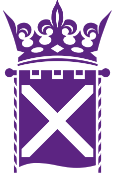

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Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Inquiry into Framework Legislation and Henry VIII powers

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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.

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Membership changes

The following changes to Committee membership occurred during the course of the Committee's inquiry :

- On 29 May 2024, Jeremy Balfour MSP replaced Oliver Mundell MSP
- On 4 September 2024, Daniel Johnson MSP replaced Foysol Choudhury MSP
- On 10 October 2024, Roz McCall MSP replaced Tim Eagle MSP
- On 15 January 2025, Katy Clark MSP replaced Daniel Johnson MSP

Executive summary

The Committee's work on framework legislation and Henry VIII powers has elicited varied and thoughtful responses. They come from committees and parliaments across the world, key stakeholder organisations at the heart of Scottish policy making, leading academics and think-tanks, and eminent legal bodies.

The Committee is very grateful to everyone who contributed to the inquiry, and the breadth and strength of those striking submissions in and of itself tells a story.

While the Committee recognises that there is not a single definition for framework legislation, it understands what it is – and believes most others will know it when they see it too. It has agreed that it broadly considers framework legislation to be:

> 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

The Committee heard varied views about the frequency of framework legislation – there seemed however to be a general acceptance that it is not a diminishing issue. On balance, the Committee considers that across jurisdictions, it is likely the occurrence of framework legislation has increased since the 1932 Report of the Donoughmore Committee on Ministers' Powers, and that this trend seems to be accelerating.

The Committee also agreed that its own preference, wherever possible, is for the detail of legislation to be spelled out on the face of a Bill to allow for transparency, proper democratic engagement, and so that stakeholders and parliamentarians can engage with and scrutinise solid proposals.

The Committee recognises the need in some cases for primary legislation to provide flexibility, by allowing for laws to be updated without requiring further Bills. In such cases though, the Committee argues for any delegated powers to be clear and well defined, and steps to be taken to strengthen scrutiny of both the primary legislation delegating the power and subsequent secondary legislation made under it.

The report sets out in detail the steps which the Committee supports being taken by both government and fellow parliamentarians to help achieve this.

Finally, the Committee concluded that, while it expects to see so-called Henry VIII powers (powers which allow for primary legislation to be amended by secondary legislation) appropriately limited in scope, it considers them a necessary, efficient tool when used suitably. There are nonetheless suggestions to strengthen scrutiny in relation to this category of power, as set out towards the end of this report.

Introduction

1. The Delegated Powers and Law Reform ("DPLR") Committee ("the Committee") formally agreed to hold an inquiry into framework legislation and Henry VIII powers at its meeting on Tuesday 7 May 2024.

2. The Committee had recently considered a number of pieces of framework legislation, including the National Care Service (Scotland) Bill [1] and the Agriculture and Rural Communities (Scotland) Bill [2] , and wanted to explore the perception that the number of framework Bills was increasing and the scrutiny challenges that such Bills presented. It raised these issues with the former Minister for Parliamentary Business at the Committee's meetings of 26 September 2023 [3] , 19 March 2024 [4] , and in correspondence in April 2024 [5] , following which the Committee decided to hold an inquiry.

3. The Committee wanted to look in more depth at these issues. In order to do so, it agreed to focus on questions relating to definitions of framework legislation, whether it is being used more frequently, and whether improvements could be made to scrutiny processes for either framework provisions or for subordinate legislation stemming from framework legislation. It also agreed to look at secondary legislation being used to amend primary legislation (so-called Henry VIII powers), and concerns about how such powers might be used.

4. The Committee considered these issues during its business planning session on Tuesday 25 June 2024, at which it heard informally from the Minister for Parliamentary Business, as well as two academics (Professor Richard Whitaker and Dr Pablo Grez Hidalgo).

5. The Committee's call for views on the inquiry ran from Friday 5 September to Thursday 31 October 2024. The Scottish Parliament Information Centre (SPICe) produced an analysis of responses.

6. On Friday 6 December 2024, Members of the Committee (Stuart McMillan MSP, Jeremy Balfour MSP and Roz McCall MSP) met privately with Members of the House of Lords Delegated Powers and Regulatory Reform ("DPRR") Committee, Lord Lisvane, former Clerk to the House of Commons, and the Office of the Parliamentary Counsel (the UK Government department responsible for drafting primary legislation) during a visit to London. A note from these meetings has been published.

7. The Committee also met (online) with the Chair of the Parliament of New South Wales' Regulation Committee, Natasha Maclaren-Jones on Wednesday 22 January 2025. A note from this meeting has also been published.

8. The formal committee oral evidence sessions took place on Tuesdays 7, 14, 21 and 28 January 2025. At these meetings, the Committee heard from: academics and the UK Government's Office of the Parliamentary Counsel; stakeholders and legal experts; other committee conveners from the Scottish Parliament and Welsh Senedd, and the former Permanent Secretary of the UK Government Legal Department; and finally the Minister for Parliamentary Business accompanied by Scottish Government officials, including the Parliamentary Counsel's Office (the Scottish Government body responsible for drafting primary legislation for the Scottish Government).

9. As evidenced by those the Committee spoke with, issues relating to framework legislation and Henry VIII powers are not unique to Scotland. While this report is focused primarily on their use by the Scottish Government and scrutiny in the Scottish Parliament, the Committee found its engagement with other legislatures and those working in other jurisdictions very helpful. The Committee hopes that this report sets out its current thinking in a way which is helpful to parliamentarians elsewhere, and is keen to remain a part of relevant discussions in other jurisdictions, including through the Commonwealth Parliamentary Association.

10. The Committee is grateful to all those who took the time to inform its consideration of the issues. It found the thoughtful and varied responses immensely helpful, and illustrative of the strength and depth of feeling that these issues arouse in stakeholder, legal, parliamentary and academic fields.

11. Minutes of all relevant Committee meetings are contained at Annexe B.

Work of the Delegated Powers and Law Reform Committee and subordinate legislation processes in the Scottish Parliament

12. Before considering the evidence that the Committee received, it may be helpful to outline what delegated powers and subordinate legislation are, the role of the Committee in relation to the scrutiny of delegated powers in Bills, and the processes in place for the scrutiny of subordinate legislation at the Scottish Parliament, as set out in Standing Orders.

What are delegated powers and subordinate legislation

13. Bills often give (delegate) authority to another person or body to make subordinate legislation. This is also known as delegated or secondary legislation. Most often, the authority is delegated to the Scottish Ministers (i.e. the Scottish Government) and exercised by way of Scottish Statutory Instrument ("SSI").

14. Bills will set out to whom (it is proposed) the power is delegated, the extent of that power (what it may be used to do), and the level of parliamentary scrutiny which should attach to the exercise of that power (e.g. negative or affirmative procedures, or bespoke procedures, as discussed later in the report).

15. Once a Bill which delegates powers is enacted, it is referred to as the parent Act in relation to any secondary legislation made under powers in it.

16. This allows governments (both the current government and future ones), or other bodies powers are delegated to, to fill in or change aspects of a policy or other details, without needing to introduce a new Bill ("primary legislation") to Parliament on each occasion.

17. Subordinate legislation is routinely used to determine the detail of an Act's implementation and timing, or to update some of its provisions.

18. In addition to "routine" use, wider delegated powers can also be used to make more significant changes, or to "fill in" significant aspects of proposals. It is these wider delegated powers which are often found in framework legislation.

Role of the Committee in relation to delegated powers in Bills

19. As set out in Standing Orders of the Scottish Parliament, it is for the Delegated Powers and Law Reform Committee to consider and report on every proposed delegated power provision in all Bills before the Scottish Parliament.

20. The Committee will scrutinise the delegated powers:

    - during Stage 1 of a Bill and report to the relevant lead committee; and
    - after Stage 2 of the Bill, if there are any new or revised powers, reporting to the Parliament.

21. At both stages, the Committee considers, in relation to each delegated power in a bill:

    - whether the delegation of the power is appropriate or whether it should instead be on the face of the Bill;
    - whether the power has been clearly drafted and goes no further than necessary to meet the stated policy intention; and
    - if it is to be delegated, whether the level of parliamentary procedure (e.g. negative, affirmative or otherwise) that is proposed for future scrutiny of exercises of the power is appropriate.

22. The Committee's scrutiny is informed by a Delegated Powers Memorandum (DPM) provided by the Scottish Government (or Member in charge of a Bill, if not the Scottish Government). This is required at Stage 1 under Rule 9.3.3B to accompany every Bill that contains delegated powers. The rule 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). [6]

23. After Stage 2, Standing Order 9.7.9 provides:

> If the Bill has been amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice—
>
> (a) the member in charge shall lodge with the Clerk, not later than whichever is the earlier of—
>
> (i) the tenth sitting day after the day on which Stage 2 ends;
>
> (ii) the end of the second week before the week on which Stage 3 is due to start,
>
> a revised or supplementary Delegated Powers Memorandum,
>
> (b) the committee mentioned in Rule 6.11 [the Delegated Powers and Law Reform Committee] shall consider and report to the Parliament on those provisions. [7]

24. To supplement this information, the Committee will regularly write to the Scottish Government (or Member in charge of a Bill) to seek additional information to allow it to properly scrutinise the powers.

25. The Committee may also take oral evidence from stakeholders and / or the Member in charge of a Bill (usually a government minister), when it has more significant questions about the delegated powers in a Bill. To note, the majority of this scrutiny takes place at Stage 1. At Stage 2, the lead committee will have considered any changes to existing powers or new powers prior to the DPLR Committee's consideration.

26. The Committee will then report its findings, including any recommendations, to the lead committee (at Stage 1) or the Parliament (after Stage 2) which will take these into account when considering the Bill.

27. In reporting to the lead committee or the Parliament, the Committee can also make more general comments, for example, giving its view on the overall approach to delegated powers taken in a Bill.

28. The Scottish Government and lead committees regularly act on the questions and recommendations from the Committee, and makes changes to delegated powers provisions at Stage 2 of Bills.

29. In the course of 2023 and 2024, the Committee took oral evidence from Ministers three times, questioning them on the delegated powers contained in the National Care Service (Scotland) Bill [8] , the Regulation of Legal Services (Scotland) Bill [9] and the Land Reform (Scotland) Bill [10] .

Scrutiny of subordinate legislation in the Scottish Parliament

30. Where an Act contains a provision which delegates a power, and that provision is in force, the power can be exercised (i.e. used). This results in subordinate legislation – most frequently in the Scottish Parliament by way of an Scottish Statutory Instrument (SSI).

31. This Committee considers all subordinate legislation instruments that require to be laid before the Parliament, regardless of procedure applied. It provides legal and technical scrutiny, testing each instrument against criteria set out in Standing Order Rule 10.3.1. These include checking that any pre-laying requirements have been met, that the power it is made under is being used as was anticipated, and that the instrument is clear and legally workable.

32. In the Parliamentary year 2023-24, the Committee reported 11% of all the instruments it considered, drawing points in them to the attention of the lead committee and the Parliament due to Committee concerns about legal or technical issues. [11]

33. In the same timeframe the Scottish Government withdrew and re-laid five draft affirmative instruments. Most often, instruments were withdrawn and re-laid as a result of questions raised by the DPLR Committee. [12]

34. All affirmative and negative procedure instruments are also scrutinised by lead committees. Which lead committee scrutinises the instrument will depend on its subject matter. There is no requirement for lead committees to consider laid-only instruments, which accounted for 30 of the 193 instruments laid by the Scottish Government in Parliamentary year 2023-24. [13]

35. Lead committee scrutiny looks into the policy merits of the instrument. Lead committees can recommend that either an instrument be annulled or not approved by Parliament depending on whether it is negative or affirmative procedure.

36. All affirmative instruments were approved by lead committees and the Parliament in 2024. Motions to annul an instrument were tabled for a total of 12 negative instruments (including one ‘package’ of six SSIs linked to court fees). 104 negative instruments were laid in total.

37. Of the 12, one of these motions to annul was agreed by a lead committee. However, the Chamber did not then subsequently agree to annul the instrument. [14]

38. There are differences in scrutiny procedures for subordinate legislation between the UK Parliament [15] and the Scottish Parliament, and as such, some of the evidence the Committee received which related to the UK Parliament would not be directly applicable to the Scottish Parliament context.

39. A number of the differences are highlighted in the below table, provided by SPICe:

Differences in scrutiny procedures of secondary legislation in the UK Parliament and Scottish Parliament: negative procedure

Scottish Parliament	UK Parliament
All SSIs subject to the negative procedure are made before they are laid.	Some SIs subject to the negative procedures can be made before they are laid, whereas others must be laid in draft.
Negative SSIs in the Scottish Parliament are considered by the DPLRC and a subject committee.	Negative SIs do not have to be considered by a committee whose remit includes the subject matter of the SI.
Motions to annul an SSI in the Scottish Parliament are known as "motion for annulment".	Motions to annul an SI in the UK Parliament are known as "prayer motions".

Differences in scrutiny procedures of secondary legislation in the UK Parliament and Scottish Parliament: affirmative procedure

Scottish Parliament	UK Parliament
All SSIs subject to the affirmative procedure are laid in draft unless specified otherwise in the parent Act.	Some SIs subject to the affirmative procedures can be made before they are laid, whereas others must be laid in draft.
A Minister is required to attend any committee considering an affirmative SSI.	A Minister is not required to attend any committee considering an affirmative SI.
A Minister recommends approval at the Lead Committee and (if the Lead Committee recommends approval) the Parliamentary Bureau is responsible for moving the motion to approve the SSI.	The Minister who laid the SI in the UK Parliament is responsible for moving the motion to approve the SI on the floor of the House of Commons.

40. The below infographics also set out the affirmative and negative procedures. More detailed information on subordinate legislation procedures in the Scottish Parliament is set out at Annexe A.

Flow Chart on Affirmative Instruments

Instrument laid

Delegated Powers and Law Reform (DPLR) Committee considers...

Are there points to raise?

Write to Scottish Government

Instrument may be withdrawn by Scottish Government

Scottish Government responds

DPLR Committeereports on instrument to lead committee & Parliament

Lead committee considers instrument

Motion of Minister recommending approval

Motion agreed?

Lead committee reports on instrument to Parliament within 40 days of instrument being laid

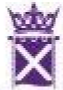
Lead committee reports on instrument to Parliament within 40 days of instrument being laid

Instrument may be withdrawn by Scottish Government

Parliamentary Bureau motion to approve put to full Parliament

Scottish Government may seek to lodge a motion to approve put to full Parliament

Decision of full Parliament on whether or not to approve the instrument



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Flow Chart on Negative Instruments

Instrument laid

Delegated Powers and Law Reform (DPLR) Committee considers...

Are there points to raise?

Write to Scottish Government

Instrument may be revoked by Scottish Government

Scottish Government responds

DPLR Committee reports on instrument to lead committee & Parliament

Lead committee considers instrument

Motion to annul lodged?

Lead committee debates motion

Motion agreed?

Lead committee reports on instrument to Parliament

Parliamentary Bureau motion to annul put to Parliament

Lead committee reports on instrument to Parliament

Lead committee may report on instrument to Parliament

Final decision within 40 days of instrument being laid

Procedure complete

Definition and frequency of framework legislation

41. Two key, interrelated, questions the Committee wanted to explore were around what is meant by framework legislation, and whether it is becoming more common. These questions were linked because, to consider whether the incidence of framework legislation being introduced into the Scottish Parliament has increased, it is crucial to have a clear understanding of what is meant by the term.

Terminology

42. While ‘framework’ was commonly used by witnesses and respondents to the Committee’s consultation, other terms were also used by respondents to refer to the type of legislation which sets out the principles for a policy but does not include substantial detail on how it will be given practical effect. These included skeleton [16], headline [17], jellyfish [18], shell [19] and enabling [20] (although enabling can refer to any Act with delegated powers).

