

DELEGATED POWERS AND LAW REFORM COMMITTEE – FRAMEWORK LEGISLATION INQUIRY SUMMARY OF THE CALL FOR VIEWS**Overview****Key points from the call for views**

- There was a consistent understanding of what framework legislation is.
- There was also a consistent view that the questions about framework legislation are not new. In addition, it was clear from the evidence submitted that other parliaments have carried or are carrying out inquiries and reporting on the same issues the Committee is exploring in this inquiry.
- Generally, there was an agreed level of concern over what was perceived to be the increasing use of framework legislation which is providing more power to governments and an acknowledgement that this presents scrutiny challenges for legislatures.
- There was recognition from most respondents that in certain circumstances there is a place for framework legislation which can provide a policy framework to be built upon at a later stage.
- There was a common view amongst respondents about the situations where it was inappropriate to use framework legislation. These included a strong view that framework legislation which results in elements of policy being made in secondary legislation is an inappropriate use of the approach.
- Respondents argued that key challenges for parliaments in scrutinising and engaging with framework legislation related to accountability and transparency. There were also concerns expressed about scrutiny of financial costs of framework legislation alongside the challenges of scrutinising policy.
- There was a common view that the scrutiny processes for framework legislation and of the secondary legislation arising from that primary legislation should be more transparent and robust. A number of stakeholders also called for a greater level of consultation about the content of framework legislation and secondary legislation.
- Respondents suggested that there was a need for detailed supporting documentation alongside framework legislation. This included providing details on the nature of the legislation in the policy memorandum and indicative costs in the financial memorandum. There were also suggestions from respondents that the delegated powers memorandum should set out the need for the delegated powers and provide examples of how powers might be used.

- Amongst many of the respondents the widely held view was that secondary legislation is generally subject to lower levels of parliamentary scrutiny than primary legislation. As a result, there was a belief that the scrutiny of secondary legislation resulting from framework legislation should be more robust with more time made to allow for stakeholder engagement and consultation on the detail of secondary legislation.
- There was a mix of views with regards to the use of Henry VIII powers. Whilst some respondents expressed negative views about them, others suggested there was a place for them in addressing minor or technical issues.
- Many respondents suggested that the exercise of Henry VIII powers should be subject to appropriate levels of parliamentary scrutiny.

The call for views

For the call for views, the questions the Committee asked where:

1. What is your understanding of what framework legislation is?
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?
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?
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.
5. Thinking of the scrutiny of framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles?
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?
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?
8. What, if any, additional safeguards might alleviate any concerns you have about the granting and / or use of Henry VIII powers?
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.

The Committee received over 40 responses. This included responses from 5 Scottish Parliament committees (Net Zero, Energy and Transport; Health, Social Care and Sport; Local Government, Housing and Planning; Finance and Public Administration and the Rural Affairs and Islands).

The Committee also received responses from 7 national and sub-state parliaments including New Zealand, Estonia, Cyprus, New South Wales in Australia, Wales, Alberta and Flanders.

The New Zealand Regulating Review Committee provided the Committee with a paper that it presented at the Australia-New Zealand Scrutiny of Legislation Conference, [Reigning in Hell on Legislation in an Emergency](#) which discussed the use of Henry VIII powers during the COVID pandemic.

The Chair of the New South Wales Legislative Council Regulation Committee, the Honourable Natasha Maclaren-Jones MLC provided the Committee with two reports tabled by the Committee in the previous parliament that canvass a number of relevant issues:

- Report No. 7 – [Making of delegated legislation in NSW](#), dated October 2020,
- and
- Report No. 9 – [Options for reform of the management of delegated legislation in New South Wales](#), dated September 2022.

A summary of the response to the call for views the Committee received is provided below structured by the questions asked. There is some overlap between sections because some respondents covered similar ground in different answers.

Understanding of what framework legislation is

There was a consensus that there is no exact definition of what framework legislation is though there was a general understanding amongst respondents that framework legislation may provide a high-level policy direction with the detail to be provided in secondary legislation using powers conferred on Ministers in the primary act.

Professor Richard Whitaker cited the definition used by the [House of Lords' Delegated Powers and Regulatory Reform Committee \(DPRRC\)](#) for framework legislation:

“where the provision on the face of the bill is so insubstantial that the real operation of the Act, or sections of an Act, would be entirely by the regulations or orders made under it’.”

The Scottish Parliament Net Zero, Energy and Transport Committee's response set out the Committee's understanding of what framework legislation is:

"The Committee would consider a Bill a framework Bill if it set out policy in a particular area only in a very high-level way, with most of the detail of that policy to be set out by way of order or regulation-making powers found in the Bill itself. If a Bill did contain some policy provision on its face but the most significant elements are left to subordinate legislation made by virtue of powers on the face of that Bill, we may also consider that a framework Bill."

Professor Colin Reid wrote that there is no exact definition of framework legislation. He then provided a summary of his understanding:

"Framework legislation establishes the structure for regulating (in its broadest sense) a topic, setting out the (broadly defined) activities subject to control, who the regulator is, the mechanisms available to influence behaviour (subsidies, prohibitions, licences, charges, guidance, etc.), the limits on and procedures for creating, implementing and enforcing these and the powers to legislate for the detail necessary to add flesh to the bare skeleton. Specific substantive policy choices (at varying levels of specificity) may or may not be incorporated into the terms of the statute, but the idea is that the framework can endure, accommodating different policy choices over time. Nevertheless, a broad direction will often be implicit, making it difficult for a completely opposite policy to be adopted without changing aspects of the framework."

The terminology and use of language which can "often be confusing and seem overly complex" was highlighted by the Open University. Linked to this Age Scotland suggested that having a single, formal definition of framework legislation to be used in the Scottish Parliament would be helpful adding:

"Having a clear definition will help to ensure that framework legislation is not used in inappropriate situations and create greater transparency for all those involved in the legislative scrutiny process."

Most respondents said there was little distinction between the two terms framework legislation and skeleton legislation with the House of Lords DRCRC using both terms. In Wales a new term which has come into the lexicon is headline bills which cover the same ground.

There was a consensus amongst respondents that the volume of what is recognised as framework legislation has increased in recent years. Two events cited as being reasons for this increase were the EU exit process and measures to address the COVID-19 pandemic.

The appropriate use of framework legislation

There was recognition from most respondents that there is a place for framework legislation which can provide a policy framework to be built upon at a later stage.

