errors as soon as possible.

We welcome any input from the committee about the information provided in Explanatory Notes.

### **Timings between parliamentary stages**

The Committee was particularly interested to hear my response in relation to the timings between parliamentary stages.

I am happy to confirm again that, where time and business allow, the Scottish Government always aims to allow more than the minimum time required by Standing Orders between stages of Bills. As the committee is aware, I remain committed to abiding by the convention that the Government should seek to voluntarily programme its Bills with a minimum gap of 14 days between the conclusion of Stage 2 and beginning of Stage 3, which is four days more than required by Standing Orders.

This is to ensure that, when introducing or amending regulation-making powers at Stage 3 (whether the amendments are entirely new or will amend or remove amendments made at Stage 2), the Scottish Government can write to the DPLRC with the amendment information to allow the committee to consider that at a meeting, where possible, before the Stage 3 debate. This was the case with the Wildlife Management and Muirburn (Scotland) Bill when a supplementary Delegated Powers Memorandum was provided to the Committee, and the Scottish Government wrote to the committee explaining why an amendment had been lodged.

Specifically in relation to the Regulation of Legal Services (Scotland) Bill, as that was discussed at our meeting, I am aware that my colleague, the Minister for Victims and Community Safety, is engaging widely with MSPs in relation to this Bill, including you, Convener.

The committee will now be aware that the first formal Stage 2 session of that Bill will take place on 14 May, following the Stage 1 debate on 22 February. I will, of course, aim to ensure Stage 3 of that Bill takes place with more than the minimum time allowed between the two stages.

Where the committee has specific concerns about timings, I would be grateful if the committee can notify me directly so that I can try to accommodate these as far as possible, while acknowledging that timing of Bills is ultimately for Parliament to agree.

## Framework Bills

In relation to framework Bills I would wish to emphasise a number of points.

Firstly, there is no set definition of what constitutes a 'framework' Bill and it may be helpful to develop a shared understanding of the term so that when it is used there is no ambiguity about what is meant. Almost every Bill contains some form of delegated powers and in that sense every Bill creates a framework for future secondary legislation or for other forms of delegated powers. But I am not sure that takes us very far forward, and perhaps a more helpful definition of a 'framework' Bill would be a Bill which includes powers to set out significant aspects of proposals in secondary legislation. I would be grateful to know if the committee agrees with that definition or if in its view 'framework' Bills should be described differently?

Secondly, I note that the issue of framework Bills has a long history in this Parliament. In 2000, Iain Gray MSP, then Deputy Minister for Community Care, noted at Stage 2 of the Adults with Incapacity Bill that *"...as we do not know yet whether such treatments will become available, the best we can do – and what we set out to do – is to set a framework that would allow us to take cognisance of such developments quickly, without taking up parliamentary time unnecessarily."* Also in 2000, civil servants giving evidence to the Subordinate Legislation Committee on the Education and Training Bill observed that *"The bill is enabling legislation to allow Scottish ministers to introduce regulations to pay grants... Ministers wish to make the detailed arrangements through subordinate rather than primary legislation to allow flexibility to adjust to meet changing needs in Scotland."*

In 2002, when taking evidence from Scottish Executive civil servants on the Local Government in Scotland Bill, Kenneth Gibson MSP questioned why *“If a key aim of the bill is empowered and accountable councils, why is so much of it take up with arrangements for regulation and ministerial powers of direction and intervention?”* Civil Servants responded for by stating that *“...we are using regulation for a deliberate purpose. We intend to ensure the legislation remains current and flexible...The bill supplies the framework, along with new powers and new flexibilities.”* Also in 2002, stakeholders giving evidence to the Local Government Committee in relation to the Community Care and Health Bill at Stage 1 observed that *“The bill is little different from many other bills that are being introduced; it is an enabling bill. It does not include much detail; the detail comes through secondary legislation, regulations, conditions and guidance.”*

In 2003, Des McNulty MSP, then Convener of the Finance Committee, said during the committee’s scrutiny of the Financial Memorandum for the Education (Additional Support for Learning) (Scotland) Bill that *“The problem is that the bill establishes a loose enabling framework that will allow the bar to be set at several different levels. Where the bar will be set is not clear to the committee. The implications for local authorities will depend on where the bar is set, so we are in a difficult situation.”* Also in 2003, Robert Brown MSP, noted during the Stage 3 debate on the Homelessness etc. (Scotland) Bill that the Bill was *“primarily framework legislation, as in many aspects was the Housing (Scotland) Act 2001.”*

In 2006, during the Stage 1 debate on the Planning etc. (Scotland) Bill, John Home Robertson MSP observed that *“Several witnesses have made the comment that it is difficult to form a final view on many sections of the bill because the detail is being left to secondary legislation. How do you respond to that?”*. Johann Lamont MSP, then Deputy Minister for Communities, responded by saying that *“With any bill there is a need for secondary legislation; the bill establishes the framework for that... What people want is the reassurance that, as the secondary legislation goes through the Parliament, there will be appropriate scrutiny and consultation... We do not have to have everything in front of us right now for us to progress things later on. We have the balance right, although there are, as ever, anxieties about where the balance will lie in the future. I am content that we have it right in this bill.”* Again in 2006, Ross Finnie MSP, then Minister for Environment and Rural Development, noted in the Stage 3 debate on the Animal Health and Welfare (Scotland) Bill that the Bill *“provides the essential flexible statutory framework, but the true test of the legislation will be in how the new provisions are implemented and in the wide programme of secondary legislation that will be required after enactment.”*