43. Dr Andrew Tickell suggested that the different terms given to framework legislation contain value judgements:

> The language that we use to describe such Bills is not a question of objective description. “Skeleton” is a term of abuse and is designed to be a critical framing of powers of this kind as an inappropriate transfer of power from the legislature to the executive, whereas “framework” sounds nice and friendly and sensible and is about planning and administration. “Headline” sounds more press-orientated than anything else... [21]

44. The term ‘framework’ is one Members of the Committee have encountered being used most commonly by Members of the Scottish Parliament to refer to legislation that sets out the principles for a policy but does not include substantial detail on how it will be given practical effect. Instead, this is left to be filled in by secondary legislation. However, the term is not one which is universally used or strictly defined.

Definition

45. The responses to the call for views generally suggested that framework legislation gives “broad” or “high-level” detail and principles, and then allows for detail to be added at a later point through subordinate legislation, as highlighted in responses from organisations including: the National Farmers Union for Scotland (NFU Scotland) [22], the Scottish Parliament’s Net Zero, Energy and Transport (“NZET”) [23] Committee and Rural Affairs and Islands (“RAI”) Committee [24], New Zealand’s Regulations Review Committee [25] and the Society of Local Authority Lawyers and Administrators in Scotland (“SOLAR”) [26].

46. Some respondents also cited existing definitions. Professor Richard Whitaker [27] and Dr Ruth Fox of the Hansard Society [28] both looked to the definition used by the House of Lords Delegated Powers and Regulatory Reform ("DPRR") Committee, which is "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" [29] .

47. The Law Society of Scotland [30] noted the definition used in the Cabinet Office's *Guide to Making Legislation*, which is "A bill or provision that consists primarily of powers and leaves the substance of the policy, or significant aspects of it, to delegated legislation".

48. Other witnesses pointed out that Bills may contain a mix of both "standard" delegated powers and framework provision. Professor Colin Reid's written submission pointed out "there is no exact definition and many statutes will include both framework and substantive elements" [31] . Kay Springham KC made a similar point "this is not a black and white situation. One might have in a piece of legislation a mixture of framework provisions, but it will not, as a whole, be framework." [32]

Need for a definition

49. The Committee heard differing views on whether a definition was required.

50. Age Scotland [33] and The Royal College of Nursing in Scotland (RCN Scotland) [34] , argued for "a clear definition" in their written submissions, with both also agreeing with the general consensus of what the term means.

51. Professor Richard Whitaker also stated that a clear, agreed definition would be helpful for academic tracking purposes [35] .

52. Finlay Carson MSP, Convener of the RAI Committee and Kenneth Gibson MSP, Convener of the Finance and Public Administration (FPA) Committee, both felt that there would be value in having a clearer definition. Kenneth Gibson MSP illustrated the difficulty that not having such clarity had caused for the FPA Committee, with a Bill team and Cabinet Secretary apparently disagreeing as to whether or not a Bill it was scrutinising was framework (in relation to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill). Acknowledging that finding a single definition could prove challenging, Kenneth Gibson MSP stated that "it might be helpful to at least know the parameters". [36]

53. Mike Hedges MS, Chair of the Senedd's Legislation, Justice and Constitution ("LJC") Committee stated that in Wales, the LJC Committee "decide that a bill is a framework bill, and we challenge the Government to tell us that it is not." He stated that this raises awareness, and could lead to increased scrutiny of regulations made under the eventual Act. [37]

54. Committees in the Scottish Parliament have similarly decided that Bills are framework in the past. Most recently, this Committee stated that it considered the Land Reform (Scotland) Bill to be framework in its report published on 17 January

2025, despite the Cabinet Secretary in charge disagreeing with this.[38]

55. In seeking a global definition, others pointed to the spectrum of different "framework" approaches, making it difficult to identify one, single, all-encompassing definition. Professor Jeff King and Dr Adam Tucker [39] suggested the Committee might wish to see a "distinction between the ordinary use of delegated powers, framework schemes, and skeleton provisions."

56. This position was also put forward by organisations including the Open University [40] and the Law Society of Scotland, which pointed to an extreme category dubbed "hyper-skeletal" by the House of Lords DPRR Committee [41] .

57. Dr Pablo Grez Hidalgo further suggested that:

> we should consider the idea of skeleton legislation or skeleton provisions as a spectrum: at one extreme, there will be examples where there will be only a statement of policy intent or policy aims and no flesh whatsoever in the bill or the provision, while all the way down at the other end of the spectrum there will be instances where the legislation or provision contains more policy decisions. Since there is a spectrum of different possibilities, it would be rather difficult to have a single definition. If there is something that characterises every instance, it is the fact that key policy decisions are left for ministers to decide at a different time through delegated legislation.[42]

58. This position was broadly echoed by the others appearing alongside Dr Grez Hidalgo, even though some felt that a definition could be useful if it could be obtained – either for academic purposes or if different scrutiny routes ensued. Appearing on a later panel, Sir Jonathan Jones KC agreed that framework legislation should be seen as a "continuum", rather than this being a "binary" issue [43] .

59. Vicky Crichton from the Scottish Legal Complaints Commission ("SLCC") also saw the idea of a spectrum as a helpful one, and highlighted the importance of considering each Bill and each delegated power in its own context, stating:

> It is ultimately for the Parliament to decide how much detail is sufficient in any given case...
>
> …a question that the Parliament or an individual committee should ask itself when it looks at a particular piece of legislation [is]: is there sufficient detail to understand the Government's intentions and how the powers in the legislation will operate to enable the full consideration of a bill? In some cases, "sufficient" might be quite minimal but, in others, it absolutely will not be.[44]

60. While their written submission had supported a definition, in oral evidence, Adam Stachura from Age Scotland conceded that a definition or label might create unnecessary jargon, and as such, create a barrier for the public to engaging with the Scottish Parliament" [45] .

61. Professor Colin Reid questioned whether a definition is necessary, acknowledging that this spectrum creates challenges in obtaining one,stating:

> *"Is it simply to help us to discuss these issues, or will it actually make a difference in procedural terms? If it is to make a difference in procedural terms, there is a huge challenge, because of what my colleagues have said about the spectrum and the mixture of broad provisions, narrower provisions and very precise ones that there can be within one bill."* [46]

62. Dr Ruth Fox of the Hansard Society [47], Kay Springham KC of the Faculty of Advocates and Michael Clancy OBE of the Law Society of Scotland [48] also all questioned what the consequence of a definition would be. It was considered a definition might allow a piece of legislation to labelled framework, but "so what?" [49]. Dr Fox also questioned who the final arbiter would be in applying any framework label to a Bill and how they would take a decision [50].

63. Lloyd Austin of Scottish Environment LINK and Jonnie Hall of NFU Scotland felt that scrutiny processes were more important, and did not see the value of defining framework legislation to create a label. [51] This point was echoed by Rosemary Agnew, the Scottish Public Services Ombudsman ("SPSO"):

> Rather than spending time pinning down a definition, the more important thing is to pin down how framework bills are scrutinised and how the subsequent secondary legislation is scrutinised. [52]

64. The point was also made in the RAI Committee's written submission that the definition it used in its Stage 1 report on the Agriculture and Rural Communities (Scotland) Bill, which was"primary legislation which sets out broad powers with the details of how these powers would be used and implemented to be set out at a later date through secondary legislation", would not include the Good Food Nation (Scotland) Bill, which it also considered to be framework. As such, RAI Committee added "and other documents to be laid in Parliament" to its 'definition' of framework legislation for the purpose of responding to the inquiry. This, it argued, brought into scope the Good Food Nation (Scotland) Bill, and allowed it to consider documents such as the Good Food Nation plan, in addition to secondary legislation [53].

65. In evidence to the Committee, the Minister for Parliamentary Business questioned what purpose and utility a definition would have, arguing that it "could be difficult" to come up with a simple and straightforward definition. [54] The Minister also made the point that a Bill changes during the course of its parliamentary journey, with opportunities for delegated powers to be added, removed or amended. He stated "Bills change as we consider them" [55].

Committee consideration, conclusions and recommendations

66. The Committee notes the evidence it received that there is not a single, precise definition, or even a single agreed term for legislation that sets out the principles for a policy but does not include substantial detail on how that policy will be given practical effect.

67. It also notes that within a single Bill, there might be both framework and substantive

elements. It is for this reason that the Committee has focused on framework *legislation*, rather than framework *Bills.*

68. The Committee considers that "framework" is the most commonly used term in the Scottish Parliament to describe this sort of legislation. This is as neutral a term as it can find.

69. There appears to be a high level of consensus as to what framework legislation is in practice, with respondents to its consultation from a range of backgrounds (academic, stakeholder, legal and parliamentary) giving similar descriptions and examples. The Committee further recognises that having a description of framework legislation will be helpful as a reference point to aid MSPs, government, officials and stakeholders in instances where a framework approach is being followed.

70. **The Committee considers that the description it has previously [56] used for framework legislation is accurate and adequate for these purposes. The Committee's understanding of framework legislation being 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.**

71. Nonetheless, the Committee recognises that, within this description, there will be spectrum of types of framework provision, grey areas, and scope for reasonable disagreement as to whether or not an individual provision or Bill fits the description it is using.

Frequency

72. Based on the common understanding of what framework legislation is, the Committee explored whether this type of legislation has increased.

Historic context

73. It was widely noted in written submissions that framework legislation is not a new phenomenon. Dr Robert Brett Taylor and Professor Adelyn M Wilson [57] state that the phrase "skeleton" legislation was "coined by Lord Herschell in *Institute of Patent Agents and others v Lockwood* 1894 AC 347, 356". Professor Jeff King and Dr Adam Tucker [58] and Dr Pablo Grez Hidalgo [59] also pointed to the 1932 Report of the Donoughmore Committee on Ministers' Powers in their written submissions to reference the fact that this is not a new debate.

74. Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay stated that framework legislation is also a "long-standing concern of UK parliaments, reflected in a succession of committee reports going back to the early 1990s." [60]

Attempts to quantify the number of framework Bills

75. Attempts to quantify the number of framework Bills was shown to be difficult, with witnesses and government disagreeing. Professor Richard Whitaker has researched framework legislation across the UK Parliament, Senedd Cymru and the Scottish Parliament. Given that Bills are not formally or routinely labelled as framework in the Scottish Parliament, Professor Whitaker concludes “it is difficult to be precise about the proportion of bills that fall into the framework category in Scotland”, Professor Whitaker calculated that around 4 (10%) of the 40 government Bills introduced in the Scottish Parliament up to March 2024 in Session 6 have been framework [61] . Those were, the Coronavirus (Recovery and Reform) (Scotland) Bill, the National Care Service (Scotland) Bill, the Circular Economy (Scotland) Bill and the Agriculture and Rural Communities (Scotland) Bill.

76. In a letter to the Committee in April 2024, the Scottish Government stated that it considered “it would be reasonable to characterise” five of its Bills introduced up to that point as framework [62] . However, these differed slightly from Professor Whitaker’s analysis. While there was agreement on three of the Bills mentioned in the paragraph above, the Scottish Government did not identify the Coronavirus (Recovery and Reform) (Scotland) Bill. It did however include the Social Security (Amendment) (Scotland) Bill and, the Housing (Scotland) Bill (for its rent control elements).

77. Other Bills in this session of the Scottish Parliament which were considered to be framework legislation were brought to the Committee’s attention. As discussed in the section looking at definitions above, the FPA Committee perceived disagreement within the Scottish Government as to whether the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill was framework legislation. [63]

78. The RAI Committee stated it considered the Good Food Nation (Scotland) Bill to be framework legislation [64] , with Scottish Environment LINK also mentioning it as a real-life experience of it engaging with framework legislation. [65]

79. Notwithstanding the difficulties calculating precise figures, the Committee heard from a number of respondents that framework legislation is becoming more common across legislatures.

80. Professor Whitaker’s research into the UK Parliament found an upward, though not uniform, trend in the number of “skeleton bills” since 1991, with 0.7 such bills per year on average for the period 1991 – 2015, but 2.1 per year between 2016-2023. [66]

81. The Senedd’s LJC Committee’s submission highlighted that it “has raised concerns during the Sixth Senedd about the frequent use of framework (or skeleton) legislation by the Welsh Government.” It noted that 43% of all primary legislation introduced between May 2021 and March 2024 was framework, according to research conducted on their behalf by Professor Whitaker. Three of the six Bills introduced in the Senedd by the Welsh Government in 2022-2023 were labelled by the LJC Committee as framework. [67]

82. The House of Lords DPRR Committee felt that there had been a “considerable increase” over the last 40 years in the number of UK Bills its members thought had “skeletal” aspects. While Lord Lisvane spoke about a “steady upward trend” in the

last 20 years. [68]

83. The Hansard Society, said, “As observers of the legislative process at Westminster it has been our impression that the number of framework bills has increased in recent years”. [69] Dr Fox of the Hansard Society suggested a ratchet effect may be driving an increase in framework legislation, meaning “Governments and ministers think, “So-and-so brought forward that bill, so why can’t I do the same?”” [70]

84. From a UK drafting perspective, Jessica de Mounteney, First Parliamentary Counsel felt that events such as Brexit and COVID-19 “led to something of a culture change”, due to the speed with which legislation was enacted during that period, with the Constitution Society also suggesting that the same two events had “normalised” delegated legislation [71] [72]. Jessica de Mounteney also posited that any speeding up may similarly be due to changes to “the way that the world works” with 24-hour news cycles and “a constant pressure to do something”. [73]

85. Drs Tickell, McKerrell and Mullay, from Glasgow Caledonian University stated in their written submission that “Bills containing framework powers are now a ubiquitous feature of modern governance and can be found in legislation across the whole range of the administrative state’s activities”. [74] They also noted that “there is evidence of a general feeling of concern over increased use of delegated powers and framework legislation at Holyrood”. [75]

86. A number of stakeholders involved with policy development in Scotland also perceived an increase in the use of framework legislation. These included the written submissions from Age Scotland [76] and RCN Scotland [77].

87. Kay Springham KC from the Faculty of Advocates felt that the evidence suggests that framework legislation is becoming more common:

> Work has been done by others on what might be considered to be framework legislation and whether there has been more of it. My sense from reading all of that is that there has been more, and that part of the explanation is Brexit and part of it is Covid.
>
> However, I do not know whether that is the entire reason. Perhaps there has been a shift in the attitude of Government. It has been suggested by others that a Government that gets elected wants to be seen to be doing things, and “doing things” is making legislation. If the policy in question has not been fully thought through, the easy answer is to do it as a framework bill and then work out the detail in secondary legislation.
>
> The evidence, as far as I can see, suggests that it is becoming more common, and there is not just one but a number of reasons as to why that might be the case. [78]

88. In evidence to the Committee, however, the Minister for Parliamentary Business rejected the suggestion that there had been an increase in the use of framework legislation in a Scottish context, stating that “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.” [79]

Committee consideration, conclusions and recommendations

89. The Committee notes the varying views it has heard based on practical experience and academic research as to whether there has been an increase in framework legislation. The Committee also notes that no witness has claimed that framework legislation is becoming less common.

90. The Committee considers that without a universal, undisputed definition and significant academic research, this is a question which it is not possible to answer definitively.

91. However, it acknowledges the perception of the majority of witnesses that the occurrence of framework legislation has increased – with some suggestions put forward as to why that may be the case.

92. **Considering the balance of evidence, across jurisdictions, the Committee considers that it is likely the occurrence of framework legislation has increased since the 1932 Report of the Donoughmore Committee on Ministers’ Powers, and that this trend seems to be accelerating.**

Why framework legislation is used

93. The Committee was keen to explore the reasons why framework legislation may be used. In doing so, it sought to examine any disadvantages of the approach, particularly in relation to scrutiny, as well as the positive case for the use of framework legislation.

94. As part of this, the Committee considered specifically what might constitute appropriate or inappropriate use of framework legislation.