Respondents also highlighted that where there were appropriate uses of framework bills, there will still concerns about the opportunities to scrutinise the use of powers at a later stage rather than with the framework itself. In this vein, the Scottish Parliament Local Government, Housing and Planning Committee submission stated:

“The Committee recognises that there is a need for the flexibility that secondary legislation affords, but at the same time there must be a balance. Parliament must have confidence in giving powers to Ministers that the extent of the powers it is giving away is clear. In addition, that flexibility must be balanced against the need to ensure that stakeholders understand how the legislation will impact on them and consequently there must be clarity on how powers will be exercised in the interest of stakeholders as well as parliamentarians.”

The Scottish Parliament Net Zero, Energy and Transport Committee stated that whilst framework legislation has a place, it believed that it should not preclude more policy detail being provided on the face of the Bill with delegated powers then provided to “make changes to that policy to respond to developments”.

Kate McCorquodale from Scrutiny and Engagement at the Legislative Assembly, Parliament of New South Wales, set out the perspective of the New South Wales Legislation Review Committee on the appropriate use of framework legislation:

“The Legislation Review Committee of NSW usually takes the approach that it prefers substantive matters to be set out in primary legislation rather than regulations to ensure an appropriate level of parliamentary oversight. “

Respondents highlighted the [Cabinet Office Guide to Making Legislation](#) which provides advice on circumstances in which it might be appropriate for a bill to contain delegated powers. The full list of situations is provided for information:

- to fill in a level of detail which it would be more appropriate to deal with by delegated powers, this may include minor, consequential, transitional, technical or administrative matters;
- where legislation may need amending more often than Parliament can be expected to legislate for by primary legislation;
- to enable consultation to take place on the detailed implementation of a policy, this may include technical details or levels of fees;
- to deal with things which it is anticipated may change regularly in the future, such as uprating for inflation;

- to provide an acceptable level of flexibility to accommodate small policy changes, such as when operating in a novel area where it is desirable to retain flexibility to tweak the policy in the light of practical experience;
- to deal with matters concerning the technical implementation of a policy which cannot be known at the point when the primary legislation is being passed;
- to accommodate the fact that a detailed policy has to work differently for different groups of people, different areas etc.; and
- where the use of delegated powers in a particular area is strongly precedented and uncontroversial.

In a similar vein, Dr Dexter Govan from The Constitution Society wrote:

“Framework legislation, or delegated legislation, may be appropriate in certain instances. These may include:

- 1) Instances where the detail of a policy is likely to change over time and hence will need to be updated frequently, making primary legislation an inappropriate vehicle for such detail. This might include where fees change alongside inflation.
- 2) Where the detail is minor, and perhaps so specialised that it requires consultation and so cannot be implemented alongside the primary legislation. This might include where fees need to be established and set.
- 3) Where minor aspects of a policy’s application differs by area/target/demographic etc. and those differences must be accounted for and expressed at length.
- 4) Details on the technical implementation of a policy which are specialised enough that their inclusion in primary legislation would be inappropriate.”

Dr Ruth Fox from the Hansard Society cited that organisation’s research in setting out scenarios where framework legislation is justified including in rapidly evolving fields like technology, artificial intelligence, science, and medicine - or where policy outcomes depend on ongoing negotiations but require swift implementation. Dr Ruth Fox highlighted the factors that could be used to assess the appropriateness of the delegation of powers, or how such powers might be constrained, include whether:

- the Government has explicitly drawn attention to the fact that the provisions are skeleton/framework legislation;
- the Government has provided a full and adequate explanation of what exceptional circumstances are involved;
- the Government has provided a full and adequate explanation of why no other approach, including primary legislation, could reasonably be adopted;
- the scope of the skeleton/framework provision is constrained on the face of the bill as far as possible;
- an initial set of provisions have been included on the face of the bill with an accompanying power to update the legislation if necessary;

- there are adequate scrutiny processes that future regulations made under the skeleton/framework provisions would be subject to and,
- draft regulations, or other indications of how the powers may be used, are provided along with the bill.

Whilst recognising the value of framework legislation, the Law Society of Scotland highlighted concerns about clarity in the law:

“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 scrutiny.

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

The accessibility of law made under framework legislation was raised by a number of respondents in addition to the Law Society of Scotland.

The Scottish Public Services Ombudsman (SPSO) and the Scottish Legal Complaints Commission both highlighted the value of framework legislation for establishing a new public body. The SPSO wrote:

“Framework legislation is likely to be appropriate where it creates a new body, which is to be institutionally or operationally independent from the Government or Parliament. Where implementation will be by such a body, framework legislation is an approach that can give them both independence and flexibility in how they implement their powers.”

The Scottish Legal Complaints Commission made a similar case:

“We believe legislation which sets out the principles, broad powers and duties of a regulator or other public body, leaving the body itself to fill in the detail or processes and procedures, for example in statutory rules could be considered an appropriate use of framework legislation.”

Examples of appropriate uses of framework legislation provided by respondents included:

- The Agriculture and Rural Communities (Scotland) Act 2024
- Circular Economy (Scotland) Act 2024
- Climate Change Emission Reduction Targets (Scotland) Bill

Professor Colin Reid wrote that for the examples highlighted above:

“These are all areas where over the fairly short term there will be changes in technical understanding, financial and physical conditions and in connected measures in related areas that will require or justify changes in the rules, quite apart from changes in political priorities after any election.”

The National Farmers Union Scotland (NFUS) also highlighted the Agriculture and Rural Communities (Scotland) Act (ARC Act) as an appropriate use of framework legislation arguing that it:

“set out over-arching objectives and purposes for future agricultural support which could be adapted as required and respond to future challenges and opportunities.”

A positive of the ARC Act identified by NFUS was the possibility that changes can be made when required to the agricultural framework which replaced the Common Agricultural Policy in response to geopolitical, economic and/or climate events.

NFUS also highlighted the ARC Act for its positive experience of co-design of policy where the Scottish Government works with stakeholders to design policy before legislating. NFUS stated that throughout the process of the ARC Act going through the Scottish Parliament:

“A huge amount of work was carried out to co-design and develop future policy. The Scottish Government collaborated and consulted with many stakeholders.”

Age Scotland highlighted the legislation passed in response to the COVID pandemic as an appropriate use of framework legislation in response to an “unprecedented situation”.

“Age Scotland believe that there can be some exceptional circumstances when framework legislation is appropriate. Most notably, the use of skeleton Bills might be appropriate in urgent, unprecedented situations like during the COVID pandemic. During the pandemic, legislation including the Coronavirus (Scotland) Acts, and the Scottish General Election (Coronavirus) Act 2021 were introduced as what could be seen as framework legislation...

