

Delegated Powers and Law Reform Committee – guidance on framework legislation and Henry VIII powers

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1. Introduction

- 1.1. The aim of this guidance is to set out the views of the Delegated Powers and Law Reform (DPLR) Committee in relation to framework legislation provisions and Henry VIII powers contained in Bills introduced in the Scottish Parliament.
- 1.2. The Committee primarily considers issues arising in Scottish Government Bills, and this guidance is written reflecting that. However, the Committee broadly expects the same principles to apply to other types of primary legislation introduced (for example Members' Bills and Committee Bills), with any modifications as are appropriate.
- 1.3. It will be of interest and assistance to the Scottish Government in the development of legislation, as well as individual MSPs, committees, stakeholders and anyone with an involvement in the scrutiny of legislation at the Scottish Parliament.
- 1.4. The definition of framework legislation is discussed further in section 2 below. Henry VIII powers are delegated powers which allow for primary legislation to be amended by secondary legislation.
- 1.5. This guidance sets out the Committee's views on what framework legislation is; why it might be used and when it is acceptable; and ways to effectively scrutinise framework legislation and subsequent exercises of framework powers. It also sets out the Committee's views on the use of Henry VIII powers in Scottish Bills.
- 1.6. This guidance is based on the work undertaken by the Committee in its inquiry into framework legislation and Henry VIII powers. This inquiry took place during 2024-25. Background to the Committee's views can be found in the published report. [The report, submissions to the Committee, and other relevant background material, can be found on the webpage accessed from this link.](#)

- 1.7. This guidance was approved by the Delegated Powers and Law Reform Committee. Clerks can advise on any aspect of the guidance and Standing Orders, and can be contacted at:

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2. What is framework legislation

- 2.1. The Committee's understanding of framework legislation is that it is:

“Legislation that sets out the principles for a policy but does not include substantial detail on how that policy will be given practical effect. Instead, this type of legislation seeks to give broad powers to ministers or others to fill in this detail at a later stage.”

- 2.2. This description reflects the broad consensus of views amongst academics and practitioners. It is meant to serve as a reference point to aid MSPs, the Scottish Government, officials and stakeholders.
- 2.3. Within this description, there will be a range of types of framework provision, grey areas, and scope for reasonable disagreement as to whether an individual provision or Bill fits within it. Furthermore, a single Bill may contain both framework and substantive elements.
- 2.4. It should also be noted that there is not a single agreed term for framework legislation. While “framework” is presently the most commonly used term in the Scottish Parliament to describe this sort of legislation, it is sometimes also referred to as “skeleton”, “headline”, “jellyfish”, “shell” or “enabling”.

3. Uses of framework legislation

- 3.1. Given its nature, framework legislation creates challenges for scrutiny. As such, Bills should, other than in very limited circumstances, set out a high degree of detail on the face of the Bill. This facilitates transparency and proper democratic engagement, by allowing both stakeholders and parliamentarians to engage with solid proposals.

- 3.2. In appropriate and very limited circumstances, there may be a case for framework powers, primarily in order to provide flexibility, to “future proof” legislation against becoming quickly outdated. Such flexibility and efficiency must be balanced with robust scrutiny, and sufficient detail to allow for such scrutiny.
- 3.3. The circumstances where a framework approach may be appropriate are more likely to arise in areas which need to be updated frequently, in ways which cannot reasonably be foreseen.
- 3.4. Powers allowing flexibility “just in case” are unlikely to meet the test for the necessity of the power, and as such would be considered inappropriate.

The Agriculture and Rural Communities (Scotland) Act 2024 was suggested to the DPLR Committee in its 2024-25 inquiry into framework legislation and Henry VIII powers as an example of legislation which required flexibility to “future proof” laws in a policy area where there is a need to adapt future approaches quickly.

Conversely, the DPLR Committee raised concerns about a “just in case” delegated power, which allowed Ministers to modify the meaning of expressions contained in Section 19(2) of the Housing (Scotland) Bill (as introduced), as it “does not usually consider it appropriate to delegate a power where it is not clear and foreseeable that such a power will be used.”