95. The main reasons suggested to the Committee for use of framework legislation can be summarised as:

    1. the ability to have **flexibility,**

    2. an ability to **co-design** policy and services, and

    3. **in instances where less policy development** has taken place.

96. Each of these reasons is examined below, as well as the cross-cutting challenges framework legislation creates, particularly in relation to legal and financial issues.

Flexibility

97. Witnesses and respondents suggested that the flexibility allowed by framework legislation helps to ‘future proof’ legislation and allows a statute to remain in place for a longer time without becoming outdated. It was felt that in such circumstances framework legislation could be efficient. However, almost all witnesses who recognised the benefits of flexibility that framework provision allowed suggested that flexibility and efficiency had to be balanced with robust scrutiny and sufficient detail to allow for such scrutiny. As such, most of the evidence the Committee heard argued that framework legislation should only be used in very limited circumstances.

98. Professor Colin Reid suggested that framework legislation “provide[s] for an uncertain and changing future” [80] and was “eminently sensible” in areas where there will be near-term changes in understanding or financial and physical conditions that mean updates to the law are likely to be needed. [81]

99. The UK Government’s Office of the Parliamentary Counsel explained to the Committee how a power might come into being, to allow for updates to be made to the law. Diggory Bailey said in his experience:

> We have discussions with departments about the degree to which they want flexibility. Sometimes, they come forward with a policy proposal, thinking that it will be framed as a power, but we look at it and say, “Do you really need a power? If you’re sure this is what you want, why can’t we write it out?” Equally, it might be the other way round. That involves a necessary process in which they describe the policy to us and what they want to achieve now and in the future, and we test that and think through how it will be received by Parliament. There is an iterative process to try to arrive at the best piece of legislation to give effect to ministers’ decisions. [82]

100. The Scottish Parliament’s Local Government, Housing and Planning Committee noted “there is a need for the flexibility that secondary legislation affords, but at the same time there must be a balance” [83] .

101. The RAI Committee supported the framework approach of the Agriculture and Rural Communities (Scotland) Bill (now Act, 2024) in part because it provided “the flexibility to adapt…support via secondary legislation”. [84]

102. NFU Scotland also supported the framework nature of this legislation. It stated that this was because of the “long-term” nature of farming and crofting, and a desire for flexibility to allow for adaptation to future circumstances. NFU Scotland suggested that the framework approach taken to the Agriculture and Rural Communities (Scotland) Act “provides scope for whatever ministers decide to do in setting objectives, in consultation with us and other stakeholders, to adjust and amend things.” [85]

103. Scottish Environment LINK pointed out that “in the environmental world, one of the reasons why we can see benefits of using framework legislation … is that science is always moving on. Some things need to be changed and updated quite quickly”. [86]

104. However, LINK also argued that there “should be limits on…flexibility and, where decisions are substantive, primary legislation should set limits to the policy”. It also argued that frameworks should still be “substantive”, and set defined policy objectives. It highlighted some reservations in relation to the Agriculture and Rural Communities (Scotland) Act 2024 on this basis. [87]

105. Adam Stachura from Age Scotland stated that the flexibility provided by the Coronavirus (Scotland) Act 2020 was sensible in the context of “fast-moving and changeable circumstances that were outwith [the Parliament’s] control” [88] .

106. Jonnie Hall of NFU Scotland also viewed framework powers as appropriate for potential emergency situations, stating “there are certain times when a Government might need to act pretty quickly…. A three or four-month period might be a bit too long if all of a sudden markets collapse or if we had a disease outbreak.” [89] Such emergency powers do exist in legislation allowing for response to emergency situations already, allowing for quick reaction and after-the-event scrutiny.

107. Members of the DPRR Committee in Westminster considered that there were some “reasonable” examples of skeleton provisions, and they could see justifiable

contexts in areas of fast-moving technological change such as online safety.[90]

108. The SPSO and SLCC both raised the issue of legislation setting up a new public body which is to be operationally independent. These organisations broadly considered that, in such circumstances, flexibility in the parent Act was helpful and appropriate to give the organisation autonomy and an ability to adapt, though the SPSO noted that the legislation "should provide sufficient clarity" on issues such as interactions with existing structures and key principles.[91 92]

109. Similarly, SOLAR stated "framework legislation is appropriate in circumstances where a Bill sets a long-term objective and flexibility is required to set up the necessary institutions and develop the monitoring procedures for meeting that long-term target." It considered the Ethical Standards in Public Life etc. (Scotland) Act 2000 an appropriate example of flexibility being used as a reasonable justification for what it considered to be broad delegated powers[93]. That Act sits behind various codes of conduct for those in public life and the Commissioner for Ethical Standards in Public Life in Scotland.

110. The SLCC highlighted perceived difficulties that can arise when a parent Act lacks flexibility, citing the Legal Profession and Legal Aid (Scotland) Act 2007, which governs its functions. It explained:

> we recently had a situation where the collapse of a single law firm, which was debated in the Parliament, led to some real issues. The flexibility in our processes that we would have liked to have had, which would have allowed us to look differently at how we deal with individual members of the public and consumers, really is not there. We think that we could have delivered a better service had we had more flexibility. There are things that we would like to have done that we could not do, and we do not believe that those things would have fallen outwith the purposes that the Parliament expects us to deliver. It is hard for a public body to step outside a very tightly specified piece of legislation, even in those types of circumstances.[94]

111. The point was also made that flexibility would not always provide a persuasive justification for the need for framework powers. Mike Hedges MS, Chair of the Welsh LJC Committee raised concerns about the Welsh Government taking powers to allow for flexibility "just in case they were needed", in situations where it wasn't clear the powers would be necessary[95]. He cited an example in the Environment (Air Quality and Soundscapes) (Wales) Bill.[96]

112. The Committee has also recently highlighted powers to lead committees in relation both the Land Reform (Scotland) Bill[97] and the Housing (Scotland) Bill[98] and invited them to consider the necessity of the powers. In relation to a delegated power at Section 19(2) of the Housing (Scotland) Bill, the Committee stated 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. The Committee asks the lead committee to consider whether there are any policy reasons that mean it believes this power is necessary, and if not, the Committee recommends that the power is not delegated."

113. Further, the framework approach taken in relation to Agriculture and Rural Communities legislation was not universally supported. In response to the call for views, William Maclaren Moses suggested that by delegating these powers in the name of flexibility the Scottish Parliament was being “sidestepped” [99] .

114. Lloyd Austin of Scottish Environment LINK made the point that framework legislation previously passed may “have a provision for an option to act quickly in certain circumstances” [100] , meaning new framework legislation may not be needed to respond to emergencies, given some powers already exist. DPPR Members also pointed out that parliaments can move fast and legislate quickly if there is a pressing need. DPRR Members spoke about the ability of parliaments to be recalled, and adapt to challenging situations, as evidenced by the ability to sit virtually in response to the COVID-19 pandemic [101] .

115. It was also pointed out that achieving flexibility is not necessarily a binary choice between framework and non-framework provisions. Professor King and Dr Tucker pointed to the “ordinary use” of delegated powers “where there is a need for flexibility, or experimentation”. [102] Scottish Environment LINK also highlighted what it described as a “halfway house” with the primary legislation incorporating more detail and structure, but significant policy nonetheless being set out in secondary legislation. It considered the UK Environment Act 2021 appropriate framework legislation as it contained a “broad target setting power, a duty to exercise this by a specific date in certain areas, a requirement to seek independent advice and a cycle of scrutiny and reporting”. [103]

116. Drs Tickell, McKerrell and Mullay from Glasgow Caledonian University neatly summed up the tension between “the potential flexibility and efficiency of rule-making by secondary legislation, and competing demands for transparency, democratic accountability, and enhanced scrutiny”. They stated that “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”. [104]

117. In evidence to the Committee, the Minister for Parliamentary Business indicated that the Scottish Government did not “routinely” set out to introduce framework Bills. He told the Committee:

> 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. [105]

Co-design

118. A further reason put forward to justify the use of framework legislation was the ability to co-design policy and services once the legislation had been passed.

119. The Health, Social Care and Sport Committee stated that it had been told that the

Scottish Government took a framework approach to its National Care Service (Scotland) Bill as it was its intention to “develop the policy iteratively and collaboratively with key stakeholders through a process of co-design”.

120. Likewise, the NZET Committee stated that “In the context of the Circular Economy (Scotland) Bill, we heard that this would create further opportunities for consultation or "co-design".” While noting its preference for scrutiny if consultation or co-design is undertaken before the Bill’s introduction “so that meaningful policy provision was on the face of the Bill”, NZET Committee recognised that:

> there may be circumstances where there are valid reasons that this policy development cannot be done with stakeholders ahead of the Bill’s introduction, in which case this may make framework provisions in a Bill appropriate. [106]

121. From a stakeholder perspective, RCN Scotland accepted “one advantage of framework legislation could be that detail relating to implementing policy decisions can be designed with a wider range of stakeholders outwith the parliamentary process.” [107] Though it also held some concerns about this in practice.

122. NFU Scotland also spoke about co-design in its submission to the Committee in relation to the Agriculture and Rural Communities (Scotland) Bill. It stated this occurred with many stakeholders from a range of backgrounds both before the Bill’s publication, during the process of it going through the Scottish Parliament, and would continue now the Bill has passed as the Rural Support Plan is developed. [108] In oral evidence, Jonnie Hall of NFU Scotland said “We have seen very much a continuation of engagement with stakeholders, which brings us to co-design. It is to our credit that that is how we do things in Scotland. [109] .

123. However, challenges created by framework legislation allowing for co-design to take place alongside and after the parliamentary process were recognised by respondents and witnesses.

124. Speaking about the National Care Service (Scotland) Bill, the Health, Social Care and Sport (HSCS) Committee stated that many witnesses expressed concern about the Government’s co-design plans as the “lack of detail in the Bill made it difficult to determine whether it would improve the quality and consistency of social work and social care services in Scotland.” [110]

125. RCN Scotland stated that its own experience of being involved in co-design through the National Care Service (Scotland) Bill had “not been positive”, despite it seeing the positive case for co-design. It echoed the suggestion made by the HSCS Committee, stating that it saw the most significant disadvantage of the approach as being on the “the ability of stakeholders (including Parliament) to meaningfully scrutinise proposals”. [111]

126. The FPA Committee, which scrutinises Financial Memorandums (FMs) accompanying Bills in the Scottish Parliament, suggested that co-design processes to finalise exact policy during and beyond the passage of the relevant primary legislation presented significant challenges for effective financial scrutiny [112] . In oral evidence, the Committee’s Convener Kenneth Gibson MSP reiterated this point

"although we are not particularly keen on them, if they [framework Bills] are to be used, all the co-design work and stakeholder engagement should be done prior to the bills coming to the committee, so that we can fully analyse the costs." [113] The FPA Convener was unequivocal, stating that, although the Committee supports co-design there is "absolutely no reason at all why co-design and stakeholder involvement cannot happen before a bill reaches stage 1." [114]

127. Similarly, the Equality and Human Rights Commission, while agreeing with the concept of co-design, argued that it "should be done in advance of a Bill being published" and that "ongoing or future co-design should not be used as justification for a framework Bill and should instead inform a more detailed Bill during its development phase." [115]

128. Rosemary Agnew, the SPSO also felt that co-design is a term that could be unclear, drawing a distinction between "co-design of the policy that informs the framework and the legislation from the co-design of how that policy will be delivered", [116] making the point that when co-design happens has an impact on the proposals put to Parliament.

129. When asked whether she was supportive of co-design taking place after a Bill was passed, Dr Ruth Fox of the Hansard Society responded:

> There might be very specific reasons for justifying it in that way, but I would, as a general principle, say no. You should do the consultation about the direction of policy, the options, the pros and cons and why the Government has chosen a particular course over another one first. There might then be a case for consulting on the specific operational detail of the regulations with the affected stakeholders at a later date when the regulations come forward. [117]

130. In evidence to the Committee, the Minister for Parliamentary Business set out that there would often be co-design before and after the passage of a Bill. He said:

> 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. [118]

Less policy development having taken place

131. One final reason suggested by witnesses for the introduction of framework legislation was that less policy development had taken place before the Bill was introduced, meaning that Ministers were instead taking a framework approach and allowing the details to be worked out and added through secondary legislation.

132. DPRR Committee Members suggested that a pressure for legislative 'slots' in Parliament meant it was attractive to civil servants and governments to give themselves a power to "fill in" policy details not yet concluded at a later point, and to

make quicker changes in the future (without needing further primary legislation).[119]

133. Lord Lisvane pointed to the pressure on governments to be seen to legislate – particularly in the immediate aftermath of an election with a manifesto to implement[120], a point echoed by the UK First Parliamentary Counsel, who shared their perception that "there is a constant pressure [on Ministers] to do something, and that that "something" tends to be legislation."[121]

134. The Hansard Society highlighted "unrealistic, self-imposed 100-day deadlines" in the context of a post-election period leading to framework legislation. It further stated that this "is not an acceptable reason for Ministers to take powers for themselves (and their successors) to legislate at a later date – especially through a process that allows for less parliamentary scrutiny than primary legislation."[122]

135. Kay Springham KC from the Faculty of Advocates also noted that the argument in relation to parliamentary time is a possible driver behind any increase in framework legislation.[123]

136. Adam Stachura of Age Scotland warned against this approach, telling the Committee:

> I think that there is a place for framework legislation, but it is being used too freely when there is a lack of detail to begin with, and it is a case of, "We will fill in the blanks at the end." That is not good for public scrutiny and even, quite frankly, for committee scrutiny.[124]

Challenges of a framework approach – including legal and financial issues

137. A number of respondents to the Committee's call for views and witnesses expanded on what they saw as the obstacles to effective scrutiny presented by framework legislation, including scrutiny of the legal and financial implications of such legislation.

138. SOLAR argued that because MSPs are asked to pass legislation without knowing exactly how the powers conferred may be exercised "the use of framework legislation dilutes the level of scrutiny and interrogation that good legislative practice requires" and impedes the Parliament's opportunity to effectively engage with stakeholders.[125]

139. The Faculty of Advocates[126] and Senators of the College of Justice (Judges sitting in the Supreme Courts) made the point that, when considering framework legislation, the entirety of the law is not scrutinised at one point, meaning that legislators cannot consider the complete manner in which it will operate. The Senators argued that:

> at the time of scrutiny, there will inevitably be an incomplete picture of what legal rights and duties may arise and what procedures must be followed and issues may be missed. [127]

140. The Faculty of Advocates summed up this concern in relation to framework legislation stating:

> when framework legislation is used: the primary legislation does not give the full picture; the secondary legislation is often subject to lighter touch scrutiny and also does not give the full picture; and the courts cannot properly carry out their function of determining whether the legislation is lawful. [128]

141. The Faculty of Advocates went on to highlight a case where not having the full picture of legislation had caused a practical challenge. It pointed to the judicial review undertaken of the Tied Pubs (Scotland) Act 2021 (Greene King Ltd v Lord Advocate 2023 SC 311). It stated that the primary legislation was “lacking in clarity” because its effect was to be implemented largely through secondary legislation which was not yet in force at the point of the judicial review. Had the litigators waited for the secondary legislation then the challenge to the primary legislation “would almost certainly have been time barred” [129] .

