

Inquiry on Framework legislation and Henry VIII powers

Submission from Scottish Land & Estates

About Scottish Land & Estates

At Scottish Land & Estates (SLE), our vision is a prosperous and sustainable future for rural Scotland, delivering benefits for all. We do this by championing and supporting rural businesses that provide economic, social and environmental benefit to the countryside. Our members represent a diverse community passionate in promoting rural Scotland, and we've acted as their voice for over 100 years.

1. What is your understanding of what framework legislation is?

There could be differing interpretations of what framework legislation means because we do not have a definition in the Scottish Parliament's Standing Orders. We understand a framework Bill to set out the broad policy intention but leaves much of the detail to be provided in secondary legislation and subject to different pre legislative consultation and parliamentary scrutiny.

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?

In light of experience to date, we feel that framework legislation should be the exception rather than the rule and should only be used in fast moving circumstances where detail is changing or not fully known at the time of the Bill being introduced. The Agriculture and Rural Communities (Scotland) Act is an example of where a framework Bill was probably justified in light of the changing circumstances in agriculture and cycles of agricultural funding. However, where wide delegated powers are given this must be balanced by a clear overall policy intention within which the secondary legislation must fit as well as a requirement on the face of the Bill to consult widely on the detail and also for the appropriate parliamentary procedure to be used depending on the nature of the secondary legislation.

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?

As indicated above, we feel framework Bills should be the exception and only be used within a clear set of guidelines. They should also only be skeletal where absolutely necessary, in other words the Bill should provide as much detail as is possible and only use delegated powers where flexibility is required in light of certain clear criteria such as the frequency that circumstances may change – not because there is a gap in policy development.

Delegated powers should never be used where policy has not been fully worked up or where government is not sure how to proceed so leave their options open. An example of the latter, we believe, is the current Land Reform (Scotland) Bill. Regarding S1(4) (Power to modify community engagement obligations for owners of large land holdings), in the response to your Committee, it is implied in what the Cabinet Secretary writes that the lack of evidence-based rationale for the hectareage thresholds is such that there may be a need to revisit these thresholds in order to deliver the policy objectives. She makes points about using secondary legislation to change the Act if it transpires that scale was the wrong way to go about delivering the policy objectives and concentration would be better.

This is an area where we feel it is important that guidance be developed to illustrate when it would be appropriate to use framework legislation (akin to UK Cabinet Office Guidance in Westminster), as well as guidance on secondary legislation and when the different parliamentary procedures are appropriate. Chapter 10 of the Parliament's Standing Orders could possibly incorporate further information on what matters may be appropriate for the different procedures for statutory instruments.

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.

As a representative membership organisation we find it very difficult to provide guidance to our members about what the potential impact of legislation will be if we do not have enough information on the face of the Bill. In those cases it is necessary therefore to assume the worse case scenario and that is not always deemed helpful by government officials we are working with in attempting to reach the best possible outcomes to deliver the policy intention.

For example, the financial impact may be impossible to estimate if there is not enough information about the types of obligations which might appear in secondary legislation. A current example again is the Land Reform Bill. Ministers are to be able to create new obligations upon land owners which have the broad objective of promoting community engagement and the only requirement for consultation is with the Land and Communities Commissioner.

Affirmative procedure is to be used here but there is no requirement to consult the landowners affected (nor the communities for that matter), no indication if those obligations could impose significant financial or other burdens and no indication of whether "community" in this context must be geographically proximate to the land or whether it could be communities of interest. This is therefore so wide that it is impossible to know what might be imposed and the only scrutiny allowed by Parliament is limited to possibly one meeting of a committee where a number of other pieces of secondary legislation may need to be considered on the same day. Stakeholder organisations which may have wished to comment or provide information to Parliament may not be well enough resourced to anticipate all secondary legislation coming before the committees.

As a general observation we believe the committee system in the Scottish parliament can work very well where there is a coalition or minority government and the level of scrutiny, even of secondary legislation, can be of a high standard. However, we have seen that it works less well where there is a majority government and there is the risk that the relevant committee may not be afforded the appropriate authority because at the end of the day the government view will succeed. It may be that a further level of scrutiny is required to be developed for specific circumstances such as these.

