OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 28 January 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 28 January 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

4th Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jamie Hepburn (Minister for Parliamentary Business)
Steven MacGregor (Scottish Government)

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 28 January 2025

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the fourth meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off their mobile phones and other electronic devices or set them to silent.

At some point during the meeting, I will need to leave for a short while, because I have lodged an amendment on the Regulation of Legal Services (Scotland) Bill, which is due to be debated at the Equalities, Human Rights and Civil Justice Committee this morning. At that point, I will hand over to my deputy convener to chair the meeting until my return. I will suspend the meeting briefly when we swap over.

The first item of business is to decide whether to take items 5 to 7 in private. Are members content to take them in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

10:02

The Convener: Under agenda item 2, we are considering an instrument subject to the affirmative procedure, on which no points have been raised.

Disclosure (Scotland) Act 2020 (Incidental, Supplementary and Consequential Provision) Regulations 2025 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

The Convener: Does the committee wish to note that the original draft of the instrument was withdrawn, and the present version relaid, following questions that the committee raised with the Scottish Government?

Members *indicated agreement.*

Instrument subject to Negative Procedure

10:02

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

Building (Fees) (Scotland) Amendment Regulations 2025 (SSI 2025/6)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Framework Legislation and Henry VIII Powers

10:03

The Convener: Under agenda item 4, we are taking evidence on the committee's inquiry into framework legislation and Henry VIII powers.

We are joined by Jamie Hepburn MSP, the Minister for Parliamentary Business. The minister is accompanied by three Scottish Government officials: Alison Coull, deputy director of the Scottish Government legal directorate, rural affairs division; Fraser Gough, from the parliamentary counsel office; and Steven MacGregor, head of the Parliament and legislation unit. I welcome all the witnesses to the meeting. Do not press the buttons on your microphones—that will be done for you when you are going to speak. I offer the minister the opportunity to give some opening remarks before we start the questioning.

The Minister for Parliamentary Business (Jamie Hepburn): I am grateful for the opportunity to speak to the committee, to offer some evidence in relation to your inquiry and to make this opening statement. I thought it might be worth while to take a moment to set out the Government's general position on the issues that the committee is considering. No doubt, we will get into some of the detail over the course of this evidence session.

First, delegated powers are an essential part of the legislative toolkit. The Government and the Parliament would not be able to function if we relied solely on primary legislation—the capacity simply does not exist to legislate in that way every time we need to update the law. On that basis, we need a legislative system that balances efficiency and effectiveness, and the appropriate use of secondary legislation is a key element of achieving that.

Secondly, the Government does not set out routinely to introduce what have been described as framework bills. Bills, and the nature, form and function of the delegated powers that are in them, are considered on a case-by-case basis. Ultimately, the approach that is taken to delegated powers is driven by what makes sense in the specific context of each bill. It is the sheer variation in the subject matter of bills and what they seek to achieve that makes it difficult—as I think most people who have given evidence to the committee have acknowledged—to draw a neat dividing line between what should be in a bill and what should be determined by secondary legislation.

That is why I believe that it could be difficult to come up with a simple and straightforward

definition of what constitutes a framework bill. Further, that may not in itself take us much further forward although, doubtless, we will get into that in our coming exchanges.

Thirdly, it is important not to lose sight of the mechanisms and processes that we already have in place in Parliament to scrutinise proposed powers in bills and how they are used. This committee will understand better than any other that every bill that the Government introduces must be accompanied by a delegated powers memorandum. For each and every power in a bill, that memorandum must explain the nature of the power, the reason for taking the power and the choice of scrutiny procedure for that power.

Parliament can and does subject the proposed powers of a bill to careful scrutiny during stage 1. I know that this committee does so in relation to almost all bills that come before it and that there can also be consideration by the lead committee. Parliament can and does challenge the Government on how some powers have been framed, which can result in changes to bills as they pass through their consideration at stages 2 and 3.

In that way, Parliament retains the ultimate authority in determining whether secondary legislation-making powers should be in any piece of legislation in the first instance. Similarly, when Government exercises the powers, including so-called Henry VIII powers to amend primary legislation, Parliament has a key role in scrutinising both the technical and policy elements of the regulations.

Ultimately, Parliament retains power to determine secondary legislation by either agreeing or disagreeing to it in its affirmative form, or determining whether to annul it in its negative form. In a parliamentary democracy, that is, of course, as it should be.

I hope that you have found those initial thoughts and opening remarks useful. Steven MacGregor, Alison Coull, Fraser Gough and I will be happy to do our best to field your questions.

The Convener: Thank you very much, minister. I will open up with a question, before passing on to colleagues.

In your opening comments, you mentioned the issue of whether we should have a definition of framework legislation. In effect, you said that you agree with the majority of the evidence that we have heard, including from academics, that a definition would probably be impossible or far too challenging to undertake.

Jamie Hepburn: Largely, yes. I refer back to the points that I have just made about the diversity in what bills seek to achieve and the process that we must go through in laying out, in a delegated powers memorandum, the basis on which we seek to proceed.

In the letter that my predecessor, George Adam, sent to the committee in April last year, he conceded that there could be some merit in developing a shared understanding of what is meant by the term “framework bill”. However, we need to understand the practical effects, the efficacy and the purpose of determining what could be viewed as a framework bill. Why would we say that something is a framework bill? What utility would that have? What purpose would coming up with a definition have?