142. Respondents who have practical experience of considering framework legislation highlighted **difficulties in assessing the financial impact** and costs of legislation. As mentioned in the section in relation to co-design, the FPA Committee and its Convener stated that framework legislation presents a significant challenge for effective financial scrutiny. This has been a concern of the FPA Committee this session. [130]

143. The FPA Committee outlined the significant work it is has undertaken to raise its concerns about the impact of framework legislation on its financial scrutiny work. It has corresponded with the Presiding Officer, the Minister for Parliamentary Business and the Scottish Government’s Permanent Secretary in relation to this issue, and has secured commitments from the Scottish Government to update guidance and put in place enhanced training for Bill teams to improve the quality of financial memoranda. [131]

144. The FPA Committee cited as an example the original Financial Memorandum for the National Care Service (Scotland) Bill which, it said, did not have enough detail to allow the Committee to assess or scrutinise the financial implications of the Bill [132] . This concern was shared by Adam Stachura of Age Scotland, who was of the view that there is a lack of understanding of the financial implications of the legislation. [133]

145. The Scottish Parliament’s NZET Committee also highlighted the difficulties in assessing the financial implications of framework legislation. It made the point that the FPA Committee does not have a role in scrutinising the impact of secondary legislation, meaning the financial impact of regulations may not be fully understood. [134]

146. The RAI Committee described the financial memoranda for both the Agriculture and Rural Communities and the Good Food Nation Acts as “wholly inadequate” [135] suggesting scrutiny concerns of the FPA Committee can also be shared by lead committees, who consider in detail the overall policy and general principles of a Bill at Stage 1.

147. SOLAR stated that “the lack of detail [in framework legislation] 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”. The impact of this, SOLAR stated, is to create challenges for local authorities to forward plan for key services likely affected by legislation, and implement appropriate budgets. [136]

148. Lloyd Austin of Scottish Environment LINK also spoke about the lack of detail in financial memoranda for framework legislation presenting a scrutiny challenge for stakeholders. Describing the organisation’s experience of engaging with the Circular Economy (Scotland) Bill Lloyd Austin said:

> It was such a framework that the financial memorandum did not indicate what the financial consequences would be for anyone. Our view might be different from that of other people about what should be done under the circular economy strategy and what the financial consequences for Government and businesses might be, but the point is that such a minimal framework meant that that debate could not happen. That debate will happen when the strategy is produced. The question is, what are the scrutiny provisions for that, and how will it be debated? [137]

149. Professor Colin Reid acknowledged this challenge. He suggested that it might be possible to request additional financial memoranda to accompany subordinate legislation, in an attempt to address the “gap” in scrutiny.

> It follows from the nature of framework legislation (and is a key part of its value) that at the time of enactment there is no guarantee of whether and how the powers granted will be used. Therefore at the Bill stage, it is inevitable that the Policy and Financial Memoranda can say very little – the whole point of the framework is that different Governments may use it for different purposes. The scrutiny gap arises because there is no equivalent requirement for policy and financial information at the time delegated legislation is presented to Parliament (or the policy leading to such legislation has sufficiently crystallised). This gap needs to be filled somehow and … It would be possible to require such Memoranda for some or all delegated legislation, but that increases the burden on government· [138]

150. On the issue of financial implications of framework legislation, the Minister for Parliamentary Business told the Committee:

> 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.
>
> …
>
> 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. [139]

Committee consideration, conclusions and recommendations

151. The Committee notes the evidence it received on why framework legislation may be used, the reasons why it may be useful in certain circumstances, and the disadvantages of a framework approach. The majority of the evidence received highlighted the challenges framework legislation creates.

152. **The Committee considers that legislation 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.**

153. **In appropriate and very limited circumstances, the Committee considers that there may be a case for framework powers, primarily in order to provide flexibility.**

154. **Where a framework approach is being taken, it is essential that a full justification at the Bill's introduction is given as to why the framework provision is appropriate in the circumstances.**

155. It is not possible to give a definitive view as to what constitutes “appropriate circumstances” for framework legislation. Each use of delegated powers will need to be considered on its own merits and in the context of that particular power.

156. 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.

157. **Where a framework approach is taken, the Committee highlights the concerns it heard about the lack of detail on estimated costs provided in accompanying Financial Memoranda. The Committee confirms that all Financial Memoranda should include an estimate of any costs arising from delegated powers provisions, based on how it is expected to, or might, be used by the administration. The Committee also calls on the Scottish Government to ensure it keeps committees updated throughout the legislative process on the estimated costs arising from a Bill and discuss with the committee the most appropriate format for presenting any updated figures.**

158. **The Committee considers powers allowing flexibility “just in case” are unlikely meet the test for the necessity of the power, and as such be considered inappropriate.**

159. **The Committee considers that 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.**

160. **The Committee considers that, as a general rule, a lack of policy development is not an appropriate justification for introducing framework legislation.**

Improving scrutiny of framework legislation

161. The Committee recognises that, where framework provision is included in a Bill, it is crucial that parliamentarians and stakeholders have the means to properly scrutinise it and consider its impact. To that end, it therefore explored what action could be taken to improve such scrutiny.

162. The Committee heard various suggestions to improve parliamentary scrutiny of framework provision in a Bill including:

    1. The Parliament (or DPLR Committee) articulating its expectations in guidance for government and drafters,
    2. Enhanced and improved information from the Scottish Government on the introduction of framework legislation, including:
        a. drafts of subordinate legislation,
        b. enhanced accompanying documents and "skeleton declarations",
    3. Post legislative scrutiny, and
    4. A "scrutiny reserve".

    The merits of these suggestions are discussed below.

The Parliament (or DPLR Committee) articulating its expectations in guidance for government and drafters

163. The DPRR Committee in the UK Parliament House of Lords has produced its own *Guidance for Departments on the role and requirements of the Committee.* [140] This sets out, amongst other information, the DPRR Committee's view on what a framework Bill is, and the very limited circumstances it considers framework legislation appropriate. It also sets out principles the DPRR Committee expects should be adhered to in relation to the delegation of powers, and how these should be explained in Delegated Powers Memoranda, including the government making "skeleton legislation declarations". These declarations are explained in detail later in the report.

164. The DPRR Committee's guidance document was mentioned by a number of respondents to the DPLR Committee's call for views, including the Hansard Society [141], Professor Richard Whitaker, [142] and Dr Robert Brett Taylor and Professor Adelyn M Wilson [143].

165. The UK Government's First Parliamentary Counsel, Jessica de Mounteney, explained that when drafting UK Bills, the Parliamentary Counsel's Office is "acutely

aware of the likelihood of criticism from the delegated powers committee, and that it informs a lot of our discussions with the department". [144]

166. It was suggested that the Committee may wish to produce similar guidance. Dr Pablo Grez Hidalgo argued that this might be a way of enhancing the Committee's influence in the earlier stages of Bill preparation, by ensuring its expectations of the Scottish Government and its drafters are clear. [145] [146].

167. During oral evidence, the Committee explored concepts related to the general point of guidance, including around 'guardrails', 'concordats' between Parliament and Government and 'principles' around framework legislation.

168. There was support for the idea of guidance or principles establishing when framework legislation would be acceptable by a number of witnesses. These included Dr Ruth Fox from the Hansard Society [147], Dr Pablo Grez Hidaglo [148], Professor Whitaker [149], and Sir Jonathan Jones KC [150].

169. There was general agreement from the stakeholder panel the Committee heard from on 14 January 2025 [151] that guidance could be a helpful tool, and NFU Scotland in their written submission indicated three criteria which could, in its view, be appropriate for governing whether framework legislation is appropriate. These are:

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. [152]

170. However, other witnesses and respondents were more circumspect. Professor Reid, speaking about guidance on what secondary legislation might be appropriate for, warned that clear-sounding principles – like not creating a criminal offence through subordinate legislation – could lead to outcomes in real life which may not have been intended to be captured by the original principle. Professor Reid stated:

> You need to appreciate that there are problems, even with something that seems as simple as creating a criminal offence. What does that actually mean? Slightly changing the boundaries of a criminal offence would make things criminal that were not criminal before. …there may be a criminal offence, but you would want it to be easy to change and update the legislation at all times for technical reasons. However, narrow changes in the boundary would bring people into criminal law who were previously outside it. There may be difficulties even with something that sounds as clear and neat as [not] creating a criminal offence. [153]

171. Dr Fox highlighted the work the Hansard Society had done as part of its delegated legislation review. One idea to come from that was a 'concordat on legislative delegation' between the UK Parliament and Government to set out a joint

understanding of what should, and what should not, be provided for in delegated legislation. Dr Fox indicated, however, that work on the delegated legislation review highlighted how difficult finding consensus could be – both in terms of what is appropriate delegation and about the structure of any agreement [154].

172. Dr Andrew Tickell felt that even if guidance existed “the Government will do what it feels politically able to get away with”. [155]

173. In evidence to the Committee, the Minister for Parliamentary Business stated that:

> If there was some determination that there should be guidance, we would need to consider how we might interact with that….
>
> 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…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. [156]

Enhanced and improved information from the Scottish Government on the introduction of framework legislation

174. As set out in the introduction, any Bill conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, must be accompanied by a Delegated Powers Memorandum when introduced. This must set 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).

175. This document assists the Committee to initially assess each delegated power in a Bill, and consider whether further information is required before reporting to lead committees.

176. In addition to the Delegated Powers Memorandum, Bills must also be accompanied by a Policy Memorandum, a Financial Memorandum and Explanatory Notes.

Drafts of subordinate legislation

177. A number of witnesses suggested that the Scottish Government should provide drafts of the subordinate legislation at the same time as Parliament is scrutinising the parent Bill, to give a clear sense to both stakeholders and parliamentarians as to how the Government intends to use a framework power.

178. The Hansard Society suggested that in exceptional, justified scenarios where framework legislation is used, “draft regulations, or other indications of how the powers may be used, are provided along with the bill” as a way to assess the appropriateness of the delegation of powers. [157]

179. Professor Jeff King and Dr Adam Tucker [158], as well as the Law Society of Scotland [159] were supportive of this approach, as was the Scottish Crofting Federation, which stated:

> 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. [160]

180. Age Scotland also argued for “general information and principles of what would be expected in secondary legislation.” [161]

181. Professor Reid however was sceptical about this solution, noting that “if you are at the stage where you have the SSIs already drafted, you do not need the framework bill—you could be producing a more solid bill.” [162]

Enhanced accompanying documents for Bills and “Skeleton declarations”

182. A number of respondents and witnesses stressed the importance of information which accompanies framework legislation. It was suggested that ensuring this is detailed and of a high standard would aid scrutiny.

183. Dr Robert Brett Taylor and Professor Adelyn M Wilson suggested that the Scottish Parliament should require “a more robust and detailed memorandum … This might usefully provide enhanced detail on the context and impact of the powers being granted.” [163] Professor 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” [164].

184. 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 NZET Committee in relation to framework legislation [165].

185. Dr Pablo Grez Hidalgo also pointed to the DPRR Committee’s practice of asking for the Government to make an explicit declaration in the delegated powers

memorandum which accompanies a skeleton Bill. This is set out in its Guidance to departments:

> **Skeleton legislation should only be used in the most exceptional circumstances**. Where the government decide that such exceptional circumstances apply, the delegated powers memorandum should make an explicit declaration ("**a skeleton legislation declaration**") that the bill is a skeleton bill or clauses within a bill are skeleton clauses. Such a declaration should be accompanied by a full justification for adopting that approach, including why no other approach was reasonable to adopt and how the scope of the skeleton provision is constrained. [166]

186. Dr Pablo Grez Hidalgo felt such a declaration could compel government to explicitly recognise the scope of delegated powers in framework Bills, and serve as a reminder of the threshold for justifying the delegation [167] . Dr Ruth Fox of the Hansard Society also noted it as a proposal pertinent to improving the scrutiny of framework legislation [168] .

187. SOLAR encouraged a similar approach to be adopted in Scotland, stating:

> we would encourage the Bill to be accompanied with 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 [169] .

188. In relation to other accompanying documents, Scottish Environment LINK similarly stated that policy memoranda for framework legislation should meet higher standards, and set out much more explicitly the policy goals [170] .

189. A note of caution as to how far this would work in practice was sounded by Professor Reid, who stated that: "at the Bill stage, it is inevitable that the Policy and Financial Memoranda can say very little – the whole point of the framework is that different Governments may use it for different purposes" [171] .

Post legislative scrutiny

190. A number of stakeholders suggested that post-legislative scrutiny of framework legislation would provide an opportunity for the Parliament and stakeholders to review how powers delegated had been used.

191. The Senators of the College of Justice made the point that "where wide powers are delegated, it may be appropriate to make their exercise subject to certain constraints, such as … setting time limits for review." [172]

192. The Scottish Crofting Federation submission suggested "framework legislation should be periodically reviewed and amended by parliament if necessary". It also suggested that timelines should be attached to periodic reviews [173] . This could be achieved by writing a review into the Act itself as required.

193. In oral evidence, Lloyd Austin of Scottish Environment LINK similarly told the Committee that post legislative scrutiny as “another means of checking implementation” was a “crucial role for Parliament.” [174]

194. The Open University made a similar case for subordinate legislation resulting from the exercise of powers in framework legislation to be subject to a formal review in a set timeframe. It was argued this would assess whether the intention of the delegation had been achieved. [175]

195. Michael Clancy OBE of the Law Society of Scotland also singled out post-legislative scrutiny as the “one change” he would make to improve scrutiny of framework legislation. He elaborated “it will tell us whether the decision to include subordinate legislation in a framework bill was the right decision. It will also enable us to establish how many times it was used, in what circumstances it was used and what the result was.” [176]

A scrutiny reserve

196. A further option proposed by Professor Jeff King and Dr Adam Tucker [177] and Dr Pablo Grez Hidalgo [178] was the use of a “scrutiny reserve” when considering framework provision. The DPRR Committee had previously recommended the use of such a mechanism in its November 2021 report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* [179] , which would mean that a committee stage in the UK Parliament could not proceed until the DPRR Committee had reported on the proposed use of a power in a Bill.

197. The DPRR Committee explained its rationale for the power, indicating that “we propose that consideration should be given to the DPRRC having a “scrutiny reserve”, exercisable in exceptional circumstances only. A difference of opinion about whether a Bill contains skeleton provision and requires a skeleton legislation declaration would amount to such an exceptional circumstance. This would allow the Committee time to take evidence from the minister and prepare a report before second reading.”

198. Dr Grez Hidalgo argued:

> 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.

Committee consideration, conclusions and

recommendations

199. The Committee was grateful for the proposals for improving scrutiny of framework provision in Bills.

Setting out expectations in relation to use of framework legislation

200. The Committee can see the case for clearly setting out its expectations to the Scottish Government and committees scrutinising legislation in guidance, in a way similar to that of the DPRR Committee. It recognises the points made in relation to the ability to influence the creation of legislation before it is introduced.

201. It understands that guidance would only be able articulate its own preferences – not direct. The Committee also recognises that there can be justifiable exceptions to general rules.

202. **The Committee will consider the response of the Scottish Government to this report, and, if, following that, it considers setting out its expectations would be helpful, prepare and publish such guidance.**

Accompanying documents

203. All documents accompanying draft Bills should be of a high quality.

204. Where Bills contain framework powers, it is crucial that sufficient information about how they can, and are expected to, be used is included in the appropriate accompanying documents.

205. In cases where the scope of a power means that it could be used to achieve different outcomes, the delegated powers memorandum should include sufficient information to explain why the power is necessary and an appropriate choice.

206. **In cases where it is considered necessary to take a framework approach, the Committee calls for an overarching justification for the approach taken to be set out in the Delegated Powers Memorandum.**

207. The Committee agrees that if the Scottish Government is in a position to produce draft regulations when introducing a Bill, it should be including this detail on the face of the Bill.

208. Nevertheless, where the Scottish Government considers that framework provision is appropriate (in the limited circumstances set out above), the Committee would not actively discourage drafts of regulations being shared, if lead committees felt this could aid their parliamentary scrutiny. It should be noted however, that having a draft of a regulation cannot substitute the usual roles of this Committee and lead committees in scrutinising actual detail in Bills, and that the intentions of the current Scottish Government in the use of any power would not bind a future administration.

Post legislative scrutiny

209. The Committee notes the evidence on the benefits of post-legislative scrutiny of framework powers as a way to examine how such powers have been used and their impact.

210. The Committee recognises that provision in an Act requiring the Scottish Ministers to review the operation of specified powers in a certain timeframe and provide a report to Parliament would allow for retrospective scrutiny of framework provision in a Bill.