... In the unprecedented situations we saw during the pandemic, the ability to pass legislation promptly, with gaps filled later during secondary legislation feels appropriate.”

Finally, Jeff King and Adam Tucker suggested the inclusion of sunset clauses in the framework legislation highlighting this approach in the European Union (Withdrawal) Act:

“Given that these uses of delegated powers are confined to their exceptional circumstances, such schemes should provide for special accountability procedures. A common one is found in sunset

provisions. Section 8(8) of the 2018 Act provided that the powers to correct for deficiencies ended after two years following completion day.”

Inappropriate uses of framework legislation

There was a common view amongst respondents about the situations where it was inappropriate to use framework legislation. As a starting point, respondents felt that it was important that the use of framework legislation was properly justified by governments rather than it being asserted it was necessary. This was raised by Dr Ruth Fox from the Hansard Society who wrote:

“Often a problem with framework legislation is that Ministers assert that certain policy matters are not appropriate for primary legislation and should be reserved for regulations without explaining why they have reached this conclusion or providing evidence to support their assertion.”

Dr Pablo Grez Hidalgo from the University of Strathclyde stated that skeleton legislation should not be justified on the basis of precedent:

“Such has been the expansion of delegated powers in the last 40 years that there is a likelihood that government will identify a previous instance in the statutory book.”

There was a strong view that framework legislation which results in elements of policy being made in secondary legislation was also an inappropriate use of the approach. For example, the Lord President of the Senators of the College of Justice (composed of judges sitting in the Supreme Courts) wrote:

“As a matter of general principle, in a democratic society, substantial policy matters should be considered and determined by the legislature which enacts a statute. Legislation which deals with important matters of principle and policy should be visible and accessible before and after it is made.”

Professor Richard Whitaker wrote that framework legislation is inappropriate when:

“it results in the substantive policy elements of a bill being made largely via statutory instruments.”

Whilst not expressing a view for or against framework legislation, the Scottish Human Rights Commission (SHRC) highlighted issues for human rights as a result of the use of framework legislation:

“The Commission is concerned about the use of framework legislation to alter human rights entitlements. Human rights are fundamental, and any significant impact to them ought to have the full scrutiny of the legislature. Therefore, framework legislation, if used, must build in enough detail to comprehensively guarantee human rights

requirements. This means that international human rights requirements ought to be explicitly articulated in the primary framework legislation and operate as a restriction on the scope of the power to make secondary legislation conferred by the framework, to prevent rights entitlements from being altered by secondary legislation. For example, the Commission suggested that explicit articulation of rights would have improved the then Social Security (Scotland) Bill.”

Specifically on the then Social Security Scotland (Bill), SHRC wrote:

“As noted in our submission to the then Social Security (Scotland) Bill, the difficulty of engaging with framework legislation may also be felt by the public at large, and civil society actors. Where there is not sufficient detail in the primary legislation, there can be difficulties with the realisation of public participation in the conduct of public affairs under Article 25 ICCPR [*UN International Covenant on Civil and Political Rights*]. Issues such as the remedies and sanctions available in respect of complaints necessarily have an impact on the most vulnerable individuals, and Article 25 ICCPR best practice requires these individuals and their representatives to be enabled to participate in the construction of any relevant system.”

A number of respondents highlighted the National Care Service (Scotland) Bill as an example of the inappropriate use of framework legislation. While not presenting a view on the appropriate use of framework legislation or Henry VIII powers, the Scottish Parliament Health, Social Care and Sport Committee wrote about its consideration of the Bill and the views it heard from stakeholders:

“Many of the concerns from respondents about the framework nature of the legislation related to the significant reliance on secondary legislation to flesh out the detail. Many respondents also raised concerns that the framework approach meant there was a lack of certainty around policy outcomes for stakeholders, arguing that including further detail on the face of the Bill would help to allay stakeholder uncertainty and give those stakeholders greater confidence in the policy more generally.”

Whilst acknowledging there is a place for framework legislation, the Royal College of Nursing (RCN) stated that it should never be used to “avoid scrutiny or as a way to get legislation over the line”. The RCN also highlighted its negative experiences of the National Care Service (Scotland) Bill:

“There are clear disadvantages and risks to taking a framework approach. Most significant is the impact such an approach can have on the ability of stakeholders (including Parliament) to meaningfully scrutinise proposals.

A very basic example of this is that stakeholders are being asked to provide views on proposals to create a National Care Service and a National Care Service Board, without having even a clear definition of

what services will come under an NCS or any detail on the relationship between the NCS Board, Scottish government and other stakeholders. This has, to put it bluntly, made it impossible for RCN Scotland to adequately scrutinise this Bill on behalf of our members.”

The Equalities and Human Rights Commission identified the example of the National Care Service (Scotland) Bill as providing an opportunity for improving scrutiny procedures for framework bills:

“In our response to the Health, Social Care and Sport Committee’s call for views on the National Care Service Bill, we highlighted that the Social Security (Scotland) Act 2018 contains procedures for a higher level of scrutiny of subordinate legislation. We suggested that an independent body scrutinising subordinate legislation, as well as providing an opportunity for the Parliament and the public to consider the proposals at an early stage, would be appropriate in the development of a National Care Service in the absence of a more detailed piece of primary legislation. This may not be appropriate for every piece of framework legislation but is a concept worth exploring.”

Age Scotland also stated that the National Care Service (Scotland) Bill was an inappropriate use of framework legislation and highlighted “the lack of detail on important aspects of the legislation”.

Whilst NFUS argued that the Agriculture and Rural Communities Act (ARC Act) was a positive example of framework legislation (see above), Scottish Environment LINK argued that it was an inappropriate use writing:

“The recent passage of the Agriculture and Rural Communities Act is a useful example. In establishing a farm payments system to replace the Common Agricultural Policy, it was inevitable that Ministers would desire a degree of flexibility. To some extent, LINK members agreed with this. The Act is likely to serve as the legislative basis for agricultural payments for decades, and it would be impossible to include a high level of detail in primary legislation that would determine how these payments will be made far into the future. The needs of industry, the scientific understanding of best practice, and the objectives of public policy will all develop over time, and this will require Ministers to adapt how payments are made at successive Rural Support Plans and even during the term of an individual Plan.

However, LINK members argued that the Act should have been used to set a much clearer direction of travel for the future of agriculture. The initial draft Bill empowered Ministers to make payments for agricultural purposes, but these powers were drawn in such a way that it was very difficult to interpret whether the CAP replacement – an enormously significant policy change – would be fit for purpose.