I say respectfully that, having looked at the evidence to the committee thus far, I have not seen anything that strongly suggests that there would be an actual purpose in determining what a framework bill might look like and having some form of set definition.

The Convener: With that, if a bill were to be introduced that was defined as a framework bill, would that improve the scrutiny and transparency work that the committees and the Parliament undertake on such legislation, or is that a moot point?

Jamie Hepburn: I think that it is a moot point. Defining a bill as a framework bill would not enhance scrutiny per se. It is more important that we go through the normal scrutiny process for any form of proposed legislation, which, for a Government bill, means first putting it through our own consideration process and then laying it before the Parliament.

Of course, collectively, as a legislature, we should be willing to consider how we can improve and refine that process, but I have not seen anything to suggest that there is anything fundamentally wrong with it. In so far as the framework bill issue affects secondary legislation, I go back to my earlier point that part of the process is that we lay a delegated powers memorandum before the Parliament. This committee should consider it and make recommendations that should then be considered by the lead committee. If the lead committee has concerns about those, they will be flagged. The Government will have to consider them in the usual way—perhaps by making changes to the bill or by defending its position—and then it is for the Parliament to consider them through the process of amending the bill and deliberating on it as it proceeds in its normal fashion.

The Convener: Thank you, minister. I suspend the meeting briefly to allow Bill Kidd to take the chair.

10:12

Meeting suspended.

10:12

On resuming—

The Deputy Convener (Bill Kidd): Minister, thank you for your answers to Stuart McMillan. Roz McCall has the next question.

Roz McCall (Mid Scotland and Fife) (Con): The committee has heard substantial evidence from witnesses that framework legislation is being used more frequently. What is your view on that? If we are using it more frequently, why is that?

Jamie Hepburn: I disagree with that perspective. I have seen no evidence to suggest that it is being used more frequently. To be candid, we are almost in danger of coming to the conclusion that that is the case because it is repeatedly asserted to be so. I have not seen anything to suggest that there is greater frequency.

The issue might come down to the fact that we have no strict definition of framework legislation. However, in so far as what we have considered might fall into that category, I do not think that there is evidence to suggest that framework legislation is happening more frequently. I am certainly aware that members assert that that is the case, and I have noted some witnesses saying the same, but I have yet to see anyone setting out a specific amount of legislation that would suggest that it is happening more frequently in comparison with previous sessions.

10:15

Roz McCall: You say that there is no evidence of framework legislation happening more frequently, but we are getting a lot of information that says that it is. On what basis are you making that judgment? To turn that around, what evidence is there to say that it is not happening more frequently?

Jamie Hepburn: In effect, what we have done—and, obviously, there are difficulties in seeking to do this—has been to look back over the legislation that has been passed over the history of the Parliament, and we have not seen anything that would suggest that there is more use of so-called framework bills now than there has been in the past.

In fact, in this parliamentary session, over the four programmes for government, we have announced the intention to introduce 57 bills—not all of which have necessarily come to light, for various reasons—and we could perhaps identify six of those 57 bills as framework bills in character. Therefore, I do not think that there is any greater frequency in the use of framework bills.

I perfectly accept that you have flipped the issue on its head and asked me to disprove it, but I respectfully suggest that it is usually those who make the charge that have to prove it rather than those who do not.

Roz McCall: I was just interested to hear on what basis you came to that conclusion.

Some witnesses suggested that guidance on framework legislation should be put in place. We have highlighted that there is no definition, and you have come back on that. Should there be guidance from the legislature to the executive on when framework legislation may be appropriately introduced? Would any guidance that we put forward be a sort of halfway house, so to speak?

Jamie Hepburn: Clearly, if the committee makes a recommendation that there should be some guidance, it would be incumbent on us to, first of all, reflect on the report and reply to it. If there was some determination that there should be guidance, we would need to consider how we might interact with that.

However, to go back to my earlier point, in the process of determining what legislation is introduced, the Government comes up with a policy proposition, and the bill team that is assigned looks at that and starts to draft a bill. We interact with the SGLD and the PCO on drafting the finer points of the bill. As we seek to introduce it, we then have to justify the delegated powers that we want to take forward through a delegated powers memorandum.

In so far as there is a process that is under way, you could argue that guidance already exists. If the question is whether guidance should be created to say when the Government can and cannot introduce a bill in a certain way, I would probably respectfully push back on that, because ultimately it should be for Parliament to determine the nature of a bill as we move forward.

Bills change as we consider them. I have just taken the Scottish Elections (Representation and Reform) Bill through Parliament—which, incidentally, one of your former committee members, Daniel Johnson, asserted was a framework bill at stage 1 consideration. The committee convener pushed back and said that it was not a framework bill, so there was a difference of view among the Opposition, let alone between the Government and the Opposition. That bill changed, and secondary legislation-making powers were added to it as we moved through the process.

The creation and passing of a bill is an iterative process. Trying to limit the manner in which a bill can be drafted before it is even introduced would not be as helpful to Parliament as people might think.

Roz McCall: You say that it would be an unhelpful process, but equally, your evidence just highlighted the fact that what started off as a non-framework bill ended up with additional secondary legislation-making powers by the end of the bill process. We do not have that definition and, because it is not there, the process is such that bills morph all the time and can become what could be seen as framework bills as they go through the process.