211. **The Committee therefore recommends that lead committees that are concerned about broad powers in a Bill consider recommending the insertion of a reporting or review provision in the Bill at Stage 2. This could require the Scottish Government to set out explicitly how the power has been used and what its impact had been.**

212. The Committee will also reflect further on post legislative scrutiny and consider recommending such provisions be considered in its reports to lead committees.

“Scrutiny reserve”

213. The Committee notes the suggestions in relation to a “scrutiny reserve”. However, in “exceptional circumstances” if it were to feel it did not have time to consider a response and report to a lead committee, the Committee could seek to push back the Stage 1 deadline to allow it to do so.

214. **The Committee considers the current provisions in Standing Orders allow sufficient flexibility in cases where it feels that more time is needed to fully scrutinise a Bill at Stage 1.**

Ways to improve scrutiny of subordinate legislation (in particular that which stems from framework legislation)

215. The Committee was keen to explore what, if anything, might enhance processes for scrutinising subordinate legislation resulting from framework legislation, and whether adopting additional steps might alleviate concerns about framework powers.

216. While some discussion was about processes in general, most focused on subordinate legislation made under broad powers in framework legislation.

217. The principal ideas the Committee examined are:

    1. Better use and awareness of super-affirmative procedures;

    2. The Parliament having the ability to amend secondary legislation, or giving the Parliament a think again / conditional approval power; and

    3. Abolition of negative and affirmative procedure and a sift to allow the Parliament to express a view on procedure to apply to each instrument on the basis of the instrument laid.

Better use (and awareness) of super-affirmative procedures

218. Many of the suggestions put forward to improve the scrutiny of subordinate legislation involve an additional level of scrutiny. Collectively, these can be termed as “super-affirmative procedures”.

219. As set out in greater detail in Annexe A, there is not a single defined super-affirmative procedure. Rather this phrase is used to capture additional pre-legislative requirements such as:

    - statutory consultation requirements before exercising a power,
    - laying drafts of regulations for comment from Committee(s),
    - extended time periods for laying of instruments / plans,
    - laying additional information alongside SSIs (including findings of consultations, financial information, or particular forms or impact assessment, such as those looking at equalities, or island communities).

220. Examples of delegated powers subject to super affirmative procedures are set out at paragraph 365.

221. Professor Jeff King and Dr Adam Tucker suggest that “current processes for scrutinising delegated legislation are geared towards a specific conception of

delegated legislation, primarily focusing on filling in gaps and addressing technical issues", and that regulations made under framework powers often warrant a higher level of scrutiny than standard processes afford. [180]

222. Dr Robert Brett Taylor and Professor Adelyn M Wilson made the point that it is open to the Scottish Parliament to insist on particular types of scrutiny for delegated legislation, with conditions in the parent Act. They specifically mention a high standard of consultation as a possible precondition to laying regulations. [181]

223. Stakeholders and legal bodies were broadly sympathetic to having super-affirmative processes. The Law Society of Scotland suggested that subordinate legislation arising from framework legislation should be consulted on in advance, and subject to a super affirmative procedure – though it did not specify which, if any, of the procedures it particularly favoured. [182] The Senators of the College of Justice also suggested that "an obligation to consult on particular measures" may be an appropriate constraint on wide powers. [183]

224. NFU Scotland made the point that "adequate time" is needed for stakeholders and parliamentarians to scrutinise regulations, particularly where they are significant [184] .

225. In oral evidence, Dr Ruth Fox noted that, at the UK Parliament the Hansard Society had identified a "proliferation" of different enhanced or super affirmative procedures. Dr Fox suggested the significant variation in super-affirmative procedures "introduces extra complexity which is problematic both for civil servants and the legislature".

226. However, Dr Fox explained that "there is some evidence that it [enhanced procedures] does constrain ministers in using those powers in future", with a choice being made to introduce primary legislation instead. [185]

227. Finlay Carson MSP, Convener of the RAI Committee, also noted the varying requirements contained in primary legislation for the laying of documents, such as action plans, as well as enhanced scrutiny procedures for subordinate legislation. This, Mr Carson noted, resulted in inconsistent procedures and timescales. [186]

The Parliament having the ability to amend secondary legislation, or a think again / conditional approval option

228. Some respondents and witnesses suggested that concerns about framework legislation stemmed from a lack of control over the resulting subordinate legislation. When Parliament delegates authority to make secondary legislation in a Bill, it does so on the basis that the body or individual it delegates the power to has the final say on its content.

229. While secondary legislation may be shaped by various preconditions, such as ensuring Ministers have regard to certain criteria, or the views of others through

consultation requirements, whoever has the power has the ability to set the final letter of the law. Parliament can either accept or reject it (assuming a parliamentary procedure is attached), but not amend it.

230. Drs Tickell, McKerrell and Mullay suggested that the inability for Parliament to amend secondary legislation may lead to less public engagement when compared with primary legislation. They suggested that the consequences of this may include less anticipation of problems with regulations, less scope to engage democratically with issues of concern, litigation in the courts and “bypassing parliament as a forum in which these arguments might otherwise be aired”. [187]

231. This difficulty in engaging with subordinate legislation was also identified by RCN Scotland, which raised concerns in relation to the National Health Service (Common Staffing Method) (Scotland) Regulations 2024. It stated that there was no time to address its concerns with the regulations after they were laid, and there had been no prior consultation with stakeholders. It indicated that “engaging with secondary legislation is significantly more difficult for ‘professional’ stakeholders and nearly impossible for members of the public.” [188]

232. The Scottish Human Rights Commission also set out concerns in relation to subordinate legislation diminishing “participation rights”, and parliamentarians' ability to effectively represent their constituents if they cannot seek to amend subordinate legislation. [189]

233. Professor Jeff King and Dr Adam Tucker [190] , the Law Society of Scotland [191] , the Constitution Society [192] , the Open University [193] and Scottish Environment LINK [194] all suggested in their written submissions that amendment of subordinate legislation should be considered. Many of these respondents also argued that it may only be appropriate to allow for amendment in a sub-category of subordinate legislation which give effect to significant policy choices or made under particularly broad powers.

234. Elaborating on the Law Society of Scotland’s written submission, Michael Clancy OBE suggested amending SSIs could be added as a super-affirmative procedure:

> It would be interesting to see what would happen if we could amend subordinate legislation during its passage through Parliament. That provision for amendment could be placed at the super-affirmative stage, so that it could not be used inappropriately for something about the fictional cost of a dog licence in a negative order, or in something more important in an affirmative order but which would not need to attract the amending power. [195]

235. On a related point, the Convener of the RAI Committee, Finlay Carson MSP, also outlined to the Committee the difficulty of finding a proportionate way to address a fairly minor change to subordinate legislation:

> The only thing that was called into question was the date at which the policy would end, but, to address our concerns, the Government would have had to withdraw the SSI or the committee or the Parliament would have had to vote it down, which would not have been a good use of parliamentary time. If there was a way that the issue could have been addressed, the SSI could still have been passed, without the need for annulling it and for another SSI to be introduced.[196]

236. However, Michael Clancy OBE also cautioned that there could be unintended consequences of enabling subordinate legislation to be amended as it "might drive more legislation to be made by subordinate legislation, because the Government would say, "You can amend it if you like.""[197]

237. Professor Reid, in his submission, highlighted the potential downsides of amending subordinate legislation, stating that it "carries great risk since so many pieces of legislation are only small parts of bigger interlocking jigsaws of rules and procedures so that a well-intentioned amendment that makes sense in isolation may render other provisions inappropriate or unworkable".[198]

238. Sir Jonathan Jones KC also sounded a note of caution, stating that it "would be quite complicated to work out what an effective amendment process would be". While not ruling out amending statutory instruments, he suggested that the "idea of a think-again power is worth thinking about as a middle course" between the Parliament having, or not having, the ability to amend subordinate legislation. Sir Jonathan outlined this as something which is "short of rejection" but is "not acceptance", suggesting that a think again power "involves highlighting a particular point on which the Government is invited to think again".[199]

239. The Hansard Society has recommended a change to the Westminster SI scrutiny system which it considers would go some way to addressing this issue. It proposed the ability for Parliament to amend "significant" statutory instruments, which would be classified as such through a sift mechanism. It explained:

> In the House of Commons, rather than direct textual amendment of an SI (which would present several practical difficulties), MPs should be able to table amendments to SI approval motions debated in the Commons. These amendments would outline in narrative form the Members' concerns with the SI that must be addressed before the SI is made into law. In the House of Lords, a new 'think again' procedure would be introduced so that Peers can ask the House of Commons to consider their concerns before an SI is approved.[200]

240. Dr Ruth Fox from the Hansard Society elaborated in oral evidence:

> You would be able to say to the Government, "We're not happy with this instrument for X reason—go away and think about it." The Government could then say, "We disagree with you and we're still going to put the instrument to an approval vote", but it would have to expend political capital to marshal a majority in the chamber and, in effect, whip against what the chamber had already agreed it would like a change on.[201]

241. Mike Hedges MS of the Senedd LJC Committee also suggested that he thought a "think again" process was likely to be introduced in Wales, telling the Committee:

> We are looking at whether amendments to statutory instruments or to the motions that accompany them could be tabled by members. We are pushing on that, but my personal view is that the best that we will get is a process whereby the Government looks at the issue again… Will we be able to amend statutory instruments? No. Can we ask the Government to look at them again? That is probably where we will end up.[202]

Current ways of influencing regulations

242. There are examples of existing super affirmative processes which require draft regulations to be laid before the Parliament for comment as a statutory precondition to exercising the power (see paragraph 365 for examples).

243. Such processes may allow for amendments to be made to the final instrument laid to be made into law. For an amendment to be made, the views of the lead committee on the initial draft would have to be taken on board by the Scottish Government.

244. To that end, Professor Reid was of the view that "the willingness of MSPs of the government party(ies) to be critical, and of Governments to listen, is a further major consideration"[203]. The need for committees of the Parliament to be assertive where they do not agree with a legislative proposal was also raised by Dr Ruth Fox of the Hansard Society. Dr Fox stated "the greatest pushback that you can give is to reject a regulation or to reject a provision in a bill."[204]

245. Kenneth Gibson MSP, Convener of the FPA Committee, echoed these points:

> What is important when it comes to scrutiny is that committees feel empowered to say no. … Committees should not just shrug their shoulders or bite their lip and say, "Well, this isn't really what we are looking for, but we'll just nod it through." They have to have the strength to say, "No, I'm sorry, but we do not really think this is doing what it should be doing."[205]

246. Professor Colin Reid also made a separate but related point as to when Parliament could "best deploy" efforts to influence the final state of regulations. He suggested the Parliament could be more involved in a middle stage – the time between a framework Bill being passed and regulations made under it being laid – regardless of any statutory super affirmative requirements.[206]

"Turn off the tap"

247. Finally, Lord Lisvane expressed a concern that seeking to find solutions like amending subordinate legislation, or adding super affirmative procedures is akin to thinking of "better ways to mop the floor rather than seeking to turn off the tap".[207]

248. In evidence to the Committee, the Minister for Parliamentary Business, responding to a question about amending or conditionally approving secondary legislation, suggested that this already happens, pointing to an instrument the Committee had

considered which had been withdrawn and re-laid due to drafting concerns raised by the Committee. The Minister acknowledged that such changes are only made "occasionally", but stated that he was not convinced such a process needed to be formalised[208].

249. The Minister also went on to make the following point:

> 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.[209]

Abolition of negative and affirmative procedure and a sift to allow the Parliament to express a view on procedure to apply to each instrument on the basis of the instrument laid

250. For the UK Parliament, the Hansard Society proposed a further mechanism for managing framework legislation. Its Delegated Legislation Review Working Paper suggested that existing scrutiny procedures, which are more numerous at the UK Parliament than at the Scottish Parliament[i], should be abolished, with a sifting process implemented to decide the level of scrutiny.

251. The Hansard Society suggested that subordinate legislation "should be sifted by a new … Committee, to identify those SIs that require further scrutiny and approval by Parliament". This would abolish the procedure set out in the parent Act, and allow a view to be taken on the appropriate scrutiny route in light of the current context and content of the secondary legislation.[210]

252. This proposal was also put forward by Professor Jeff King and Dr Adam Tucker in their written evidence[211], while Dr Robert Brett Taylor and Professor Adelyn M Wilson reminded the Committee of the temporary introduction of the sifting process which it agreed to for EU Exit SSIs under the EU Exit SSI Protocol (agreed with the Scottish Government). This similarly allowed the Committee to consider the appropriateness of the procedure being attached to instruments made under the European Union (Withdrawal) Act 2018, based on the significance of the policy.[212]

253. The proposal was discussed further with Dr Fox of the Hansard Society in oral

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i The Interpretation and Legislative Reform Act 2010 provides for 'laid only', 'negative', 'affirmative' procedures in the Scottish Parliament

evidence, who set out in detail how such a process might work, stating that the procedure would still be less onerous than the primary legislation route, but would allow for scrutiny based on the content of an instrument rather than "on an assumption that was made in a bill".[213]

254. While Professor Whitaker said the measure was "sensible"[214], Professor Reid stressed that the Scottish Parliament is different to Westminster, and also pointed out:

> Sifting and then choosing the appropriate procedure is a lovely idea, but I worry about its acceptability from the Government's point of view because of what it would do to timetables. The Government would not know when things would happen, and scheduling and co-ordinating things could become difficult, although that is not an insuperable problem.[215]

Committee consideration, conclusions and recommendations

255. The Committee understands the concern expressed by Lord Lisvane about seeking to stem framework legislation at source. However, while framework legislation remains and legislatures have to scrutinise it, the Committee considers that improving scrutiny of subordinate legislation is one way to address the challenges it creates.

Super-affirmative

256. **The Committee supports the use of super-affirmative procedures to enhance effective parliamentary scrutiny.**

257. It recognises that in different contexts, statutory consultation requirements, laying instruments in draft, extra time and additional information all assist stakeholders and parliamentarians and lead to improved scrutiny.

258. The Committee makes recommendations to lead committees relatively frequently that they consider some form of super-affirmative procedure be attached to a proposed delegated power in a Bill, where it considers this appropriate in the context. It will continue to do so.

259. The Committee recognises that different super affirmative scrutiny procedures can make navigating the process a challenge. It highlights the importance of ensuring that preconditions correspond with the significance of the power.

260. **Where a Scottish Government Bill proposes the delegation of a broad power it should consider adding an appropriate super-affirmative procedure to enhance parliamentary scrutiny.**

261. The Committee will take steps to ensure information is available to lead committees on the range of super affirmative procedures that can be used to assist their scrutiny of framework primary legislation.

Amending subordinate legislation and think again / conditional approval powers

262. The Committee notes the evidence it heard about giving consideration to amending subordinate legislation, and the various proposals to make procedural changes to allow either for amendment, or to demand a rethink from government.

263. The Committee recognises that super affirmative procedures which give committees opportunity to comment on drafts of instruments allow Parliament to have some influence over the final content of subordinate legislation, and in some cases would result in amendments being made.

264. **The Committee highlights paragraphs 242 – 245 which set out how a super-affirmative requirement to lay an early draft of an instrument can allow Parliament to influence the content of subordinate legislation.**

265. **The Committee agrees that, even where formal super affirmative requirements are not in place, the 'middle stage' between primary legislation of a framework nature being enacted and secondary legislation under it being laid provides an opportunity for the Parliament to influence policy. It highlights to lead committees that pre-legislative scrutiny may be useful to consider progress in relation to significant regulations or other laid documents. It also calls on the Scottish Government to allow sufficient time for such scrutiny to take place, and to ensure it keeps lead committees up to date during the policy formulation phase of regulations.**

266. The Committee considers that an inability to amend subordinate legislation frustrates parliamentarians and stakeholders on occasion, and has an impact on scrutiny and accountability.