LINK members made a range of suggestions as to how the legislation could be improved, and we are grateful for the engagement of Ministers and MSPs from across parties. The final Act was improved, though still does very little to require Ministers to act in any particular

manner. For example, the Act empowers Ministers to include targets on environmental outcomes in the Rural Support Plan, but does not require them to do so.”

The Scottish Crofting Commission also highlighted the ARC Act as an inappropriate use of framework legislation. The Commission argued that the ARC Act:

“does not provide sufficient guidelines as to where exactly the journey goes, it does not provide enough guidance or a useful benchmark against which future policies can be measured. It appears as if the current proposal has been mainly chosen to avoid daunting political choices and to omit upsetting a range of important stakeholders with conflicting interests.”

Scottish Environment LINK also highlighted the Circular Economy (Scotland) Act as another inappropriate use of framework legislation.

Whilst the SPSO stated that framework legislation is likely to be appropriate where it creates a new body, which is to be institutionally or operationally independent from the Government or Parliament (see above), it added that there may be situations when framework legislation is inappropriate:

“There may be elements which are not appropriate even when a framework bill itself is not problematic. When a framework bill creates powers that could undermine or substantially change existing organisations without appropriate scrutiny. To take as an example, Scottish Parliamentary Supported Bodies.

These organisations are established as such to ensure they are fully independent of Government. It is not appropriate to use a framework bill to give Government significant powers over such bodies whose functions and remit were created by the Parliament.”

The Association of Taxation Technicians and Chartered Institute of Taxation and its Low Incomes Tax Reform Group submission highlighted the use of framework legislation for tax law in Scotland and argued that it was appropriate for setting out how taxes are administered but not to set taxation rates:

“We believe as a general principle, that any exercise of power which sets out what is subject to tax and/or imposes obligations or burdens on citizens (such as to pay tax, or to pay penalties and interest for late or non-compliance) should be in primary legislation and laid before the full scrutiny process before being enacted. It is therefore inappropriate to use framework legislation and SSIs to create any tax obligations or to make any changes to existing tax law contained in primary legislation.

In addition to powers to determine and calculate a tax, our view is also that the principles of penalties should be contained in primary legislation, including the circumstances that can lead to a penalty, the

level of penalties imposed, when taxpayers can appeal, and enforcement. Equally, provisions that ensure there are safeguards for taxpayers should be contained in primary legislation.”

Challenges associated with scrutinising or engaging with framework legislation

Respondents argued that key challenges for Parliament in scrutinising and engaging with framework legislation related to accountability and transparency. There were also concerns expressed about scrutiny of financial costs of framework legislation alongside the challenges of scrutinising policy.

The call for views also got a mixed response about the Scottish Government’s approach to co-design of policy. Whilst many respondents welcomed the principle of co-design, there was a belief that the time when it was conducted was often wrong as it usually fell after framework legislation had been passed.

The Faculty of Advocates highlighted the view of the Scottish Parliament Consultative Steering Group in relation to delegated legislation:

“There should be meaningful consultation on secondary legislation before it is laid before the Scottish Parliament. The Parliament should seek to ensure that significant provisions are included in primary rather than secondary legislation.”

The challenge of policy scrutiny

The Net Zero, Energy and Transport Committee outlined a key challenge in scrutinising or engaging with framework legislation which reflected the view of many respondents:

“The less detail there is on the face of a Bill, the less there is to scrutinise. This is one of the main concerns raised about framework provisions, alongside a perception that they are becoming a more common way to make law, during the Committee’s scrutiny of the Circular Economy (Scotland) Bill.”

Reflecting its experience of scrutinising the ARC Act, the Rural Affairs and Islands Committee highlighted the difficulty in scrutinising a bill which contains little detail:

“During its scrutiny of these framework bills, however, the Rural Affairs and Islands Committee noted the challenges in considering a bill’s general principles due to the limited information available about how the proposed powers would be exercised by the Scottish Ministers. This has presented a challenge in terms of taking a view on the appropriateness of the proposed powers or the impact of a proposed plan and the extent to which the proposals are ‘fit for purpose’.”

The Health, Social Care and Sport Committee shared its experience of its consideration of the National Care Service (Scotland) Bill discussing the

difficulties in scrutinising the policy approach given it would be laid later in secondary legislation. This challenge for both the Committee and stakeholders continued into scrutiny at stage two, the Committee response highlighted this:

“The Committee undertook additional scrutiny at Stage 2 on the Scottish Government’s proposed amendments to the Bill. During this additional scrutiny, stakeholders continued to voice concerns over the framework nature of the legislation and the lack of detail, as well as the extensive reliance on secondary legislation to flesh out that detail at a later stage and the more limited scope for scrutiny of that secondary legislation compared to primary legislation.”

The Welsh Parliament’s Legislation, Justice and Constitution Committee highlighted a number of issues with framework legislation including:

- It can leave significant policy development to be made by regulations.
- Delegated powers taken can be too broad and could change the scope of legislation.
- The scrutiny procedures attached to delegated powers in framework Bills can sometimes limit the ability of the Senedd to scrutinise changes.
- Powers have been taken “just in case” or to enable “futureproofing” and “flexibility”.
- Adequate consideration is not given to how powers could be used differently by future governments.
- The use of framework legislation is one part of an emerging picture of a shift in the balance of power between the Senedd and the executive.

The Legislative Assembly of Alberta submission identified why framework legislation is difficult for parliamentarians to scrutinise:

“Framework legislation may be difficult to scrutinize if it is not clear, without the benefit of the regulations, what the effect or operation of the legislation will be. This may be a particular challenge for Members who lack the technical knowledge or resources to determine what elements of a scheme should properly be included in the statute and what would likely be found in regulations.”

Sam Gordon of the New Zealand Parliament Regulations Review Committee highlighted that where framework legislation or secondary legislation is required in response to an emergency, this often means that legislatures have only a short time for scrutiny citing an example:

“For example, the Severe Weather Emergency Recovery Legislation Act 2023 enables secondary legislation to be made to address issues arising out the severe weather emergencies New Zealand experienced in early 2023. Section 8 of that Act states that the relevant Minister must not recommend the making of secondary legislation under the Act, unless a draft of the order has been provided to the Regulations Review Committee and the Minister has had regard to any comments

provided by the Committee. In practice, the Committee only has 3-4 days to provide feedback on the draft secondary legislation. This can be challenging depending on the complexity of the secondary legislation.”