Another challenge for stakeholders is that it is not possible to know whether the primary legislation may transpire to be in contravention of other principles such as ECHR. As an organisation which represents the interests of people in Scotland who own and manage land, we are particularly tasked with ensuring that legislation does not detrimentally affect those interests and does not contravene other law. It can appear at times that delegated powers could be used to avoid scrutiny in this regard because not enough detail is given. It is rarely the case that the accompanying policy or financial memorandum provide examples of what may appear in secondary legislation. Ideally you would have drafts of regulations available to scrutinise before the Bill passes through parliament.

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

We firmly believe that there should be clear guidance for Ministers as to when framework legislation is appropriate and when it should not be used. The current guidance for Ministers and Officials appears to be contained in [Bill handbook - procedure guide for Scottish Parliament bills](#) (unfortunately there is no date or version control on the document available online) and Parliament's Guidance is [Scottish Parliament Bill Guidance.pdf](#) . It is not clear whether the Scotland Act 1998 would allow Standing Orders to cover this but either the Government's or parliament's Guidance or both may be more appropriate.

There should also be guidance on which parliamentary process is suitable for secondary legislation based on factors such as whether significant financial interests are concerned. If the latter deals with procedure then it may be possible to cover this in Chapter 9 of the Parliament's Standing Orders.

It would be useful if it was mandatory that framework legislation was subject to post legislative scrutiny on a fairly regular basis (for example every 5 years) so that the secondary legislation passed pursuant to that Act are afforded a further opportunity for scrutiny. It follows that delegated legislation should be able to be amended – either during its original parliamentary process or following a post legislative review.

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?

Guidance as referred to above is required.

Whilst the Delegated Powers and Law Reform Committee (DPLRC) does a very good job of scrutinising the delegated powers in various pieces of legislation, the sheer volume of those powers contained in almost every piece of legislation means that insufficient time is often available to fully scrutinise. This is made more difficult because there are no guidelines setting out criteria or standards by which secondary legislation should be judged.

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?

Our understanding of “Henry VIII” powers is that these allow Ministers to amend or repeal a primary Act via secondary legislation.

As a general principal in a democratic society we do not believe that a primary Act which has passed through the full pre legislative consultation and due parliamentary process should be able to be materially amended or repealed by using delegated powers unless in very specific circumstances and where there is a clear justification and adequate consultation. What constitutes a material amendment would need to be defined but might include a provision which alters the policy objective being delivered by the Act in a way which differs significantly from the policy intent of the primary Act.

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

As already indicated, there should be clear guidance which sets out if and when such powers might be justified to ensure that the will of Parliament is upheld and adequate scrutiny is afforded. We have already seen that the Courts have admonished the government for leaving it to the courts to interpret their poorly formulated legislation. See for example

https://supremecourt.uk/uploads/uksc_2021_0079_judgment_f169e2f69a.pdf

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

We do not have anything substantive to add to what we have indicated above. We would simply reiterate the following points:-

- It is imperative that guidance is developed to ensure government has criteria to meet before a Bill can be laid containing delegated powers. This may ensure that delegated powers are not misused in future to fill gaps where policy intention has not been fully worked up or where insufficient time has been allowed to fully consider drafting before an Bill is introduced.

- Similarly there should be guidance to give direction on which type of parliamentary procedure for secondary legislation (negative, affirmative, super affirmative) should be used. This could formalise some current “rules of thumb” voluntarily used by Scottish Government e.g. where the text of the primary act (for example a definition of area by reference to a number of hectares) is changed then affirmative should be used. Such criteria would assist the DPLRC in its scrutiny of statutory instruments and whether or not they are competent in the first place.
- If delegated powers are only used where there is a clear policy objective for the primary Act and secondary legislation is permitted only to allow flexibility whether that is necessary to adapt to fast changing circumstances, then there should be no reason that draft statutory instruments could not be provided along with the other Bill documents when the Bill is introduced or at worst before the end of the parliamentary process. If this is not possible then we would suggest the Bill has been introduced too soon and that implementation of policy objectives have not been given sufficient time to be fully thought through. A delay in introduction may well ensure better legislation at the end of the day, thus reducing the risk of legal challenge and ensuring more efficient use of parliamentary time.