267. The Committee recognises, however, that any system to allow for amending of subordinate legislation or to introduce a formal think again power would require further consideration to ensure it was proportionate, safeguarded a technically accurate, cohesive and workable statute book, and did not result in unintended consequences or carry unforeseen risks, such as encouraging greater use of framework legislation.

268. **The Committee understands the frustration of not being able to amend subordinate legislation – particularly significant regulations which are made under framework powers. If concerns in relation to framework legislation persist, it considers that further work should be undertaken to consider whether amending subordinate legislation, or introducing a formal think again power, might help assuage these. It will highlight this issue to its successor committee in its legacy report.**

269. The Committee notes that a similar debate is taking place in Wales, and will monitor any changes implemented there, or any other comparable jurisdiction.

Sift process

270. In relation to the proposal for a sift process, the Committee highlights the work it does considering the procedure attached to exercises of all delegated powers in its scrutiny of Bills. The Committee regularly makes recommendations to lead committees if it considers these should be changed.

271. The Committee further highlights that if, after a bill is passed, a lead committee is not content with the level of procedure attached to a power (negative, affirmative or laid no procedure) in the Scottish Parliament, under Rule 8.11B of Standing Orders, it can propose to the DPLR Committee that the procedure be changed to one of the other procedures set out in the Interpretation and Legislative Reform (Scotland) Act 2010. Where the DPLR Committee agrees and recommends the proposal be approved, the Parliament can vote on a motion to agree (or disagree) the change be made.

272. As indicated at paragraphs 38 - 39, the procedures in the UK and Scottish Parliaments for considering subordinate legislation differ, and, as a consequence, the discussion in relation to a sift process suggested for the UK Parliament may not be applicable to processes in the Scottish Parliament.

273. **The Committee does not consider further exploration of a sift process necessary at this time.**

Henry VIII powers

274. The Committee also used the inquiry to consider the issue of so-called "Henry VIII powers": powers which delegate authority to amend primary legislation by way of secondary legislation.

275. Henry VIII powers are a distinct issue to that of framework legislation. Such powers give power to the executive to make law, by modifying or repealing existing primary legislation. This is usually considered to be the role of Parliament in a parliamentary democracy, and as such, some consider them to be a more controversial category of subordinate legislation.

276. The focus of the Committee was on appropriate use of such powers in Acts of the Scottish Parliament, their current use, and any safeguards which may be introduced in relation to them.

277. This section will consider (i) general views, (ii) a focus on function over form, and (iii) the naming of such powers. It will then look at possible safeguards.

278. In its consideration of all delegated powers in Bills in the Scottish Parliament, the Committee considers all Henry VIII powers, considering in each case:

    - whether the delegation of the power is appropriate or whether it should instead be on the face of the Bill;
    - whether the power has been clearly drafted and goes no further than necessary to meet the stated policy intention; and
    - if it is to be delegated, whether the level of parliamentary procedure (e.g. negative, affirmative or otherwise) that is proposed for future scrutiny of the use of the power is appropriate.

279. Where the Committee has concerns in relation to a Henry VIII power, it will write to the Scottish Government for further information or clarification, and can make recommendations to lead committees to consider changes to the power if it feels it appropriate to do so.

280. The Committee has considered most proposed Henry VIII powers it has examined to be acceptable in principle and that they are subject to appropriate parliamentary procedures. It has occasionally raised concerns in relation to such powers and reported these to the lead committee involved.[216]

General views

281. The Committee heard a range of views from respondents and witnesses in relation to the use of Henry VIII powers. Broadly these views can be divided into two groups: some were not concerned by the nature of such powers, suggesting the context and detail was the point of crucial importance, and noting their ability to make technical legislative changes in an efficient way. Others took a principled stance that Henry VIII powers were largely inappropriate. The majority of witnesses, regardless of principled position, acknowledged that in some instances they were

necessary.

282. Witnesses also told the committee that not all powers which are of a Henry VIII nature are equal, and that there is a spectrum of uses for such powers.

283. The consensus view from those the Committee heard from felt that the drafting of such powers should be considered closely to avoid any inappropriate use.

General view: broadly necessary, but use judiciously

284. Drs Tickell, McKerrell and Mullay noted that every Act of the Scottish Parliament passed during 2024 until they made their submission, with the exception of the budget Bill, combined an ancillary provision with a Henry VIII clause. [217] When discussing a hypothetical Henry VIII power to amend legislation to ensure it keeps up to date Dr Tickell said “the argument from efficiency seems more persuasive to me in that context”. [218]

285. Age Scotland broadly agreed with the use of Henry VIII powers for minor or technical changes, or for use in emergencies [219]. NFU Scotland also saw their utility to “facilitate legislative efficiency”, but similarly noted the need for prudential use [220].

286. Dr Kat Fradera also supported their use “sparingly” [221] and Professor Jeff King and Dr Adam Tucker agreed the necessity of such powers, though urged caution [222].

287. The Hansard Society accepted the need for such powers when there was clear justification, but questioned whether “ancillary provisions” to make “incidental” or “consequential” amendments to primary legislation may have substantive policy implications. It highlighted examples from the UK Parliament which it felt may have gone beyond this. [223]

288. Dr Pablo Grez Hidalgo said that powers of a Henry VIII nature exist on a spectrum, and was of the view that what is appropriate or inappropriate use depends on the purpose and scope of the power:

> 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. [224]

289. The NZET Committee also suggested Henry VIII powers should be narrowly framed [225]. The Legislative Assembly of Alberta told the Committee that there had been examples of controversial Henry VIII powers in their jurisdiction, but noted that they

are used and passed into law there.[226]

290. Kay Springham KC of the Faculty of Advocates saw that such powers could be appropriate, but was of the view that their use should be the exception rather than the rule, stating: “From a democratic accountability point of view, one would want to see firm controls in the primary legislation over when those powers can be exercised, so that one is constraining what the executive can and cannot do.”[227]

General view: broadly inappropriate

291. The Law Society of Scotland[228] and the Scottish Crofting Federation[229] were generally against Henry VIII powers unless in extreme / emergency circumstances. The Constitution Society[230] viewed them as “largely constitutionally inappropriate”, with Dr Dexter Govan from the society elaborating “I take a maximalist view of the issue. It is very difficult to envisage situations where Henry VIII powers are appropriate.”[231]

Other general views

292. The Welsh Senedd’s LJC Committee outlined significant concerns that it had raised in relation to Henry VIII powers in Welsh Government Bills, including concerns about lower levels of parliamentary oversight attached the use of some such powers.[232] In oral evidence, Mike Hedges MS, raised the number of Henry VIII powers the Welsh Government introduced in some Bills as a cause for concern[233].

293. Although it did not give a view on more routine use of Henry VIII powers, the Scottish Human Rights Commission[234] argued that it would be “inappropriate for secondary legislation to amend key pieces of primary legislation which confer specific human rights protections.”

294. The Senators of the College of Justice similarly stated that it was inappropriate for Henry VIII powers to be used to remove a defence to a criminal offence, alter electoral rights, to amend constitutional or devolution enactment or to amend or repeal provisions relating to fundamental rights[235].

Function over form

295. Some witnesses told the Committee that the focus should be more on what a power may do, rather than the fact the power is expressed in a way which allows primary legislation to be amended by secondary legislation.

296. Dr Ruth Fox of the Hansard Society suggested that function was the most important consideration in oral evidence, saying: “We have always argued that we should concentrate on the function—the purpose—of the power, not its form, because, as has been highlighted, there is a spectrum.”[236]

297. The Committee also heard that, in New Zealand, its counterpart committee takes a “pragmatic and context-specific approach”, and does not object to Henry VIII powers because of their form.[237]

298. Diggory Bailey from the Office of the Parliamentary Counsel confirmed that when drafting a delegated power in a UK Bill, their office thinks primarily about policy intention, as well as clarity of the law and usability for the end user, rather than the form a power will take saying the starting point “is substance rather than the form”, noting a power could be expressed as Henry VIII or not Henry VIII, but have the same legal effect – though this choice would have consequence for where the law sits. Diggory Bailey explained this with an example, telling the Committee:

> Suppose that there is a policy that involves looking at an identity document. We could say that people have to look at an identity document as specified by regulations, and then leave the list of identity documents to regulations. Alternatively, we could put all the documents in the primary legislation. However, if we put it all on the face of the primary legislation, what if something emerges in future, such as a new form of digital ID, and we want to amend the list? To do that, we could take a power to amend the list—that would be a Henry VIII power. Alternatively, we could say that the documents are things such as passports, driving licences et cetera, or any other ID document that is specified in regulations. However, the legislation would then be split, as some stuff would be listed in the primary legislation and the rest of the list would be in secondary legislation.
>
> My starting point would be that it is more helpful to have that list in one place. If we think that it can be done in such a way that a document can easily be slotted into the list, it would actually be better to have a Henry VIII power to put additional documents in the primary legislation. [238]

The naming of Henry VIII powers

299. A number of witnesses used the discussion about the appropriateness of Henry VIII powers to criticise the name by which such powers are known. The Open University suggested that the name in and of itself might be problematic. It elaborated that the “use of the term “Henry VIII” powers could be / is alienating. It implies an implicit understanding of the history and actions of Henry VIII (a Tudor English King). It is not in common usage other than in legal and parliamentary circles”. [239]

300. In its submission, the Faculty of Advocates gave background to the term:

> Historically, the term was used in respect of the conferment of such a power upon King Henry VIII of England by the Statute of Proclamation 1539. In that context, Henry VIII had persuaded the Commons to include a provision in the bill which would permit him to amend legislation where necessary. [240]

301. Dr Andrew Tickell suggested Henry VIII “is a term of abuse”. [241] Adam Stachura of Age Scotland deemed it “antiquated” [242] , and Rosemary Agnew the SPSO called the name a “barrier”, though recognised the efficiency of making some straightforward and uncontroversial changes through such powers [243] . Michael Clancy OBE recalled having a "campaign" that failed to have Henry VIII powers in Scotland renamed James VI powers [244] .

302. The Minister for Parliamentary Business also told the Committee that he could think

of “no more pejorative term than “Henry VIII power””. [245]

Safeguards – signposting, post-legislative scrutiny, guidance and sunset provisions

303. A number of suggestions were put forward as possible safeguards for the use of Henry VIII powers. The main ones considered were: “signposting” of Henry VIII powers, post-legislative scrutiny, sunset provisions and guidance on their use.

304. These suggestions were made in addition to the committee’s usual scrutiny process, which subjects each power to its three principal tests around necessity, scope and procedure. In the course of such scrutiny, the Committee considers that, generally, “affirmative procedure [is] more appropriate than the negative” [246] for Henry VIII powers. This point was also made by both the Senators of the College of Justice and the LJC Committee from the Welsh Senedd [247] , which also emphasised the importance of ensuring that there are appropriate limits on how the power can be used (the scope of the power) – a point also central to this Committee’s consideration.

Signposting and justification

305. It was suggested that information accompanying a Bill should be clear when a delegated power may be used to amend primary legislation, and that it should include a robust justification as to why such a power is considered necessary.

306. One way of achieving this was said to be through explicitly highlighting such powers in delegated powers memoranda. In general, it would usually be clear from the DPM that a power can be used to amend primary legislation, though there is no standardised wording to highlight such powers. Delegated powers memoranda also must include a reason for taking a power.

307. Professor Reid suggested “requir[ing] the Government in proposing a Bill in some way to further highlight the inclusion of such powers, perhaps even more explicitly in the Delegated Powers Memorandum.” [248] Dr Pablo Grez Hidalgo suggested that the Scottish Government “must meet a high justificatory standard in the delegated powers memorandum whenever it seeks Henry VIII powers” [249] . Sir Jonathan Jones KC also felt it was appropriate that a government be required to explain why it proposes to take a Henry VIII power [250] .

308. This was supported by SOLAR [251] , who, like the NZET Committee [252] and Mike Hedges MS, Chair of the LJC Committee, highlighted the importance of a full justification being provided in the delegated powers memorandum. Age Scotland also supported clearer labelling of such powers and highlighted the importance of them being justified. [253]

309. New Zealand’s Regulation Review Committee also told the Committee that “early identification [in accompanying documents] may provide for better scrutiny”. [254]

Post legislative scrutiny

310. A further proposal was to undertake post legislative scrutiny into the use of Henry VIII powers. Dr Robert Brett Taylor and Professor Adelyn M Wilson suggested an extra obligation could be on the Scottish Government to report to the Scottish Parliament on the use of a Henry VIII power through adding such a requirement to the parent Act. They pointed to a similar requirement in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 which requires the Scottish Government to periodically report on the “keeping pace” power in that Act’s use and to issue policy statements on the approach being taken. [255]

311. Dr Robert Brett Taylor and Professor Adelyn M Wilson also noted the Constitution, Europe, External Affairs and Culture Committee’s work scrutinising the Scottish Government’s biannual reports on its use of the powers granted under the Retained EU Law (Revocation and Reform) Act 2023 [256] , though this report, they noted, is based on a political agreement rather than a statutory obligation.

312. Professor Jeff King and Dr Adam Tucker similarly recommended “post-legislative scrutiny should be conducted to evaluate the impact and appropriateness of the use of Henry VIII powers”. [257] The same point about gathering information on the use of Henry VIII powers was also made by Kay Springham KC giving evidence from the Faculty of Advocates. [258]

313. In oral evidence, Mike Hedges MS, of the Senedd’s LJC Committee, backed post-legislative scrutiny. Mr Hedges suggested that if a Henry VIII power is implemented “we need future post legislation investigations and scrutiny of how it is being used.” [259]

Guidance

314. A further idea put forward related to there being some form of guidance on when use of a Henry VIII power might be appropriate.

315. Age Scotland supported guidance on when Henry VIII powers can be used [260] . Likewise, Professor Shaun Bevan suggested strict guidance as a safeguard [261] .

316. The Faculty of Advocates pointed out that “given that any exercise of the Henry VIII powers is susceptible to judicial review, we note that some clarification from parliament would be welcome in respect of the circumstances in which it is considered appropriate for Henry VIII powers to be conferred”, while not giving its own view on any appropriate or inappropriate uses [262] .

317. The Senators of the College of Justice also raised the prospect of a “concordat between the Scottish Government and the Scottish Parliament as to the circumstances in which such powers may be included in a Bill and the procedure to be followed when they are” [263] .

Sunset provisions

318. Finally, the Committee heard that a further safeguard may be to include a sunset clause (a provision which means a power expires at a point specified) which meant

that a Henry VIII power ceases to be and could not then be used, either after a certain amount of time, or if it was not used.

319. Dr Pablo Grez Hidalgo supported sunset clauses that specify an expiration date for the use of a Henry VIII power [264] .

320. Lord Lisvane also suggested that sunsetting was an option, particularly for unused powers [265] . Dr Robert Brett Taylor and Professor Adelyn M Wilson also raised sunsetting in their evidence, stating "Arguably the greater the scope and breadth of the powers granted, the stronger the counter-balances ought to be". [266]

321. However, although not speaking specifically about Henry VIII powers, Professor Colin Reid stated his scepticism about sunset clauses, citing the example of the infrastructure levy in the Planning (Scotland) Act 2019. Professor Reid said:

> Progress has not been made on its introduction, and that leaves everybody uncertain. I think that we are now less than a year from the deadline. Since nothing has happened, does that mean nothing will happen, or will there be a terrible rush with things happening at the end, before the deadline? I am not sure that the artificial pressure created by that situation is conducive to good governance when, whether for good or bad reasons, the expected progress has not been made and a strict deadline is in place. [267]

322. The Minister for Parliamentary Business told the Committee that he had not seen any evidence to suggest that Henry VIII powers are being used inappropriately. He also cautioned against the idea of sunsetting unused Henry VIII powers after a certain period, in case this provided an incentive to governments to use powers "that it will soon no longer be able to use, just to circumvent a sunset clause." [268]

323. The Minister also responded to a question on cleaning the statute book of unused Henry VIII powers, explaining:

> 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. [269]

324. More generally in his evidence, the Minister for Parliamentary Business emphasised the 'function over form' argument put to the Committee, telling the Committee:

> When an organisation's name changes or a new organisation emerges, … 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.