In addition to parliamentary committees, a number of other respondents also highlighted the lack of detail in framework legislation and the associated challenge in scrutinising it. For example, the Faculty of Advocates wrote:

“The primary difficulty with the scrutiny of framework legislation is that, by definition, the policy detail is divided between primary and secondary legislation. Because of that, whichever legislature is responsible for assessing and scrutinising the primary legislation will be required to do so without the full detail of how the policy will ultimately be implemented.”

The Scottish Human Rights Commission (SHRC) wrote:

“The use of framework legislation can inhibit the ability of elected representatives to scrutinise policy decisions and effectively represent the views of their constituents, because depending on the procedure used for the subordinate legislation, they need not vote on it and have no right of amendment.”

Scottish Environment LINK stated that the passage of a Bill should be the point at which it will be subject to the greatest scrutiny in the parliament and from stakeholders and the media adding that:

“If a Bill simply sets a framework, it is clearly more difficult for those focused on outcomes to engage effectively.

As described above, committees have less time to scrutinise secondary legislation which is in some cases more impactful and consequential than the primary legislation.”

In a similar vein, the Law Society of Scotland highlighted issues around a lack of effective parliamentary scrutiny of framework legislation:

“The challenges associated with scrutinising framework legislation are quite clear. If a 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 call the law-making process into disrepute.”

The Scottish Legal Complaints Commission recognised the challenges present in scrutinising framework legislation:

“We understand that scrutinising framework legislation can be challenging for both Parliament and stakeholders as it can feel lacking in any specific details and open to interpretation. We have seen in

discussions about the Regulation of Legal Services (Scotland) Bill which have in some cases focused on outcomes and principles, but in others have focused on how to bake in detailed processes or procedures to give assurance about how individual issues will be dealt with.”

Professor Richard Whitaker suggested that one of the things that governments could do to improve a parliament’s ability to scrutinise framework bills would be to provide drafts of the regulations that ministers plan to make with the powers delegated to them in a bill. This proposal already forms part of the UK Cabinet Office’s recommended best practice.

Age Scotland highlighted the impact for old people of engaging with framework legislation:

“From our experience of engaging with pieces of framework legislation, there are many challenges associated with this. These include it being difficult to provide comments on a piece of legislation which does not contain sufficient detail as to how it would be implemented and look in practice. For example, if there is a lack of detail in the legislation for us to scrutinise during a consultation or call for views, we cannot be sure of the potential impacts, either positive or negative. The impact of legislation on the rights and experiences of older people is often overlooked and if we do not have sufficient details within draft legislation, we cannot be sure that older people are protected or their experiences improved...

... The other main concern we have in terms of the challenges engaging with and scrutinising framework legislation is the lack of opportunity to voice our thoughts on any secondary legislation which is passed after the primary bill.”

Financial scrutiny of framework legislation and secondary legislation

The Scottish Parliament Finance and Public Administration Committee set out concerns about the challenges for financial scrutiny of framework legislation:

“The impact of framework legislation on financial scrutiny has been an area of concern for the Committee throughout this session. This approach, as well as the use of co-design processes to finalise exact policy during and beyond the passage of the relevant primary legislation, presents significant challenges for effective financial scrutiny.”

The Committee stated it has previously raised these concerns during scrutiny of the Financial Memorandums for Bills including the National Care Service (Scotland) Bill, the Circular Economy (Scotland) Bill, the Agriculture and Rural Communities (Scotland) Bill and the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill. Specifically on the example of the Climate Change (Scotland) Bill, the Committee wrote:

“As noted in that report, the increasing use of framework bills to seek ‘enabling’ powers to be used at some later date, and following a co-design process, means that providing Parliament with an FM that sets out best estimates of the costs, savings and changes to revenues is significantly hampered. Our report states that we do not disagree with the principles of co-design or engaging with stakeholders on policy proposals, both of which support better outcomes and improve decision making. We are, however, “unconvinced by the argument that co-design and engagement must follow on from the legislative process instead of being used to inform and refine policy proposals in advance of legislation being introduced”. Our scrutiny of the FM raised wider concerns regarding the risk to the Scottish Budget of passing framework bills with no clear identification of the estimated costs of implementation.”

Both the Net Zero, Energy and Transport (in relation to its scrutiny of the Circular Economy (Scotland) Bill) and the Rural Affairs and Islands Committees also highlighted concerns about the ability to scrutinise the financial impacts of both framework legislation and the impact of regulations which follow that primary legislation.

Co-design and consultation with stakeholders

Whilst the NFUS submission was very positive about the Scottish Government’s approach to co-design, other respondents were more critical. The Net Zero, Energy and Transport Committee provided its experience of the Circular Economy (Scotland) Bill:

“Governments may also seek to use framework provisions where they simply have not yet determined in any detail what policy in a particular area is to be. The legislation sets down enabling powers as a marker of future intention, not committing the government to specific actions, but allowing it to move at pace when ready rather than slowing momentum to seek parliamentary approval through primary legislation at that point. In the context of the Circular Economy (Scotland) Bill, we heard that this would create further opportunities for consultation or “co-design”. It would be preferable for scrutiny if this consultation or “co-design” was undertaken before the Bill’s introduction so that meaningful policy provision was on the face of the Bill – again the Committee would recognise that a delegated power to make amendments to this policy in future may be appropriate. “

The Rural Affairs and Islands Committee suggested that the co-design approach should include ensuring that the exercise of the powers conferred in framework legislation should be co-designed with stakeholders and that this would provide some reassurance to parliamentarians that the exercise of proposed powers or production of a proposed plan would be ‘fit for purpose’. The Committee added that in its stage 1 reports on both the Good Food Nation and ARC bills, the Committee recommended that there should be statutory consultation and ‘co-design’ with stakeholders on draft secondary legislation or plans in order to ensure the legislation is implemented effectively.

On the specific issue of co-design, the Equality and Human Rights Commission stated that co-design “should not be used as justification for a framework Bill and should instead inform a more detailed Bill during its development phase”. The use of co-design to inform legislation was also highlighted by the Royal College of Nursing who wrote:

“We believe that a fundamental principle should be that Scottish government should carry out the necessary consultation and co-design work before introducing the legislation. Scottish government must do the detailed policy development work before writing the Bill and any framework bill should be preceded by a detailed policy document setting out how the proposals will look and work in practice.”

The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) highlighted the implications for consultation with stakeholders of framework legislation:

“The lack of detail provided in framework legislation also impedes the opportunity for Scottish Parliament to participate in effective engagement with stakeholders. Our members have difficulty expressing informed views to Scottish Parliament on the risks and challenges posed to the successful implementation of framework legislation without a clear idea of how the delegated powers will be used. In other words, meaningful consultation responses for framework legislation cannot be provided where the provisions themselves do not give practical effect to its operation. For this reason, we take the view that the use of framework legislation can inhibit stakeholder participation in the legislative process.”