You say that putting guidance in place would not be helpful. I have a concern about that, which I will try to frame right way. If we took a view on whether legislation should be framework legislation, what would the Government's view be on establishing principles to provide committees such as the DPLR Committee with clear means by which to assess and report on whether a bill is framework in nature, especially since they morph?

Jamie Hepburn: The committee could do that now. I am aware that the committee has looked at the Land Reform (Scotland) Bill, and—if I am correct—when discussing the bill, the committee made an assessment that it could fall into that category. The Government disagrees with that.

On your point about the Scottish Elections (Representation and Reform) Bill, I was not for a moment suggesting that the bill suddenly became a framework bill by process of further deliberation and amendments. However, if we accept your hypothesis, if a bill that was not determined to be framework legislation at the outset, when it was introduced, proceeded to have lots of secondary legislation-making powers added to it as it progressed through Parliament, and it was suddenly felt that it had become a framework bill, what would that mean in terms of guidance and our processes?

I understand that a cynical point of view would hold that such guidance would not be helpful to the Government because it would restrict and confine the manner in which we could draft bills—I have to concede that—but the question gets to the heart of the point that I am trying to make: what would be the utility of having defined what a framework bill might be? In this instance, I am not convinced that it would be helpful to the Parliament either, so to get to the nub of the issue, what is the specific concern, and what would be the purpose of having a strict definition of what constitutes a framework bill? That is not yet clear to me.

Roz McCall: From the evidence that we are taking, the purpose would be to ensure effective scrutiny, and that would be—

Jamie Hepburn: Surely, the counterpoint to that would be to ask, "What's deficient about the scrutiny process thus far?" I am unclear as to whether there are substantial deficiencies in the strict basis on which we scrutinise legislation right now. I was sitting here listening to the committee consider two statutory instruments before this discussion, and I heard that one was withdrawn and relaid because Parliament raised concerns about the initial drafting. That very much sounds to me like process and scrutiny being effective.

Roz McCall: Okay—accepted. Moving on, how do you think the use of framework legislation affects the balance of power between the executive and the legislature?

Jamie Hepburn: Are you asking about the actual use of secondary legislation, rather than the definition of framework legislation?

Roz McCall: Yes. Do you think that there is concern that the broad powers in some framework legislation could be used by future ministers in a way that was not envisaged when the legislation first came into force?

Jamie Hepburn: Broadly speaking, no, because the parameters of how any form of secondary legislation should be utilised is set out in the bill, so, in that sense, I am do not have concerns about its misuse. If such a concern was to emerge, the executive is accountable to the legislature, and the Parliament could determine to have a look at that piece of legislation and change it through primary legislation. I am not aware that there is substantial concern around that.

More broadly, subordinate legislation is so called because it is subordinate in terms of the process used to pass it, but it is not—if I could say it in a euphemistic sense—subordinate in terms of making law. The law has the same effect and it still has to come to the Parliament. The Parliament retains the ability to either pass or reject subordinate legislation in its affirmative form or Parliament can pass a motion to annul statutory instruments in their negative form. Therefore, it is not as though it creates broad sweeping powers for the Government, with no recourse to the Parliament.

Roz McCall: Okay. Thank you.

Jeremy Balfour (Lothian) (Con): Good morning, minister. One of the comments that your colleagues make when a framework bill comes to the Parliament—particularly those that we have had recently—is that they want to consult and design the scheme with stakeholders. Thus, they want more to come under secondary legislation so

that we can have that flexibility. Why can that co-design, which is a good thing, not be done before the legislation comes to Parliament? Everyone will then know what stakeholders think, although there are often different views among stakeholders, and then Parliament can come to a view. Why does that have to happen after the primary legislation has been passed?

Jamie Hepburn: There will be a mixture of reasons. The overall approach that we take is that there will be co-design through the process of engagement with relevant parties in advance of introducing legislation. That will happen, but sometimes it will be appropriate to set out in the bill the high-level principles under which the law should function. Thereafter, as part of the various functions that are determined through secondary legislation, that should also be done by co-design. I do not see anything illegitimate about that. It will depend on the specific proposition that is before the Parliament.

Jeremy Balfour: I am not quite sure that you have answered my question. Why can the co-design not happen first, so that the Parliament gets to scrutinise that? What is the benefit to the Parliament, to legislation and to good law if that co-design happens first?

Jamie Hepburn: Let us take one of your areas of interest, Mr Balfour. I have observed you in the Parliament for many years, and I know that you are interested in how our social security system should operate. I do not think that anyone would suggest that it would be appropriate to set out in great detail how specific benefits might function in primary legislation each and every time. Social and economic circumstances change, and we might need to change the manner in which a form of benefit operates, and it would be entirely appropriate to do that through secondary legislation. I expect that you would, rightly, be the first person to say that we should co-design that with the people who would stand to benefit from any form of benefits payment, or those who would have to administer such payments.

In certain circumstances, therefore, it is entirely appropriate for laws to be passed or for issues that are to be determined by secondary legislation to be subject to co-design, as much as primary legislation should be.

Jeremy Balfour: Do you think that one of the reasons why the Government got itself into an issue with the health and social care bill was that the co-design was going to be done once the legislation was passed but many voices were telling us different things? In retrospect, do you think that it would have been better for more detail to have been found about that bill at an earlier stage, so that Parliament could have come to a view on it, rather than moving it or kicking it into the long grass?