325. The Minister was "not convinced" that guidance is "absolutely required". Nevertheless, the Minister stated that "if the Parliament considered some form of guidance useful, we would look at that." [270]

Committee consideration, conclusions and recommendations

326. Given their potential ability to modify or repeal existing Acts of Parliament, the Committee expects to see Henry VIII powers appropriately limited in scope.

327. However, the Committee does consider such powers to be a necessary, efficient tool when used appropriately. It found the argument in relation to function over form to be persuasive.

328. The Committee is generally content with the drafting of most Henry VIII powers in Scottish Government Bills, and that they are subject to appropriate parliamentary procedures.

329. The Committee notes the comments on terminology. While Henry VIII seems to be the best understood and most widely used term, the Committee notes that such powers can also be accurately referred to as "powers which allow for primary legislation to be amended by secondary legislation".

330. **The Committee expects that, where a proposed delegated power may 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[24][ii] .**

331. **The Committee considers that it would usually be clear from the Scottish Government's Delegated Powers Memorandum when a power can be used to amend primary legislation. However, it notes the views of stakeholders and other witnesses on clarity and accessibility in the course of this inquiry and asks the Scottish Government to consider what more it can do to ensure it consistently sets out such powers' ability to amend primary legislation in a clear and accessible way. As with all powers, such memoranda should also fully justify and clearly set out why it considers its choice to be necessary.**

332. **The Committee notes the evidence it heard in relation to post-legislative scrutiny examining the use of such powers. Similar to its points in relation to post-legislative scrutiny of framework legislation, the Committee notes**

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ii **The Committee accepted such justification from the Scottish Government in relation to two powers in the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill, report published 13 January 2025**

that provision requiring the Scottish Ministers to review the operation of certain powers and providing a report to Parliament would provide a vehicle for such scrutiny to take place. It recommends any lead committee concerned about such a power in a Bill considers recommending such a provision be inserted.

333. **The Committee notes the evidence it heard on sunset clauses. While it does not consider that these should routinely be adopted, there may be a place for such a mechanism where concerns are raised during the course of a Bill's scrutiny about how such a power may be used.**

Annexe A – Subordinate legislation procedures

334. Procedures for scrutiny of SSIs are set out in the Parliament's Standing Orders, and in Part 2 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA").

335. There are key steps that occur in the creation of subordinate legislation:

   1. **Laid:** this is the process by which an instrument is formally presented to the Parliament. This is done by (electronically) lodging the instrument with the Clerk (Standing Orders Rule 10.1.1).

      An instrument can be laid in draft form (usually affirmative instruments), or as already "made" into law (usually negative or laid-only instruments). Nearly all SSIs must be laid, but some are 'laid only' meaning that the Parliament does not have a role in approving or annulling the making of the instrument, but they are still considered and reported on by this Committee.

   2. **Made:** an instrument is "made" (and hence no longer in draft) when it is signed by a Scottish Minister and becomes part of the statute book (even though it may not yet be in force).

      N.B. draft affirmative instruments cannot be made until the Parliament agrees to a motion to approve them.

   3. **Coming into force**: an instrument will usually contain a "commencement" provision that sets out when the instrument, or specific provisions within the instrument, come into force. In some cases, individual provisions within an instrument have different commencement dates. The commencement date determines when a provision becomes enforceable.

336. ILRA [sections 28-30] provides for three types of SSI, defined according to the parliamentary procedure that applies to them:

   - instruments subject to the negative procedure – which are laid after they are made and are then subject to annulment by a resolution of the Parliament;

   - instruments subject to the affirmative procedure – which are laid in draft and require to be approved by resolution of the Parliament before they are made; and

   - instruments not subject to the negative or affirmative procedures but which must be laid before the Parliament (e.g., those that are 'laid only').

Laid-only

337. The Scottish Parliament does not have a role in approving or annulling the making of **'laid only' instruments**. This is usually the procedure given to less controversial aspects of **B**ills (for instance the commencement of certain provisions, the substance of which have already been agreed by the Parliament).

338. Laid-only instruments are recorded in the Business Bulletin, considered by the

DPLR Committee, and referred to a lead committee. There is normally no requirement on the lead committee to consider (or report on) the instrument – though the committee is entitled to consider (and report) if it wishes to do so and should be mindful of any concerns about the instrument highlighted by the DPLR Committee.

Negative

339. **Instruments subject to the negative procedure** can be annulled by the Parliament for a period of 40 days (not including recess periods of four or more days) from the day on which they were laid (even if they come into force before that point). Under ILRA, they should not come into force for at least 28 days after the date on which they were laid (and any breaches of this rule must be explained in a letter to the Presiding Officer). Such instruments are considered by the DPLR Committee, and are also all considered by a lead committee.

340. Negative instruments account for the greatest number of instruments considered by the Parliament.

341. All negative instruments appear on lead committee agendas, but lead committees are not obliged to report to the Parliament on negative instruments, except where a motion recommending annulment has been lodged.

342. In many cases, lead committees will "note" a negative instrument which will come into force unless anything further happens. If there are concerns about a negative instrument, however, a lead committee can seek further information from stakeholders and / or the Scottish Government.

343. Any MSP (whether a member of the lead committee or not) may lodge a motion recommending annulment of a negative instrument at any time during the 40-day period after an instrument has been laid, including after the lead committee has considered the instrument.

344. If a lead committee agrees with a motion to annul an instrument (which would usually follow a debate on the motion to annul the instrument at the lead committee), the decision is then put to a vote of the Parliament. If the Parliament agrees to annul the instrument, nothing further will be done under it (and, if necessary, it will be revoked).

Affirmative

345. **Instruments subject to the affirmative procedure** are statutory instruments that require approval by resolution of the Parliament before they can be made or come into force. As such, they are laid as "drafts", and therefore are often referred to as "draft affirmatives". After negative instruments, these are the next most common type of subordinate legislation in the Scottish Parliament.

346. As with negative instruments, draft affirmatives are all considered by this Committee and a lead committee. Draft affirmatives are also all considered by the Parliament.

347. Under Standing Order Rule 10.6, there are two main steps in the process for a draft affirmative:

    1. a debate by the lead committee on a motion, lodged by a Cabinet Secretary or

Minister, inviting the committee to recommend approval of the instrument (a "motion recommending approval");

2. consideration by the Parliament of a separate motion (normally lodged on behalf of the Bureau) inviting the Parliament to approve the instrument (a "motion to approve").

348. This means that a Minister and officials will attend a meeting of the lead committee. It is standard practice to take evidence from the Minister (and officials) on the instrument immediately before the motion is debated by the committee. It is a matter for the committee to decide whether it also wants to take evidence, orally or in writing, from stakeholders on the instrument.

349. All MSPs will then have an opportunity to vote for, against or to abstain on the instrument as a whole when it comes to the Chamber.

350. Under Standing Orders, lead committees have 40 days (not including recess periods of four or more days) to report on an instrument after it is laid.

"Made affirmatives" and "super-affirmatives"

351. In addition to negative, affirmative and laid-only procedures, some instruments can be "made affirmative" or "super-affirmative".

Made affirmative

352. **Made affirmative** (also known as "provisional affirmative") instruments allow Ministers to make changes which come into force immediately, but the instrument must subsequently be approved by the Parliament within a timeframe specified by the parent Act (often 28 days) or it ceases to have legal effect.

353. This procedure is usually applied in circumstances where Scottish Ministers require to act "urgently" within a particular policy context. For example, it is often used to make changes to tax rates (to avoid forestalling) or for emergency situations.

354. In 2021/22, this Committee undertook a major inquiry into use of the made affirmative procedure during the coronavirus pandemic.[271] This followed a steep increase in use of the procedure, from a handful of times in a year to over 100 uses in response to the pandemic between March 2020 and November 2021.

Super affirmative

355. The term **"super-affirmative procedure"** is not a defined term.

356. It may be used to refer to any delegated power provision with preconditions to the use of the power.

357. For example, an Act may require that the person or body with delegated authority (usually Scottish Ministers) to consult the Parliament (and sometimes also other stakeholders) on its proposals before it can lay a statutory instrument. The parent Act also often requires Scottish Ministers to "take into account" representations made by consultees before finalising its proposals.

358. This usually means laying of draft regulations for comment from committee(s).

359. Other "super affirmative procedures" include extended time periods for laying instruments or plans to allow for additional scrutiny, or laying of additional information alongside subordinate legislation (such as financial information or impact assessments).

360. Super-affirmative procedure is specified in an Act in circumstances where a higher degree of Parliamentary scrutiny is thought appropriate, and where the normal affirmative procedure is considered insufficient. It affords the Parliament (and/or other stakeholders) the opportunity to influence the content of the instrument at an early stage, recognising that, once an instrument is drafted and laid, the Parliament can only approve or not approve the instrument.

361. Where such a requirement is stipulated in the parent Act, whether the early (consultation) part of the super-affirmative procedure is subject to Standing Orders depends on the wording of the parent Act. If the Act requires the relevant person (usually the Scottish Ministers) to consult the Parliament, and a consultation document is then laid before the Parliament, Rule 17.5 applies. This Rule requires the Parliamentary Bureau to refer the consultation document to a lead committee, requires the lead committee to consider the document and report on it, and then requires the Parliament to consider the document in the light of that report.

362. If, however, the parent Act simply requires the relevant person (usually the Scottish Ministers) to consult on proposals (i.e., without a specific requirement to consult the Parliament), then Rule 17.5 does not apply. As a result, while it would be expected that any consultation document that is laid would be referred to a lead committee, it would be for the committee to decide whether to consider and report on it, and it would be for the Parliamentary Bureau to decide whether to propose Chamber consideration of any such report.

363. Committees can report their conclusions or recommendations on the initial draft (or consultation document) to the Scottish Government in either a letter or a committee report.

364. The Scottish Government then lays the final version of the instrument (as amended if appropriate) under the draft affirmative procedure. At this stage, the lead committee follows the usual process for scrutinising an affirmative instrument. The parent Act may require the Scottish Government to explain how it has responded to the representations made on the initial draft (or consultation document).

365. Examples of the "super-affirmative procedure" can be found at Section 97 of the Climate Change (Scotland) Act 2009 which sets out a "pre-laying procedure" for certain subordinate legislation made under the Act, and also at Sections 40 and 41 of the Land Reform (Scotland) Act 2016 (setting out a three-step consultation/approval process for the first regulations made under Section 39 of the Act (which delegated to ministers a power under which they may require information to be provided about persons with a controlling interest in land, and to have that information included in a public Register).

Documents subject to parliamentary control

366. Situations can also arise where a document of a different sort (i.e. not in the form of legislation) is laid before the Parliament under an Act that makes the document

subject to a form of Parliamentary control (usually something equivalent to the affirmative or negative procedure). Standing Orders Rule 10.10 states that:

> The Rules in this Chapter shall also apply, except for a pension or grants motion for which specific provision is made in Rule 8.11A, with such modifications as are appropriate, to any report, guidance, code of practice or other document laid before the Parliament which is subject to any form of Parliamentary control… .

367. Although made under an Act, these documents are not themselves subordinate legislation as such, but they do have quasi-legislative effect. That is, while the power to make (or issue) these documents is set out in statute, the documents themselves do not form part of the statute so don't directly impose legal requirements on the people to whom they apply, however, in most cases the relevant person is to have regard to them in carrying out their functions.

368. Documents are "subject to Parliamentary control" only if they meet all three of the following conditions: :

    1. it gives Ministers (or another person) power to generate a document of some sort (not in the form of a statutory instrument) (N.B., it may, but need not, also provide that specified persons must have regard to, or must comply with the document.)

    2. it requires any document so generated to be laid before the Parliament

    3. it gives the Parliament the power thereafter to shape the outcome – most likely by being able to reject the document within a specified timescale, or by its approval being needed before the document can be issued or take effect.

369. Such documents are subject to scrutiny by this Committee and a lead committee, with controls for the Parliament as set out in the parent Act to allow MSPs to approve or annul the document to allow it to come into (or remain) in force.

370. The below infographics set out the affirmative and negative subordinate legislation routes, including the roles of this Committee, lead committees and the Chamber.

Flow Chart on Affirmative Instruments

Instrument laid

Delegated Powers and Law Reform (DPLR) Committee considers...

Are there points to raise?

Write to Scottish Government

Instrument may be withdrawn by Scottish Government

Scottish Government responds

DPLR Committeereports on instrument to lead committee & Parliament

Lead committee considers instrument

Motion of Minister recommending approval

Motion agreed?

Lead committee reports on instrument to Parliament within 40 days of instrument being laid

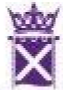
Parliamentary Bureau motion to approve put to full Parliament

Lead committee reports on instrument to Parliament within 40 days of instrument being laid

Scottish Government may seek to lodge a motion to approve put to full Parliament

Instrument may be withdrawn by Scottish Government

Decision of full Parliament on whether or not to approve the instrument



The Scottish Parliament
Pàrlamaid na h-Alba

Flow Chart on Negative Instruments

Instrument laid

Delegated Powers and Law Reform (DPLR) Committee considers...

Are there points to raise?

Yes: Write to Scottish Government

- Instrument may be revoked by Scottish Government
- Scottish Government responds → DPLR Committee reports on instrument to lead committee & Parliament

No: DPLR Committee reports on instrument to lead committee & Parliament

Lead committee considers instrument

Motion to annul lodged?

Yes: Lead committee debates motion

Motion agreed?

- Yes: Lead committee reports on instrument to Parliament → Parliamentary Bureau motion to annul put to Parliament → Final decision within 40 days of instrument being laid
- No: Lead committee reports on instrument to Parliament → Procedure complete

No: Lead committee may report on instrument to Parliament → Procedure complete

Annexe B – Extracts from minutes

15th Meeting, 2024, Tuesday 7 May 2024 Work programme (in private): The Committee agreed to hold an inquiry into framework legislation, later in the year.

23rd Meeting, 2024, Tuesday 3 September 2024 Work programme (in private): The Committee considered and agreed its approach to the inquiry into framework legislation and Henry VIII powers.

29th Meeting, 2024, Tuesday 29 October 2024 Work programme (in private): The Committee considered and agreed its options for a fact finding visit in relation to the inquiry into framework legislation and Henry VIII powers.

33rd Meeting, 2024, Tuesday 26 November 2024 Framework legislation and Henry VIII powers (in private): The Committee considered the responses received to the call for views and its approach to oral evidence. It agreed to delegate authority to the Convener to finalise the panels of witnesses.

1st Meeting, 2025, Tuesday 7 January 2025 Framework legislation and Henry VIII powers: The Committee took evidence from—

- Dr Ruth Fox, Director, Hansard Society;
- Dr Dexter Govan, Director of Research, Constitution Society;
- Dr Pablo Grez Hidalgo, Lecturer in Public Law, University of Strathclyde;
- Professor Colin T Reid, Emeritus Professor of Environmental Law, University of Dundee;
- Dr Andrew Tickell, Head of Department for Economics and Law, Glasgow Caledonian University;
- Professor Richard Whitaker, Parliamentary Academic Fellow, University of Leicester;
- Jessica De Mounteney, First Parliamentary Counsel; and
- Diggory Bailey, Legislative Drafter, Office of the Parliamentary Counsel.

Framework legislation and Henry VIII powers (In Private): The Committee considered the evidence it heard earlier in the meeting.