SOLAR also highlighted a similar issue to the Finance and Public Administration Committee stating that the lack of detail “makes it extremely difficult for local authorities and the wider public sector to assess the impacts of the legislation and the costs of implementing the policy”.

Scrutiny of framework legislation – what changes could be made?

Respondents emphasised the need for effective parliamentary scrutiny of framework legislation along with ensuring a role for stakeholder consultation during the legislative process.

Professor Adelyn Wilson and Dr Robert Brett Taylor suggested that to assist parliamentary scrutiny of either a framework bill or the secondary legislation which follows, the Scottish Parliament should require:

“a more robust and detailed memorandum to accompany any Bill or delegated legislation. This might usefully provide enhanced detail on the context and impact of the powers being granted or used.”

A strong delegated powers memorandum “that fully justifies the need for the delegated powers and provides examples of how powers might be used” was also suggested by the Net Zero, Energy and Transport Committee.

Professor Richard Whitaker made a similar point stating that bills that delegate considerable numbers of powers to ministers may be acceptable “if enough detail is provided about the limits to and the policies to be implemented by those powers”.

The provision of a “robust delegated powers memorandum, which makes an explicit declaration that the Bill is a framework legislation and provides a full justification for adopting that approach, including an explanation as to why no other approach was reasonable to adopt” was also called for by the Society of Local Authority Lawyers and Administrators in Scotland.

Alongside the need for more information in the delegated powers memorandum, some respondents also suggested there was a place for more detail in the Bill’s accompanying documents including the policy memorandum and the financial memorandum to set out the aims and financial costs of the framework legislation.

The Scottish Parliament’s Rural Affairs and Islands Committee suggested that more information on the likely use of delegated powers could be provided to Parliament to inform scrutiny of framework legislation along with more detail about implementing the legislation:

“Detailed information about how the proposed powers would be exercised, or content of a proposed plan, would help inform parliamentarians about the appropriateness, impact and costs. The Committee recognises this might not be possible in all circumstances and that the Scottish Government may be reluctant to share this information before the legislation is passed...

... The Parliament may also consider that there should be a presumption that statutory duties on the Scottish Ministers to produce a plan should be accompanied by a requirement to lay the document in Parliament and for there to be a period of a certain number of days to allow for any parliamentary scrutiny.”

Dr Pablo Grez Hidalgo suggested that the Delegated Powers and Law Reform Committee could develop:

“a guidance document for government departments and the OPC [Office of the Parliamentary Counsel] that clarifies the committee’s expectations regarding delegated powers clauses. This document could outline general principles on the appropriate use of delegated legislation and set specific requirements for drafting delegated powers memoranda. The guidance should highlight that the DPLRC views skeleton legislation as acceptable only when there is a compelling and exceptional justification.

Implementing this guidance could enhance the DPLRC’s influence

during the early stages of Bill preparation. Committee members could urge the Scottish Government to circulate this guidance extensively across various government departments, including the Government Legal Directorate and the OPC. Furthermore, the DPLRC might occasionally invite ministers and senior civil servants to oral evidence sessions to discuss the guidance. This would not only elevate the committee's profile but also ensure that government departments are adequately informed about its expectations and requirements."

Dr Ruth Fox from the Hansard Society referenced suggestions from the House of Lords Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee on safeguards to improve the scrutiny of framework legislation including:

- A requirement for the Government to make an explicit statement (a 'skeleton legislation declaration') that the bill is a skeleton bill or contains skeleton clauses, accompanied by a full justification for the use of a skeleton approach.
- A role for the Speakers of the two Houses in adjudicating whether a bill, or its clauses, are skeleton legislation.
- A requirement for enhanced scrutiny procedures (such as a 'super-affirmative procedure') to apply to the exercise of powers conferred under skeleton legislation. The DPRRC suggests that this could be implemented by an amendment to the Statutory Instruments Act 1946.
- Longer minimum intervals between stages of bills for skeleton bills, or bills with skeleton clauses.
- A requirement for the exercise of powers under skeleton legislation to be subject to a consultation requirement, with a Minister required to report the results of the consultations to Parliament as well as how the consultation has been taken into account.

Focusing on the role of parliamentary committees, Dr Pablo Grez Hidalgo suggested that a power of scrutiny reserve could be an option for the Delegated Powers and Law Reform Committee:

"Although the structure of the Scottish legislative process differs from that of the UK, the idea of a scrutiny reserve could still be relevant in Scotland. The DPLRC already intervenes during Stage 1 of a Bill where relevant delegated powers issues arise. When the DPLRC finds the government's justification lacking, there should be sufficient time for MSPs to consider the minister's formal response to the report before committee stage. A power of scrutiny reserve could contribute to ensure that MSPs have sufficient time to review this response, and therefore could serve as a powerful tool. For instance, it might encourage greater government self-restraint, leading to amendments that allow for further provisions to be added directly to the Bill or the publication of sample Scottish Statutory Instruments (SSIs) to provide MSPs with a clearer sense of how the policy might evolve."

Ensuring a role for stakeholders during the legislative process was highlighted in the submission from Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullan from Glasgow Caledonian University:

“We would like to emphasise procedures of parliamentary scrutiny are important, not only representing an opportunity for the legislature to scrutinise proposals, but also acting as a public platform for others to share views on or highlight potential problems with new proposals, giving actors outside the parliament an opportunity to highlight, in public, through written or oral evidence, the strengths, weaknesses, problems and scope for improvement in the policies and proposals set out in a Bill.”

This approach was also reflected by Professor Colin Reid who suggested that framework bills could include duties to consult ahead of tabling secondary legislation:

“One positive step would be to insist on the inclusion in the Bill of more extensive formal consultation duties, with obligations to report on the views received and how they have been responded to, with an opportunity for parliamentary involvement at that stage, rather than when it is too late and unamendable regulations are laid.”

The Scottish Crofting Commission also suggested there was a need to introduce a period of consultation on secondary legislation before it is enacted:

“Framework legislation should only be enacted after draft proposals for secondary legislation have been published. Stakeholders must be provided with satisfactory evidence as to how the framework, as well as the proposed draft secondary legislation will address the stated objectives.”