Jamie Hepburn: Can you just clarify that you mean the National Care Service (Scotland) Bill?

Jeremy Balfour: Yes.

Jamie Hepburn: Again, I respectfully say that Maree Todd made a statement to the Parliament just last week or the week before—I cannot remember which—in which she laid out the Government's intended way forward for that bill. That came on the back of parliamentary scrutiny. By my estimation, that—if nothing else—shows that parliamentary scrutiny is effective in so far as Parliament can determine and command what legislation should say. To be candid, that bill has gone in a direction that the Government did not want. However, I go back to what I said in my opening statement: in a parliamentary democracy, the Parliament should retain that power. I very much consider that bill to have been determined by the process of scrutiny.

On your point about looking at things in retrospect and with hindsight, of course, we need to learn from every circumstance. We have gone through that experience, and we will seek to learn from it, just as we would in passing any form of legislation.

10:30

Jeremy Balfour: That is helpful.

When a bill team and the minister sit down to consider a piece of proposed legislation, how do they decide whether everything will be in the bill or whether to leave a lot more to secondary legislation? Is that a conscious decision? Is it something that your colleagues or those advising them think about, or does it just emerge as the process goes on?

Jamie Hepburn: It can be a bit of both. I alluded to that point at the outset and, in response to a question, I talked about the process that the Government goes through in crafting a bill. Consideration will, of course, be given to the appropriate balance between what should be in the bill and what should be determined by secondary legislation. We go through that process, and then—to go back to a point that I have made already—we have to justify our approach through a memorandum at this committee, which subject committees will consider thereafter.

Sometimes, the approach will emerge as the bill proceeds through Parliament. It is not unusual or abnormal for powers to be added, often at the request of the committee that has looked at a bill at stage 1. Committees will make recommendations for things to be added or, sometimes, as a result of interaction between the

Government and other members of Parliament, measures have to be added to a bill. That might involve the addition of secondary legislation-making powers.

Jeremy Balfour: On the amount of secondary legislation, your thesis or argument is that there is not substantially more than there was 26 years ago. Do you not recognise that Covid and Brexit led to an increase in secondary legislation? That was absolutely justifiable, but they led to an increase.

We have also heard evidence that the Government has changed in the past 26 years. Rightly or wrongly, we live at a faster pace. We are all driven by social media, and decisions are made on that basis. That is a legitimate reason why there is more secondary legislation. Do you not accept that in any way at all?

Jamie Hepburn: I have seen little to suggest that the fact we live in a faster-paced world and in the age of social media is dictating that more things are determined by secondary legislation.

I think we all accept that, when we considered legislation on Brexit and in relation to the emergency response to Covid—I was there and you were, too, Mr Balfour—a substantial amount of law had to be made by secondary legislation. We could not meet the requirements in the normal format. You will recall that, during Covid, there was a restriction on the number of people who could come into the Parliament building. I certainly accept that, in that period, more had to be done by secondary legislation.

That does not necessarily mean that more framework bills overall were coming forward. In some cases, there were framework bills, but, looking across the piece, I have seen little evidence to suggest that there are substantially greater numbers of what could be felt to be framework bills now than was the case previously.

We could look at the history of these things. Since the early days of devolution, it has been a feature of our legislative process that ministers seek to bring forward something that sets a framework. That was laid out in the letter to the committee from my predecessor, George Adam, but I will make the point again. In 2000, in relation to the Adults with Incapacity (Scotland) Bill, Iain Gray said that it would

"set a framework that would allow us"—

that is, the then Scottish Executive—

"to take cognisance of such developments quickly, without taking up parliamentary time unnecessarily."—[*Official Report*, *Justice and Home Affairs Committee*, 29 February 2000; c 836.]

In 2006, Johann Lamont, speaking to the Planning etc (Scotland) Bill, talked about the bill establishing a framework. In the same year, Ross Finnie, speaking to the Animal Health and Welfare (Scotland) Bill, talked about the bill providing an "essential flexible statutory framework".

So, it is not a new phenomenon, but I have heard members assert in the Parliament that it is. It seems to have permeated out there to become almost accepted fact that there are more so-called framework bills than there were in the past, but no one has presented any evidence to me that suggests that that is the case.

The Convener: Before I pass on to Bill Kidd, does the minister see a difference between consultation and the co-design of bills?

Jamie Hepburn: That is a good question, convener, and it is, earnestly, not one that I have considered in great detail. There is clearly a correlation between the two, and I suppose that it depends on what stage the bill is at. Good consultation should happen in advance of the introduction of any bill. In essence, that can lead to greater interaction with stakeholders and to the co-design of certain legislation.

Consultation and co-design are closely related. There could be differences between them, but I suggest that both should be a substantial exercise.

The Convener: The representative from NFU Scotland put forward a very strong case with regard to the co-design work that took place between the Government and NFU Scotland on agriculture legislation. Obviously, every policy area is different, and co-design will be better suited to some areas than to others. However, we also heard evidence that there might not be full engagement with the wider stakeholder group if the co-design element is focused only on a small number of key stakeholders in a particular sector, so there could be challenges there as well.