- 3.5. As a general rule, lack of policy development before a Bill’s introduction is not an appropriate justification for framework legislation. As such, consultation and “co-design” on a Bill’s provisions should take place prior to its introduction to enable sufficient policy detail to be provided on the face of the Bill.
- 3.6. It is not possible to give a definitive view as to what constitutes “appropriate circumstances” for framework legislation. Each delegation of a power will need to be considered on its own merits and context.
- 3.7. Where a framework approach is being taken, it is essential that full justification is given at the Bill’s introduction as to why the framework approach is appropriate in the circumstances.

4. Scrutiny of framework legislation and subsequent use of framework powers

- 4.1. Scrutiny of framework legislation as a Bill progresses through Parliament, and ensuring appropriate scrutiny of the subsequent use of framework powers, are closely interlinked.

- 4.2. This section of the guidance seeks to assist committees and stakeholders in scrutinising framework legislation, and provides further information on the Committee’s expectations on the information provided to the Parliament when a framework approach is taken. Further helpful background may also be found in the full Committee [report into framework legislation and Henry VIII powers](#).

Accompanying documents

- 4.3. Bills in the Scottish Parliament are required by its Standing Orders to be introduced with certain “accompanying documents”, including Policy, Financial and Delegated Powers Memorandums, giving further information in relation to provisions in the Bill which support the Bill’s scrutiny.

- 4.4. Paragraph 9.3.3B of the Scottish Parliament’s Standing Orders states:

“A Bill which contains any provision conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, shall on introduction be accompanied by a Delegated Powers Memorandum setting out, in relation to each such provision of the Bill—

- (a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;
- (b) why it is considered appropriate to delegate the power; and
- (c) the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).”

- 4.5. In cases where it is considered necessary to take a framework approach in relation to a Bill or a provision in a Bill, a full justification for taking this approach should also be set out in the Delegated Powers Memorandum. It follows that a Bill which contains more expansive powers will require a more thorough justification for the delegation of those powers.
- 4.6. It is crucial that sufficient information about how framework powers could, and are expected to, be used is included in all appropriate accompanying documents.
- 4.7. In cases where the scope of a power means that it could be used to achieve different outcomes, the Delegated Powers Memorandum should include sufficiently detailed information to explain how the power may be used and why it is necessary and appropriate.

- 4.8. In cases where the information in the Delegated Powers Memorandum is insufficient for the purposes of committee scrutiny, the DPLR Committee will require the Minister in charge of the Bill to explain to the Committee why the powers are needed and how they may be used, which could include requiring oral evidence to be given to the Committee. It is likely that the lead committee may also seek further information from the Scottish Government in relation to such issues.
- 4.9. In exceptional circumstances where the DPLR Committee considers it does not have sufficient time to consider fully a proposed delegated power (for example, due to insufficient information), the Committee could seek to push back a Stage 1 deadline to allow it to do so.
- 4.10. Likewise, the Financial Memorandum for the Bill should include an estimate of any costs, or range of costs, arising from a delegated powers provision, based on how it is expected to, or might, be used. The Scottish Government should also ensure it keeps committees updated throughout the legislative process on the estimated costs arising from a Bill and discuss with committees the most appropriate format for presenting any updated figures.

Super-affirmative procedures

- 4.11. The DPLR Committee supports the use of so-called “super-affirmative” procedures to enhance effective parliamentary scrutiny. Where a Bill proposes a broad delegation of power, the DPLR Committee will consider recommending an appropriate super-affirmative procedure.
- 4.12. There is no set “super-affirmative” procedure, but this term is used to cover additional requirements to the standard affirmative procedure which may include:
- statutory consultation requirements before exercising a power,
 - laying drafts of regulations for comment by committee(s),
 - extended time periods for laying of regulations or plans,
 - laying additional information alongside regulations (including findings of consultations, financial information, or particular forms or impact assessment, such as those looking at equalities, or island communities).
- 4.13. When scrutinising a Bill, the DPLR Committee will continue to recommend, in circumstances it considers appropriate, additional “super-affirmative” requirements. Lead committees may wish to do the same, and should consider which additional requirements might be appropriately attached to framework powers. While such consideration may be made in light of a recommendation reported by the DPLR Committee, lead committees may also wish to make such recommendations on the basis of policy considerations.