Dr Dexter Govan from the Constitution Society highlighted approaches to framework legislation in other countries and in particular Germany:

“Outside of the United Kingdom, in countries across Europe, codified constitutions set limitations on delegated legislation, and thus improve framework legislation by so doing. While the lack of a codified constitution prohibits this in Scotland, legislation or guidance might still be advanced in this direction. Article 80(1) of the German Basic Law ensures that statutory instruments must work towards a policy goal specifically stated in primary legislation. In Portugal, the Assembly empowers the Government to create delegated legislation, with Articles 164 and 165 of the Constitution limiting the areas where delegated legislation can be employed. Article 165 even creates time limits on delegated legislation. Putting appropriate limitations on the use of delegated legislation on a statutory footing works effectively elsewhere and codifies good practice regarding framework legislation. There is no reason to believe this could not also be applied effectively in Scotland.”

The Open University in Scotland suggested to support parliamentarians a system of induction or training on framework legislation might be beneficial.

The Welsh Parliament's Legislation, Justice and Constitution Committee submission set out the key details the Committee considers when it scrutinises framework legislation. These include considering:

- The balance between the information that is included on the face of the Bill and that which is left to secondary legislation.
- Whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make secondary legislation.

Scrutiny of secondary legislation resulting from framework legislation – what practical changes could be made?

Amongst many of the respondents the widely held view was that secondary legislation is generally subject to lower levels of parliamentary scrutiny than primary legislation. As a result, there was a belief that the scrutiny of secondary legislation resulting from framework legislation should be more robust with more time made to allow for meaningful stakeholder engagement and then scrutiny of secondary legislation.

Two proposals were that secondary legislation made using powers conferred in framework legislation should be subject to consultation before the final version is laid before Parliament and that the parliamentary process for considering that secondary legislation should be detailed.

A number of respondents suggested that drafts of the regulations which are planned to follow the passing of framework legislation should be included for consideration with the framework bill to ensure Parliament is aware of the Government's intentions with regards to use of the powers conferred.

The proposal for a more robust scrutiny process was made by a number of respondents. Scottish Environment LINK proposed the development of a new process for considering secondary legislation which resulted from framework legislation:

“LINK members propose a new way of considering secondary legislation. At present, there are negative, affirmative and 'super-affirmative' procedures that involve a pre-legislative consultation with the Scottish Parliament.

It should be questioned whether secondary legislation could be subject to a multi-stage procedure such as general principles and amendments. It could be that such a procedure might be introduced for the 'exceptional' circumstances of legislation that may be considered as Framework Bills so that parliament can properly consider and, if necessary, amend the detail.”

Adopting a slightly different approach some respondents suggested that secondary legislation made using powers conferred in framework legislation should be subject to the affirmative or super affirmative procedure. However, NFUS suggested that it would not support the idea that all secondary legislation should be affirmative arguing that there is still a need for a negative procedure where immediate action is needed.

The submission from Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullan from Glasgow Caledonian University suggested that the introduction of new stronger scrutiny procedures did have a potential downside:

“One solution to the pitfalls of delegation is to introduce new, stronger scrutiny procedures for subordinate legislation in Parliament. As pointed out by the House of Lords Constitution Committee, however this could lead to complexity, and therefore remove the benefits of delegated legislation; flexibility and efficiency. The balance between flexibility and efficiency on one hand, and robust scrutiny on the other, will always be a matter of judgement, with the full circumstances of each use of delegated powers important to ensure that they are appropriate.”

Professor Richard Whitaker highlighted the example of the approach to scrutiny of secondary legislation in Northern Ireland and in Australia:

“The distinctive aspect of the NIA’s procedure for considering what are called statutory rules (SRs rather than SIs) is that committees consider proposals for SRs ahead of them being laid before the Assembly. Proposed SRs are sent to the policy relevant committee (rather than a delegated legislation committee) via what is known as an SL1 Letter. This letter must explain the procedure to be used for the SR and its purpose as well as the results of any consultation. The committee can scrutinise the statutory rule from a policy as well as a legal perspective. This process is derived from the statutory duty of NIA committees to ‘advise and assist each Northern Ireland minister in the formulation of policy.’”

“In the Australian case, backbenchers are in a better position than those in the UK’s legislatures in forcing debate on disallowing a piece of delegated legislation. In the Australian Senate, such motions take precedence over other business. Australia also has a system whereby motions to disallow a statutory instrument (SI) will automatically take effect if not dealt with, within fifteen sitting days. This means that, in the House of Representatives (the lower house in the Australian Parliament) motions of that type are normally debated in government time in order that the government does not lose the SI.”

Sam Gordon of the New Zealand Parliament Regulations Review Committee highlighted that scrutiny of secondary legislation has been less challenging because the Committee receives advance notice from the relevant entities that draft secondary legislation will be coming to the committee on a specified date, this is helpful because it:

“ensures the committee can organise its affairs so that it meets the deadlines imposed for scrutiny by the relevant legislative framework. Other than notice, it’s unclear what other practical measures could be implemented to assist with scrutiny of secondary legislation.”

Kate McCorquodale from Scrutiny and Engagement at the Legislative Assembly, Parliament of New South Wales, highlighted the role of the Subordinate Legislation Act 1989 which:

“Creates an obligation on a 'regulation maker' to provide the Legislation Review Committee with a Regulatory Impact Statement to accompany the piece of secondary legislation (whether or not it stems from framework legislation). These statements include a critical analysis of the work completed to draft the piece of secondary legislation along with the provision of submissions from interested parties.”

Whilst recognising there would be a benefit to have control over the content of secondary legislation that can be passed following an enabling act, the Lord President of the Senators of the College of Justice highlighted that this would be difficult to manage:

“While it seems desirable to have some degree of control as to the content of secondary legislation that can be passed following an enabling Act, it is difficult to identify practical means by which this can be achieved that will provide that control while at the same time maintaining the flexibility which is the rationale for delegated powers.”

The Royal College of Nursing highlighted concerns about accessibility to and understanding of secondary legislation for stakeholders and the general public:

“The Committee will understand that the decision on whether to use affirmative, negative or some other procedure for subsequent delegated legislation is important when considering scrutiny. However, whatever procedure used, engaging with secondary legislation is significantly more difficult for ‘professional’ stakeholders and nearly impossible for members of the public.”

The Open University in Scotland made a similar point about accessibility of secondary legislation:

“The challenges differ and depend on the stakeholder groups who may need to engage with scrutiny. The system and the terminology used can often be confusing and seem overly complex. Whilst guides and information, for example on the Scottish Parliament’s website, can be helpful navigating this system of delegated law making the reality is that navigating it can be a challenge for many stakeholders.”