Jamie Hepburn: It will be different from bill to bill. I respectfully suggest that there might always be a sense that more people might like to be at the table. Sometimes, the reality is that you can have only so many seats around the table. That goes back to the point about having good, meaningful consultation that enables as many people and organisations to take part as want to. From there, if you are engaging in a co-design process, you can identify those who have the most direct relation to the legislation that you are seeking to take forward. Then you can involve in an active co-design process the people who are most likely to be directly impacted or most likely to be administering any element of legislation that you are seeking to take forward, which, with respect, cannot be everybody.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for your replies so far, minister. When you are considering the financial memorandum for

framework legislation, how does the Scottish Government take a view on the full cost estimates, the range of costs, the potential savings and the margins of uncertainty that will arise?

Jamie Hepburn: I know that that has been an issue of concern for the Finance and Public Administration Committee, and I have certainly raised and emphasised the point to my colleagues that the quality of the financial memoranda should always be sufficient for the purpose of the finance committee's consideration of any legislation or, indeed, subject matter. That should be a thorough and proper exercise.

It goes back to the point about on-going deliberation and consideration of legislation, whether it be in primary or secondary form. My expectation is that, if a committee of the Parliament is looking for more information, colleagues should provide it.

Bill Kidd: On that basis, is the Scottish Government doing, or even considering doing, anything to facilitate improved scrutiny of the financial basis of framework legislation—perhaps by helping committees to have greater scrutiny ability or by its own departments carrying that through?

Jamie Hepburn: I go back to the point about parliamentary scrutiny that I emphasised earlier. The finance committee has raised a concern and has written to me about it. I have heard that concern and I have acted on it. I have communicated to all ministerial colleagues, and to all senior civil servants who are involved in the consideration of any financial memoranda, that they should ensure that they go through the rigorous process that the Parliament rightly expects. We could also update the Government's handbook on the bill to that effect.

If the Parliament considers that we can do more, it need only ask. If it asks for something that we can do, I will be happy to implement it. If it asks for something that we cannot do, I will be happy to set out why that is the case.

Bill Kidd: But, at the moment, you believe that there is a robust and rigorous process that can handle just about anything that might emerge.

Jamie Hepburn: We are not going to get everything right every time, but we certainly aspire to do so. That is my expectation.

Bill Kidd: That is great. Thank you very much.

The Convener: Before I hand over to Katy Clark, Jeremy Balfour has a supplementary question.

Jeremy Balfour: With all due respect, minister, I think that you are slightly underplaying this. The convener of the Finance and Public Administration Committee—Mr Gibson, who has been at the Parliament for 26 years—appeared before us last week and said that his committee finds it very difficult when that type of financial memorandum is issued and it cannot undertake detailed scrutiny. I think that his words were that none of that legislation should come to the Parliament. How do you respond to his comments?

Jamie Hepburn: First, I do not think that I am underplaying the issue at all. There might be a difference of opinion between us, in which case Mr Balfour will just have to live with that.

I have responded—I am using the dictionary definition of "responded"—to the convener of the finance committee. I have written to him to reassure him that we have taken steps to improve the information that can be provided. As I said in response to Mr Kidd, if there is more that we can do, I will be happy to listen to suggestions and consider them.

I cannot remember precisely which bill it was about—it might have been the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill—but the finance committee had some concerns that it would not receive updated information until after stage 2 of the bill process. I will stop there and quickly check that point with Steven MacGregor. Is that the right bill?

Steven MacGregor (Scottish Government): Yes.

Jamie Hepburn: It is the right bill. The committee had concerns that it would not get updated information until after stage 2. However, that is what the Parliament has asked for as part of its defined processes. If the Parliament wants to change those processes and say that enhanced information should be available before stage 2, although obtaining that might pose a challenge to the Government, we need to listen to that request and see how we can meet it.

However, that could have the consequence of delaying consideration of legislation. Convener, I noted that, when you went to speak to your equivalent committee in the House of Lords, one point made—albeit in the Westminster context—was that, between the Government and the Parliament, effort should be made to speed up the consideration of primary legislation. I am very much up for that. We can identify that, in the current session, the Scottish Parliament is taking longer to consider such legislation. We often provide more information between stages 1 and 2 already, but if we were to make that a formal part of the process, it could have that consequence.

10:45

Jeremy Balfour: You are not going to like this suggestion, minister, but, in the future, if there have been substantial changes to a bill through amendments, should there be scope between stages 2 and 3 for the committee to take more evidence from key stakeholders, before stage 3 amendments are considered? That would be up to the convener, but should it be in their mind that, if there has been a substantial change to a bill, that could be examined before stage 3?

Jamie Hepburn: I am certainly aware of that having happened in advance of stage 2, when it has been indicated that changes are going to be proposed. That happened with the Scottish Elections (Representation and Reform) Bill, for example. I would need to cast back and see whether it has ever happened between stages 2 and 3, depending on the time agreed. I make the point that, in contrast with the United Kingdom Parliament, where the Government has much more power over the timing of the process for consideration of legislation, timings here are agreed by the cross-party Parliamentary Bureau. If a committee raised a particular issue, the bureau would have to consider that and set the stage 3 deadline accordingly.

I am not convinced that there is not scope within the current process for that to happen. To go back to the point that I have just made, if we were to make that a routine part of our process, we would need to go into it with eyes wide open. That would do nothing other than elongate the process for considering legislation that is before Parliament.