I am also aware that the Delegated Powers and Law Reform Committee’s interest in the issue is not new and that in 2017 when the then Minister for Parliamentary Business, Joe Fitzpatrick MSP, gave evidence he noted in response to a question about the Social Security (Bill) that *“There is no trend towards framework bills but, as you say, there are circumstances where that approach is more appropriate in order to have ongoing flexibility”*.

The reason for providing these examples is that they demonstrate that the issue of framework Bills is not new or novel, which is at odds with remarks made at a recent meeting of the Finance and Public Administration Committee by Michael Marra MSP: *“There has been a very marked increase in the number of framework bills that the Parliament is considering, including major pieces of legislation such as the National Care Service (Scotland) Bill and the bill before us now, the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill. We are seeing them all the time now. I am a relatively new member of the Parliament, having been elected in 2021, but my understanding is that, in years past, such bills were incredibly rare, if not completely unheard of, yet we are now seeing them at the committee almost every month. Is it a fashion that is running through the civil service?”* I do not think Mr Marra’s characterisation of the Government’s legislative programme as routinely framework in nature is fair or accurate, nor would I agree with his view that framework Bills are historically rare. The reality is that consideration of, and debate about, the balance to be struck between what provision should be included on the face of a Bill and what should be set out in delegated powers is an issue as old as this Parliament itself.

The point I wish to emphasise to the committee is that this Government does not set out to deliberately create Bills which are framework in nature. The development of Bills, and the nature, form, and function of delegated powers in them, is considered on a case-by-case basis and the approach taken is ultimately driven by what is fit for purpose in the specific context of each Bill. Delegated powers will often be required to set out technical, procedural, operational or related details to enable the principal policies and structures set out in the Bill to be given effect to. This is always subject to appropriate conditions and limits. Some policy areas, such as social security, or more recently in relation to agriculture, require considerable flexibility in how they operate so that the legislative framework can be responsive to changing circumstances, including to make relatively minor changes to delivery mechanisms. Delegated powers are a necessary component of any modern statute book, and it is essential that the Government is able to make appropriate use of them.

Including delegated powers in a Bill is not an opportunity for Government to side-step parliamentary scrutiny. This Parliament’s processes and procedures governing delegated powers are robust and comprehensive. Every Bill which has delegated powers must be accompanied by a Delegated Powers Memorandum (DPM), which must set out for each and every delegated power:

- The nature of the power
- The reason for taking the power
- And the choice of scrutiny procedure for the power

That DPM is then subject to scrutiny by this committee and it will, quite rightly, stress-test the rationale provided by Government and routinely probe specific points of interest to it. And then when those delegated powers are used, they are subject to further scrutiny by this committee and the relevant subject committee.

In terms of your specific question, I have not and do not intend to undertake an exhaustive analysis of the Scottish Government's legislative programme, past and present, to arrive at a figure for framework Bills. However, I am happy to acknowledge that in terms of Session 6 Bills, under the definition I have set out above, I think it would be reasonable to characterise the Circular Economy Bill, the Social Security (Amendment) Bill, the Agriculture and Rural Communities Bill, the Housing Bill (for its rent control elements) and the National Care Service Bill as framework Bills. In each case, the Government has fully articulated its rationale for taking the approach that it has and why it considers an appropriate balance between putting provision in primary and secondary legislation has been struck in the specific circumstances of each case. And I note that in relation to the Agriculture and Rural Communities Bill the lead committee observed in its Stage 1 report that "*The Committee agrees with the Scottish Government's approach that a framework Bill is appropriate to establish a long-term basis for future support schemes*". I do not think these Session 6 examples represent a trend, or a step-change in the frequency of framework Bills compared with previous sessions of Parliament.

### **SSI volumes**

Committee members asked for information about the anticipated volume of SSIs to summer recess by expected lead committee. That is provided at the Annex to this letter.

Kind regards,

**GEORGE ADAM**

## Annex A

Committees	Affirmative	Negative	Laid no procedure	TOTAL
CJ	0	3	1	4
CTTEA	0	0	0	0
DPLRC	0	1	0	1
ECYP	1	2	0	3
EFW	6	0	2	8
EHRCJ	4	1	2	7
FPA	0	1	0	1
HSCS	2	2	2	6
LGHP	1	1	0	2
NZET	3	1	0	4
RAI	0	2	0	2
SJSS	2	2	0	4
SPPCA	0	0	0	0
<b>TOTAL</b>	<b>19</b>	<b>16</b>	<b>7</b>	<b>42</b>

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

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