Views on Henry VIII powers

Henry VIII powers enable Government Ministers to use secondary legislation to amend primary legislation. There was a mix of views with regards to the use of Henry VIII powers. Whilst some respondents expressed negative views about them, others suggested there was a place for them in addressing minor or technical issues.

Dr Pablo Grez Hidalgo emphasised constitutional concerns with regards to the use of Henry VIII powers:

“Given their implications for the principle of parliamentary democracy, it is crucial that these powers are defined as narrowly as possible to ensure that they are exercised by ministers in line with the purpose and the wording of the enabling Act. Due to their constitutional implications, the Scottish government must meet a high justificatory standard in the delegated powers memorandum whenever it seeks Henry VIII powers.

That said, there are circumstances where the use of Henry VIII powers can help streamline parliamentary processes, allowing MSPs to concentrate on core policy issues. One example is the use of these powers for making incidental, consequential, or transitional provisions.”

The Constitution Society also suggested Henry VIII powers “are largely constitutionally inappropriate”. The Society added that:

“As legislation has become more complex, in many areas governments have pleaded the need for Henry VIII powers on the basis that certain areas of an economy or society require an unusual and extended level of flexibility in legislative power. These arguments are largely unconvincing.”

The Open University in Scotland set out what it sees as the significance of Henry VIII powers:

“The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament.”

The Open University added:

“By enabling such powers to become habitual and with little scrutiny and no option for a parliament to amend them, there is a danger of becoming indifferent to them, and to the fact that they are being enacted without scrutiny, policy constraints and transparency.”

The Scottish Public Services Ombudsman (SPSO) highlighted its own experience of Henry VIII powers being used to create a new function of Independent National Whistleblowing Office for the NHS in Scotland (in 2019). The SPSO said its experience of this use broadly positive, in part because it was able to provide Parliament with direct evidence about implementation of the proposal based on the office’s experience. The SPSO added:

“As can be seen in the response to the previous question, we have direct experience of Henry VIII powers being used. For us, the key to their effective use was the framework within which they were used, which guaranteed SPSO’s independence from Government and recognised our status as a Scottish Parliamentary Supported Body.

As a Parliamentary Body, it can be difficult to find the statutory vehicles when our legislation needs updated, particularly when those changes may be relatively minor. It is helpful to have a process to do so but, given the need to maintain our independence it is essential it comes with appropriate safeguards.”

The Association of Taxation Technicians and Chartered Institute of Taxation and its Low Incomes Tax Reform Group stated that it believes Henry VIII powers should not be used to change tax laws. It added that the use of such powers “do not offer the space for consultation and scrutiny that tax legislation, which can often be complex, requires”.

The submission from the Lord President of the Senators of the College of Justice stated that it was inappropriate for Henry VIII powers to be used in a number of ways including removing a defence to a criminal offence; altering electoral rights; or to amend constitutional or devolution enactment or to amend or repeal provisions relating to fundamental rights.

Professor Colin Reid suggested there was a paradox in terms of preferring more policy on the face of the Bill potentially leading to the need for Henry VIII powers to avoid the legislature being overwhelmed:

“There is a paradox here. The more that the use of framework legislation is avoided, the more specific details will have to be included in primary legislation and therefore the greater the need to allow Henry VIII powers to avoid Parliament being clogged up with primary legislation to achieve non-controversial legislative maintenance.”

Additional safeguards which might alleviate concerns about the granting or use of Henry VIII powers

The Net Zero, Energy and Transport Committee stated that where Henry VIII powers are taken, it is important that they are clearly and narrowly framed and cannot be used to make significant changes. This should include providing a full justification for the powers in the delegated powers memorandum along with examples of potential uses.

Dr Pablo Grez Hidalgo made a similar point about narrowly defining Henry VIII powers in a Bill and added that these powers should also be subject to time limits to ensure they aren’t indefinitely available.

The Faculty of Advocates suggested that for the granting of Henry VIII powers, it should be incumbent on the government to “justify to parliament the need for any such powers”. The Faculty added:

“Any provision granting Henry VIII powers should explicitly limit the scope of the legislative powers conferred on ministers by clearly setting this out in the Bill itself. The Bill ought also to include a requirement for parliamentary oversight when a power is being exercised.”

A number of respondents suggested that the exercise of Henry VIII powers should be subject to appropriate levels of parliamentary scrutiny with the presumption that they follow an affirmative or super affirmative procedure. For example, Dr Robert Brett Taylor and Professor Adelyn Wilson wrote:

“The Delegated Powers and Regulatory Reform Committee [House of Lords] accordingly proposed that delegated legislation which made changes to primary legislation should be made using affirmative laying procedures. It would be within the discretion of the Scottish Parliament to insist on the use of affirmative laying procedures in such cases, or to require the use of alternative enhanced scrutiny procedures. Such requirements might be outlined in new Bills, or in Standing Orders, or in a protocol agreed between the Scottish Parliament and Scottish Government.”

Taylor and Wilson also suggested that the Scottish Government should provide reporting to the Scottish Parliament on the use of any Henry VIII powers.

The Welsh Parliament’s Legislation, Justice and Constitution Committee submission set out ways in which it had sought to strengthen scrutiny of Henry VIII powers during its consideration of Bills:

“In its report on the Infrastructure (Wales) Bill, the Committee highlighted that there were 14 Henry VIII powers in the Bill, out of a total of 80 delegated powers, and that 5 of these powers could be exercised by Welsh Ministers without the Senedd having any knowledge that the law which it approved has been modified. The report highlighted section 128 of the Bill, which enables regulations to provide for a direction-making power for the Welsh Ministers to disapply requirements imposed by the Bill. Whilst the Minister in charge of the Bill rejected the Committee’s recommendations to apply the affirmative procedure in these circumstances, she did accept that amendments should be made to the Bill to ensure that the directions made by the Welsh Ministers must be laid before the Senedd with an accompanying written statement.

Another way of strengthening the scrutiny given to Henry VIII powers is to require the Minister making them to consult with relevant stakeholders before making, or laying a draft of, a statutory instrument. In its report on the Environmental Protection (Single-use Plastic Products) (Wales) Bill, the Committee recommended that regulations that would allow Welsh Ministers to change the list of single-use plastic products prohibited by the Bill should be subject to a duty to consult. The Welsh Government accepted this recommendation.”

The Welsh Parliament has also raised concerns about UK Bills which include Henry VIII powers for matters within devolved policy areas. Bills highlighted included the Professional Qualifications Bill, the Health and Care Bill and the Retained EU Law (Revocation and Reform) Bill.

Iain McIver, SPICe Research