Katy Clark (West Scotland) (Lab): One reason that you have given in justification of the current approach is about the capacity of the Parliament. As you know, committees often spend substantial time scrutinising primary legislation, but there is often a great deal of frustration at the lack of clarity and detail in a bill and at what the Government's intentions are. Committees often spend a great deal of time speculating on what they think that the Government will do when it comes to the secondary legislation, to the extent that that is, I would argue, hindering the scrutiny process.

One suggestion that has been put to the committee is to enable framework bills to contain duties to consult stakeholders and report on their views to Parliament when it is considering secondary legislation. What is your view on the suggestion that we enhance the scrutiny process for secondary legislation?

Jamie Hepburn: Again, we would need to look at the specific recommendation if one were to emerge, and consider how it might impact the progress of any legislation.

I think that there is an issue around capacity in Parliament. To be candid, that is for Parliament, and not necessarily the Government, to consider. There are capacity issues in Government as well, of course, but it would not be for the Government to tell Parliament about its capacity to consider such matters. If it is felt that there needs to be enhanced capacity in Parliament, that is for Parliament to deliberate on. On the question of whether there should be any change to our process, we would need to consider the specific recommendation.

To go back to the premise of the question, in some cases, it will be more possible than in others to set out what will be determined by secondary legislation. I have already given the example of social security. The uprating of benefits will happen on an on-going basis, so it is not possible to say what a particular benefit might be five years hence.

Some setting of registration fees, for example, is determined by secondary legislation. I think that I am right in recalling that from my time as health minister in the dim and distant past—it might have changed since, but I suspect not. We also use secondary legislation to set registration fees for social workers, because we cannot say what those fees will be five years hence.

By contrast, we might have in mind a clear idea, subject to refinement, of how a specific power to make secondary legislation might be used imminently. In those circumstances, it would be fair to provide that detail.

Katy Clark: Uprating of benefits and changes to the levels of fines are defined and narrow issues for the Parliament to consider, and they often relate to increases in the cost of living and people's wages. However, it would have been possible to put a great deal more detail in the Fireworks and Pyrotechnic Articles (Scotland) Act 2022, for example, and in some criminal justice legislation, but the Scottish Government chose not to go down that path. That approach can make it difficult for the Criminal Justice Committee to ascertain exactly what the Government is proposing, so we have to consult and scrutinise on the basis of what we think the Government is likely to do.

Often, the Government does what we guess it will do and what we think is most likely. However, do you agree that the whole point of scrutiny is to scrutinise specific proposals and that currently, in many situations, such detail is not in primary legislation? In those situations, should there be scope for an enhanced scrutiny process for secondary legislation?

Jamie Hepburn: It depends on what "enhanced" means. I go back to the point that I

made in answer to an earlier question. Today, two statutory instruments were before this committee for consideration. It was pretty clear that the two instruments that happened to be considered on the day that I am here did not require substantial scrutiny, based on the committee's assessment, but the committee could have taken a different view—it could have determined that more scrutiny was required, written a report and made recommendations.

The committee is able to do that now. If there is a sense that something beyond that is needed, we need to consider what that might be. If there is a recommendation, we will consider it.

Katy Clark: You are open to looking at that. That is great.

Jamie Hepburn: I am always open to every proposition.

Katy Clark: A number of witnesses have suggested that draft regulations should be published alongside framework legislation. What is your view on that? Would that be possible in some situations?

Jamie Hepburn: It could be. If the Government thought that that could be achieved and a committee of the Parliament thought that it would be helpful, we could look at that, but it would not be possible in every case. I go back to the point that I made earlier about some things being determined on an on-going basis, which is the purpose of having that defined in secondary legislation. That will not be true in every instance, but the purpose of secondary legislation is to be able to make changes to the law, when circumstances change and with the consent of the Parliament, more quickly than we could through primary legislation. However, if we had a substantial amount of detail, it probably would be put in primary legislation.

Katy Clark: As we all know, people tend to work to deadlines. When we ask for specific regulations or a specific document, the Parliament is often given the explanation that that information is not ready yet. That is a cultural issue in relation to how we organise ourselves. Would it be possible, in some situations, to have stricter requirements on draft regulations being available at an earlier stage?

Jamie Hepburn: I have already made the point that that could be possible in some situations, but whether we need such a requirement is another matter. When that can be done and when it would be sensible to do it, let us look at that but, in other circumstances, that will not be possible.

Jeremy Balfour: I return to your point about parliamentary time. Primary legislation does not come to the chamber on a weekly basis. We spend a lot of time debating important topics, but that is not legislation. The issue has to do with our approach to stage 1—we understand that. However, when we scrutinise bills, is the pressure on committees rather than on the whole chamber? My gut feeling is that we do a stage 3 no more than every six or eight weeks. That does not seem to be a lot of pressure on Parliament itself. There might be pressure on ministers and behind the scenes but, for Parliament, that deeper scrutiny is not a pressure on time, is it?

Jamie Hepburn: It is, because it is not just a matter of the legislation coming before the chamber. A considerable amount of work has to go into the creation of legislation in advance.

I would throw it back at you, Mr Balfour. You are taking forward a member's bill. How would you fancy taking forward five in a year? I think that you should be well cognisant and well apprised of the substantial amount of work that has to go into the crafting of a bill, its consideration by a committee and the Parliament's capacity to support members.