Drafts of regulations

- 4.14. If the Scottish Government is able to produce draft regulations when introducing a Bill, this detail should be included on the face of the Bill.
- 4.15. In circumstances where the Scottish Government considers framework provisions more appropriate (and in line with the limited circumstances in which the Committee feels a framework approach may be appropriate as set out above), sharing drafts of regulations may be helpful. In such cases, lead Committees should feel able to request draft regulations if they feel that it could aid their scrutiny of a framework bill or provision.
- 4.16. However, it should be noted that the intentions of the Scottish Government in relation to the use of a power would not bind a future administration. Even in cases where draft regulations are supplied, the DPLR Committee and lead committees will scrutinise the detail of the provisions in the Bill, rather than the detail of any draft regulation. Draft regulations would be provided purely as an illustrative example in relation to how a power is likely to be exercised.

Pre-regulation scrutiny

- 4.17. Once a framework provision is enacted, the period before secondary legislation is made is a key opportunity for the Parliament to influence the policy to be reflected in regulations. This is the case even where statutory additional “super-affirmative” requirements are not in place.
- 4.18. Lead committees may wish to consider “pre-regulation scrutiny” to look at progress in relation to the drafting of significant regulations to be made, or other documents which require to be prepared, published and laid, under framework powers.
- 4.19. The Scottish Government should also allow sufficient time for such scrutiny to take place, and ensure that it keeps lead committees up to date during the policy formulation phase of regulations or other laid documents.

Post legislative scrutiny

- 4.20. Post-legislative scrutiny (“PLS”) is the term used for when the Parliament looks back at laws it has passed, reviewing the impact and effectiveness of them. PLS is usually carried out by a committee. Further [information on PLS in the Scottish Parliament is on the Scottish Parliament website.](#)
- 4.21. Post-legislative scrutiny of framework powers by a committee may be an appropriate way to examine how such powers have been used and their impact.

- 4.22. Lead committees may wish to consider recommending the insertion of a reporting or review provision in a Bill where there are concerns about broad framework powers. This could require the Scottish Government to set out explicitly how the power has been used and what its impact had been. The DPLR Committee will also recommend inserting such provision in cases it considers this appropriate.
- 4.23. A provision in a Bill requiring the Scottish Ministers to review and report to the Parliament on the exercise of specified powers in a certain timeframe would facilitate retrospective scrutiny of the framework provision.

5. Henry VIII powers

- 5.1. “Henry VIII power” is the best understood and most widely used term for delegated powers which allow for primary legislation to be amended by secondary legislation.
- 5.2. Given their potential ability to modify or repeal existing Acts of Parliament, Henry VIII powers should be appropriately limited in how they may be exercised.
- 5.3. The Committee accepts that Henry VIII powers are a necessary, efficient tool when used appropriately.
- 5.4. Delegated Powers Memorandums should make it clear where a power is able to amend primary legislation, and fully justify why such a power is necessary.
- 5.5. Where a proposed delegated power could be used to amend primary legislation, the power should usually, as a minimum, be subject to the affirmative procedure. Only where strong justification is given would a less rigorous parliamentary procedure be appropriate.
- 5.6. Similar to the points above in relation to post-legislative scrutiny of framework legislation, provision requiring Scottish Ministers to review and report to Parliament on the operation of certain Henry VIII powers would provide a vehicle for PLS on them to take place. Any lead committee concerned about a Henry VIII power in a Bill may wish to consider recommending that a reporting/review provision should be added. The DPLR Committee will also recommend inserting such provision in cases it considers this appropriate.
- 5.7. Sunset clauses (provision in a Bill that specifies an expiry date for parts of or all of the Act once it is passed into law) should not routinely be adopted in relation to Henry VIII powers. However, there may be a place for them in certain contexts, where there are concerns about how secondary legislation may be used to amend primary legislation beyond a certain period.