That takes us back to my point. Candidly, yes, there are pressures on Government. There is the idea that the Government is gargantuan and has a million people working for it, but there are only so many people there to support ministers to take forward amendments to legislation. Also, there are only so many people in Parliament to support Opposition members and back-bench members of the party in Administration to take forward amendments. That is just a reality. If Parliament wants to enhance its capacity, that is for Parliament to consider, not the Government.

You are quite right to say that we are not doing a stage 3 every week. I hazard a guess that Parliament would not want us to do a stage 3 every week.

Jeremy Balfour: That is an interesting philosophical question, which might be for another day.

I will move on. As you will be aware, one issue with secondary legislation is that we have to take it or leave it—we vote for it or we vote against it. We can make comments but, ultimately, the power that Parliament has is to say yes or no. Some witnesses have suggested that there should be an ability to amend secondary legislation or have the ability to conditionally approve it. For example, that might allow us to say, "We like 98 per cent of this, but we have real concerns about 2 per cent. Would the Government look at that again and bring forward a fresh view on it?" Could that approach work? Would the Government be open to it?

Jamie Hepburn: On a practical basis, that happens, albeit occasionally. I do not know

whether it is just good fortune that I have come to committee today, convener, but one of the instruments that you considered earlier was relaid because concerns were raised about the initial draft. The Government reflected on that and took it away. We heard what Parliament had to say and the instrument was redrafted accordingly. I am less convinced that we need to make that a formal part of our process. We have a system that, by and large, works effectively in that way.

If we started to get to the stage whereby secondary legislation could be amended, that would take us down the line of some form of primary legislation making that is probably not as substantial as passing primary legislation is just now.

The point at which Parliament has to consider whether it is appropriate that, generally, a certain area should be determined through secondary legislation or subordinate legislation-making powers is when it considers the bill and entrusts that power to the Government to draft the regulations accordingly, knowing that it will still have the opportunity either to approve or to annul them.

Jeremy Balfour: Would you accept that, with the exception of this committee, secondary legislation is less well scrutinised than proposed primary legislation?

11:00

Jamie Hepburn: By its very nature, the scrutiny of proposed primary legislation is a longer process, and I accept that that leads to a certain form of scrutiny in the sense of gathering evidence, which you might not see with secondary legislation, although it is perfectly possible. I have been a member of Parliament for more years than I care to remember—for as long as Mr Kidd and Mr McMillan have been—and I remember sitting on committees where we were able to take evidence on secondary legislation. Committees can do that right now. It is a process of Government working with Parliament to accommodate concerns, and I would expect Government to do so.

Roz McCall: My last questions, which are a little subset on their own, are on Henry VIII powers. When is it considered appropriate to include a Henry VIII power?

Jamie Hepburn: In the first instance, I will make this point about the inclusion of a so-called Henry VIII power. I say "so-called" because I found the evidence that Andrew Tickell gave to the committee interesting. He talked about "pejorative" language in the context of "framework" bills or "skeleton" bills. I can think of no more pejorative term than "Henry VIII power". The first thing that we think of regarding Henry VIII is that he married six wives and beheaded two of them, so "Henry VIII power" could be felt to be quite a pejorative term.

Putting that to one side—I have got that off my chest—such a power is subject to agreement by the Parliament. The Parliament agrees, through the process of determining any legislation, whether a so-called Henry VIII power should be part of it. It is not a mystical power that the Government has without recourse to legislation. It has to be defined in any bill that is passed. If the Parliament considers that it is not appropriate for such a power to be included, it is perfectly possible for the Parliament to reject such a proposition.

We should remind ourselves that the power is used in fairly straightforward manners. For example, it may be prescribed in primary legislation that, in taking forward or exercising any power, there is a statutory list of consultees to be consulted. When an organisation's name changes or a new organisation emerges, do we really want to go through a process of adding the new name to that statutory list? Do we really want to start again and go through the process of introducing primary legislation to change that list, or is it appropriate to say that the Government can use the power to update the list? Incidentally, if it was not done by that means, it would be by some form of other secondary legislation-making power but, to all intents and purposes, the outcome would be the same.

I have certainly not seen any evidence to suggest that the power is being used in an inappropriate manner. You had evidence from senators of the College of Justice, who talked about the appropriateness of utilising those powers. With respect, I do not think that such a suggestion has come through in the evidence that you have gathered. It is down to the fact that "Henry VIII power" is such a pejorative term. Far be it from me to say what the committee's recommendations should be, but you could perhaps come up with nicer terminology than "Henry VIII power". That would be tremendously helpful.

I do not think that that has come through in the evidence that you have gathered thus far. It is, in effect, another agreed form of secondary legislation-making power through the process of considering primary legislation. It is not some sweeping power, as was the case when we had absolute monarchs, which is where the terminology comes from.

Roz McCall: I appreciate the example that you have given. I will delve a little bit, as the committee has taken evidence that suggests that the function

of the power is more significant than its form—and I would probably add its name to that.

Should the legislature be concerned with Henry VIII powers just because they allow changes to be made to primary legislation by secondary legislation, or should we be more focused on the scope and significance of those changes?

Jamie Hepburn: I think that it should be the latter. Once again, the ultimate reassurance is that people have recourse to the courts. It is true of any function that has been delegated to the Government—it is certainly true in relation to so-called Henry VIII powers—that the courts would take a dim view of the Government trying to use its powers in a way that had not been intended or agreed by the Parliament.

Roz McCall: Excellent. That is helpful.

What is your view on the scope of the powers being included in primary legislation? Specifically, has the scope of Henry VIII powers been widely used in recent times? We have heard evidence that there is a danger that having Henry VIII powers of particularly wide scope can become a bit of a habit and that those have been accepted in some instances. Do you recognise that?

Jamie Hepburn: It has been interesting to see the evidence that the committee has gathered, and I know that the committee rightly went to London to look at the experience there. The manner in which those functions are exercised in the Scottish Parliament is different from how they are exercised in the UK Parliament. The UK Government has far more discretion than the Scottish Government about the powers that it can exercise. I have seen nothing to suggest that there is any substantial concern here.

I go back to a point that I have made already. If there was any concern, it would be perfectly possible for the Parliament to prescribe that there should not be that function or that the function should be exercised differently, probably—I hazard a guess—by using another form of secondary legislation-making power.

Roz McCall: Another point that has come up is the idea of sunsetting Henry VIII powers, so that there would be a way of closing off a power that was not being utilised. What do you think of that suggestion?

Jamie Hepburn: That would very much depend on the context. I can give a hypothetical example of something that I do not think we would do but which could lead to concern about the appropriate use of those powers. An executive or a Government might decide that it had better use a power that it will soon no longer be able to use, just to circumvent a sunset clause. That might be a cynical view, and I suggest that we would not do that. It comes down to the purpose of the sunset clause and why we would use such a clause just because a power existed in a particular form. I am not clear what the purpose would be.

Roz McCall: I go back to the wonderful comments that I made earlier on guidance. Would guidance be helpful?

Jamie Hepburn: It could be, but it would depend on what the guidance said.

Roz McCall: Absolutely. We have heard evidence from witnesses that it might be appropriate to have some form of guidance in place to say when it would be suitable and acceptable to use Henry VIII powers—which is what we are calling them just now—regardless of the name. Would that be helpful to the Government? If so, that is great, but if not, why not?

Jamie Hepburn: I am not convinced that that is absolutely required, partly based on the frequency with which we prescribe the ability to exercise such a function and, more fundamentally, based on the frequency with which we exercise it. However, if the Parliament considered that some form of guidance would be useful, we would look at that. It is for the Parliament to consider that, and it might feel that it would be beneficial to consider the inclusion of such guidance, although the reason why the powers exist is probably well understood.

Roz McCall: That is helpful. Thank you.

The Convener: I will go back to the point on sunsetting. There are occasions when Governments remove legislation that has been on the statute book for decades—sometimes centuries—and is clearly no longer being utilised, in order to clear the statute book. Would the Scottish Government consider doing that with unused Henry VIII powers?

Jamie Hepburn: We constantly look at the statute book. The very purpose of making primary legislation is to look at the effectiveness of the existing law of the land and consider whether it requires to be changed. I will not sit here and earnestly suggest that we will undertake that exercise across the board, because we probably will not, given the point that I made about capacity in the organisation and the need to focus on what we need to focus on. However, if a particular issue emerged at a particular time, we would, of course, look at it. If the Parliament makes recommendations about any aspect of the law, it is incumbent on the Government to consider them.

The Convener: I have a final question before I open up the discussion to colleagues for final questions. I had to leave earlier, so I did not get the chance to ask this question at that point.

On the definition or label of "framework", there was a helpful suggestion in the evidence from NFU Scotland, which considered that three criteria should be used to define framework legislation. I read them out in the committee two weeks ago and, for consistency, I will do so again:

"1) There is a need to deliver flexibility and adaptivity to mitigate possible future challenges.

2) Extensive work is undertaken with relevant stakeholders before and during the parliamentary process.

3) A clear indication of the overall required outcomes is set out by the Scottish Government."

Do you think that NFU Scotland's suggestions are helpful in relation to considering a definition of, or setting criteria or parameters for what is termed as, "framework" legislation?

Jamie Hepburn: They are helpful in so far as the NFUS has set out how it conceptualises what framework legislation is. On whether it would be helpful to have an agreed definition, I cannot help but go back to the point that I have made already: it does not strike me that setting a definition would, in and of itself, take us much further forward. What would be the point, the purpose and the efficacy of coming up with a strict definition of a framework bill? Why would we do it? How would that definition be used?

I concur with the first point, on the need to adapt and be flexible. That is the purpose of secondary legislation-making powers, although I do not know whether having those powers constitutes the creation of a framework bill.

On the third point, about indicating the purpose of secondary legislation-making powers—I am definitely paraphrasing; I tried to take a note but I could not keep up with your rate of speech, convener—as I said earlier, we already do that. There are delegated powers memorandums. I respectfully suggest that a lot of the things that people are looking for are already built into our system. That might speak to my point about whether we need a definition of a framework bill. Frankly, a lot of the things that people have identified are already part of our system.

The Convener: I see that colleagues have no final questions. Minister, is there anything else that you want to put on the record?

Jamie Hepburn: No. I appreciate the opportunity to speak with the committee about the matter, and I look forward to seeing your conclusions.

The Convener: I thank the minister and his officials for their evidence. The committee might follow up with a letter with any additional questions stemming from the session.

11:14

Meeting continued in private until 12:14.

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