2nd Meeting, 2025, Tuesday 14 January 2025 Framework legislation and Henry VIII powers: The Committee took evidence from—

- Rosemary Agnew, Ombudsman, Scottish Public Services Ombudsman;
- Lloyd Austin, Convener of the Governance Group, Scottish Environment LINK;
- Jonnie Hall, Deputy CEO & Director of Policy, National Farmers Union Scotland;
- Adam Stachura, Associate Director for Policy, Communications and External Affairs,

Age Scotland;

- Michael Clancy, Director of Law Reform, Law Society of Scotland;
- Vicky Crichton, Director of Public Policy, Scottish Legal Complaints Commission; and
- Kay Springham KC, Faculty of Advocates.

Framework legislation and Henry VIII powers (in private): The Committee considered the evidence it heard earlier in the meeting.

3rd Meeting, 2025, Tuesday 21 January 2025 Framework legislation and Henry VIII powers: The Committee took evidence from—

- Finlay Carson MSP, Convener, Rural Affairs and Islands Committee;
- Kenneth Gibson MSP, Convener, Finance and Public Administration Committee, Scottish Parliament;
- Mike Hedges MS, Chair, Legislation, Justice and Constitution Committee , Senedd Cymru (Welsh Parliament); and
- Sir Jonathan Jones KCB KC, Senior Consultant, Linklaters LLP.

Framework legislation and Henry VIII powers (in private): The Committee considered the evidence it heard earlier in the meeting.

4th Meeting, 2025, Tuesday 28 January 2025 Framework legislation and Henry VIII powers: The Committee took evidence from—

- Jamie Hepburn, Minister for Parliamentary Business;
- Steven MacGregor, Head of Parliament and Legislation Unit;
- Alison Coull ,Deputy Director, SGLD, Rural Affairs Division; and
- Fraser Gough, Parliamentary Counsel Office. Scottish Government.

Framework legislation and Henry VIII powers (in private): The Committee considered the evidence it heard earlier in the meeting.

5th Meeting, 2025, Tuesday 4 February 2025 Framework legislation and Henry VIII powers (in private): The Committee considered the themes arising from evidence heard during its inquiry.

9th Meeting, 2025, Tuesday 11 March 2025 Framework legislation and Henry VIII powers (in private): The Committee considered a draft report on the inquiry. Various changes were agreed to, and the Committee agreed to consider a revised version of the report at its next meeting.

10th Meeting, 2025, Tuesday 18 March 2025 Framework legislation and Henry VIII powers (in private): The Committee considered and agreed a draft report. It also delegated responsibility to the Convener for finalising its publication.

Annexe C – Evidence

Meeting on Tuesday 7 January 2025

- Dr Ruth Fox, Director, Hansard Society;
- Dr Dexter Govan, Director of Research, Constitution Society;
- Dr Pablo Grez Hidalgo, Lecturer in Public Law, University of Strathclyde;
- Professor Colin T Reid, Emeritus Professor of Environmental Law, University of Dundee;
- Dr Andrew Tickell, Head of Department for Economics and Law, Glasgow Caledonian University;
- Professor Richard Whitaker, Parliamentary Academic Fellow, University of Leicester;
- Jessica De Mounteney, First Parliamentary Counsel; and
- Diggory Bailey, Legislative Drafter, Office of the Parliamentary Counsel.

Meeting on Tuesday 14 January 2025

- Rosemary Agnew, Ombudsman, Scottish Public Services Ombudsman;
- Lloyd Austin, Convener of the Governance Group, Scottish Environment LINK ;
- Jonnie Hall, Deputy CEO & Director of Policy, National Farmers Union Scotland;
- Adam Stachura, Associate Director for Policy, Communications and External Affairs, Age Scotland;
- Michael Clancy, Director of Law Reform, Law Society of Scotland; and
- Vicky Crichton, Director of Public Policy, Scottish Legal Complaints Commission;
- Kay Springham KC, Faculty of Advocates.

Meeting on Tuesday 21 January 2025

- Finlay Carson MSP, Convener, Rural Affairs and Islands Committee;
- Kenneth Gibson MSP, Convener, Finance and Public Administration Committee, Scottish Parliament;
- Mike Hedges MS, Chair, Legislation, Justice and Constitution Committee , Senedd Cymru (Welsh Parliament); and
- Sir Jonathan Jones KCB KC Senior Consultant Linklaters LLP.

Minutes on Tuesday 28 January 2025

- Jamie Hepburn, Minister for Parliamentary Business;

- Steven MacGregor, Head of Parliament and Legislation Unit'
- Alison Coull, Deputy Director, SGLD, Rural Affairs Division; and
- Fraser Gough, Parliamentary Counsel Office. Scottish Government.

Written Evidence

- Age Scotland, Beth Allen
- Association of Taxation Technicians and Chartered Institute of Taxation and its Low Incomes Tax Reform Group, David Wright, Joanne Walker and Lindsay Scott
- Chancellery of the Riigikogu
- Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay, Glasgow Caledonian University
- Dr Kat Fradera
- Dr Pablo Grez Hidalgo
- Dr Robert Brett Taylor and Professor Adelyn L M Wilson
- Equality and Human Rights Commission
- Faculty of Advocates, Faculty of Advocates
- Hansard Society , Dr Ruth Fox
- House of Representatives, Cyprus
- Jeff King and Adam Tucker
- Law Society of Scotland
- Legislative Assembly of Alberta, Legislative Assembly of Alberta
- NFU Scotland, Jonathan Hall
- Net Zero, Energy and Transport Committee, Scottish Parliament, Net Zero, Energy and Transport Committee
- New Zealand Regulations Review Committee
- New Zealand Regulations Review Committee, Sam Gordon
- Parliament of New South Wales
- Prof Colin T Reid
- Prof Colin T Reid Second supplementary submission
- Prof Colin T Reid supplementary submission
- Professor Richard Whitaker

- Professor Shaun Bevan
- RCN Scotland
- Scottish Crofting Federation
- Scottish Environment LINK, Dan Paris
- Scottish Human Rights Commission
- Scottish Legal Complaints Commission, Vicky Crichton
- Scottish Public Services Ombudsman , Scottish Public Services Ombudsman
- Scrutiny and Engagement, Legislative Assembly, Parliament of New South Wales, Australia, Kate McCorquodale
- Senators of the College of Justice, Lord President
- The Constitution Society, Dr Dexter Govan
- The Flemish Parliament
- The Legislation, Justice and Constitution Committee, Welsh Parliament
- The Open University in Scotland, Mr Keith Robson
- The Scottish Parliament, Finance and Public Administration Committee
- The Scottish Parliament, Health, Social Care and Sport Committee
- The Scottish Parliament, Local Government, Housing and Planning Committee
- The Scottish Parliament, Rural Affairs and Islands Committee
- The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)
- William McLaren Moses

Correspondence

- submission from Scottish Land & Estates, 16 January 2025

1 Delegated Powers and Law Reform Committee. 13th Report, 2023 (Session 6). Delegated powers provisions in the National Care Service (Scotland) Bill at Stage 1 (SP Paper 313)

2 Delegated Powers and Law Reform Committee. 6th Report, 2024 (Session 6). Delegated powers in the Agriculture and Rural Communities (Scotland) Bill at Stage1 (SP Paper 515)

3 Delegated Powers and Law Reform Committee. Official Report, 26 September 2023, Cols 14 - 17

4 Delegated Powers and Law Reform Committee. Official Report, 19 March 2024, Cols 14 - 17

5 Minister for Parliamentary Business. Written submission, 18 April 2024.

6 Scottish Parliament. Standing Orders (6th edition, 10th revision, July 2024).

7 ibid

8 Delegated Powers and Law Reform Committee. Minutes of meeting, 10 January 2023.

9 Delegated Powers and Law Reform Committee. Minutes of meeting, 21 November 2023.

10 Delegated Powers and Law Reform Committee. Minutes of meeting, 17 September 2024.

11 Delegated Powers and Law Reform Committee, 57th report, 2024 (Session 6). *Work of the Delegated Powers and Law Reform Committee 2023-24* (SP Paper 650)

12 Delegated Powers and Law Reform Committee, 57th report, 2024 (Session 6). *Work of the Delegated Powers and Law Reform Committee 2023-24* (SP Paper 650)

13 Delegated Powers and Law Reform Committee, 57th report, 2024 (Session 6). *Work of the Delegated Powers and Law Reform Committee 2023-24* (SP Paper 650)

14 S6M-15078 Alexander Burnett: Consideration of SSI

15 UK Parliament webpage: Statutory instruments procedure in the House of Commons [retrieved 13 March 2025].

16 Many Sources, including Dr Pablo Grez Hidalgo. Written submission.

17 Delegated Powers and Law Reform Committee. *Official Report* , *7 January 2025*, Col 7.

18 Delegated Powers and Law Reform Committee. *Official Report* , *7 January 2025*, Col 7.

19 New South Wales Legislative Council Regulation Committee.Written submission.

20 Open University in Scotland. Written submission.

21 Delegated Powers and Law Reform Committee. *Official Report* , *7 January 2025*, Col 7.

22 National Farmers Union for Scotland ("NFU Scotland"). Written submission.

23 The Net Zero, Energy and Transport ("NZET") Committee. Written submission.

24 Rural Affairs and Islands ("RAI") Committee. Written submission.

25 New Zealand's Regulations Review Committee. Written submission.

26 Society of Local Authority Lawyers and Administrators in Scotland ("SOLAR"). Written submission.

27 Professor Richard Whitaker. Written submission.

28 Hansard Society. Written submission.

29 House of Lords Delegated Powers and Regulatory Reform ("DPRR") Committee 12th Report of Session 2021-22 *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* *(HL Paper 106)*

30 The Law Society of Scotland. Written submission.

31 Professor Colin Reid. Written submission.

32 Delegated Powers and Law Reform Committee. *Official Report* , *14 January 2025*, Col 33

33 Age Scotland. Written submission.

34 Royal College of Nursing ("RCN") Scotland. Written submission.

35 Delegated Powers and Law Reform Committee. *Official Report* , 7 *January 2025*, Cols 6-7

36 Delegated Powers and Law Reform Committee. *Official Report* , 21 *January 2025*, Col 7

37 Delegated Powers and Law Reform Committee. *Official Report* , 21 *January 2025*, Col 10

38 Delegated Powers and Law Reform Committee. 5th Report, 2025 (Session 6). *Delegated powers in the Land Reform (Scotland) Bill at Stage 1* (SP Paper 721)

39 Professor Jeff King and Dr Adam Tucker. Written submission.

40 Open University in Scotland. Written submission.

41 Law Society of Scotland. Written submission.

42 Delegated Powers and Law Reform Committee. *Official Report* , 7 *January 2025*, Col 6

43 Delegated Powers and Law Reform Committee. *Official Report* , 21 *January 2025*, Col 5

44 Delegated Powers and Law Reform Committee. *Official Report* , 14 *January 2025*, Col 31

45 Delegated Powers and Law Reform Committee. *Official Report* , 14 *January 2025*, Col 7

46 Delegated Powers and Law Reform Committee. Official Report, 7 January 2025, Col 7

47 Delegated Powers and Law Reform Committee. *Official Report* , 7 January 2025, Col 8

48 Delegated Powers and Law Reform Committee. *Official Report* , 14 January 2025, Col 30

49 Delegated Powers and Law Reform Committee. *Official Report* , 14 January 2025, Col 30

50 Delegated Powers and Law Reform Committee. *Official Report* , 7 January 2025, Col 8

51 Delegated Powers and Law Reform Committee. *Official Report* , 14 January 2025, Col 8

52 Delegated Powers and Law Reform Committee. *Official Report* , 14 January 2025, Col 7

53 Rural Affairs and Islands ("RAI") Committee. Written submission.

54 Delegated Powers and Law Reform Committee. *Official Report* , 28 January 2025, Cols 5 - 6

55 Delegated Powers and Law Reform Committee. *Official Report ,* 28 January 2025, Cols 8 - 9

56 Delegated Powers and Law Reform Committee. 12th Report 2022 (Session 6). *Inquiry into the use of the made affirmative procedure during the coronavirus pandemic.* (SP Paper 110) This paper quoted from a briefing by the House of Lords Library titled *In focus -Skeleton bills and delegated powers* (21 December 2021)

57 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

58 Professor Jeff King and Dr Adam Tucker. Written submission.

59 Dr Pablo Grez Hidalgo. Written submission.

60 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

61 Professor Richard Whitaker. Written submission.

62 Minister for Parliamentary Business. Written submission, 18 April 2024

63 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 7

64 RAI Committee. Written submission.

65 Scottish Environment LINK. Written submission.

66 Professor Richard Whitaker. Written submission.

67 Senedd's Legislation, Justice and Constitution ("LJC") Committee. Written submission.

68 Note of Committee fact-finding visit to London, Friday 6 December 2024.

69 Hansard Society. Written submission.

70 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 13

71 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 41

72 Constitution Society. Written submission.

73 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 41

74 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

75 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

76 Age Scotland. Written submission.

77 RCN Scotland.Written submission.

78 Delegated Powers and Law Reform Committee. *Official Report ,* 14 January 2025, Col 40

79 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 7

80 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 26

81 Professor Colin Reid. Written submission.

82 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 42

83 Local Government, Housing and Planning Committee. Written submission.

84 RAI Committee. Written submission.

85 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Cols 4 - 5

86 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 10

87 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 5

88 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 6

89 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Cols 12 - 13

90 Note of Committee fact-finding visit to London, Friday 6 December 2024.

91 SPSO. Written submission.

92 SLCC. Written submission.

93 SOLAR. Written submission.

94 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 33

95 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 5

96 Senedd's Legislation, Justice and Constitution Committee. Written submission.

97 Delegated Powers and Law Reform Committee. 5th Report, 2025 (Session 6). *Delegated powers in the Land Reform (Scotland) Bill at Stage 1* (SP Paper 721)

98 Delegated Powers and Law Reform Committee. 50th Report, 2024 (Session 6). *Delegated powers in the Housing (Scotland) Bill at Stage 1* (SP Paper 637)

99 William Maclaren Moses. Written submission.

100 Delegated Powers and Law Reform Committee. *Official Report* , 14 January 2025, Col 14

101 Note of Committee fact-finding visit to London, Friday 6 December 2024

102 Professor Jeff King and Dr Adam Tucker. Written submission.

103 Scottish Environment LINK. Written submission.

104 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

105 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 4

106 NZET Committee. Written submission.

107 RCN Scotland. Written submission.

108 NFU Scotland. Written submission

109 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 10

110 Health, Social Care and Sport Committee. Written submission.

111 RCN Scotland. Written submission.

112 Finance and Public Administration ("FPA") Committee. Written submission.

113 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 4

114 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 13

115 The Equality and Human Rights Commission. Written submission.

116 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 11

117 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Cols 17 and 18

118 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 11

119 Note of Committee fact-finding visit to London, Friday 6 December 2024

120 ibid

121 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 41

122 Hansard Society. Written submission.

123 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 40

124 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 6

125 SOLAR. Written submission.

126 The Faculty of Advocates. Written submission.

127 The Senators of the College of Justice. Written submission.

128 The Faculty of Advocates. Written submission.

129 ibid

130 FPA Committee. Written submission.

131 ibid

132 ibid

133 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 14

134 NZET Committee. Written submission.

135 RAI Committee. Written submission.

136 SOLAR. Written submission.

137 Delegated Powers and Law Reform Committee. *Official Report*, 14 January 2025, Cols 13 - 14

138 Professor Colin Reid. Written submission.

139 Delegated Powers and Law Reform Committee. *Official Report*, 28 January 2025, Cols 15 - 16

140 House of Lords Delegated Powers and Regulatory Reform Committee. Guidance for Departments on the role and requirements of the Committee. November 2021.

141 Hansard Society. Written submission.

142 Professor Richard Whitaker. Written submission.

143 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

144 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 49

145 Dr Pablo Grez Hidalgo. Written submission.

146 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 22.

147 Delegated Powers and Law Reform Committee. *Official Report* , 7 January 2025, Cols 20- 22

148 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 22

149 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 22

150 Delegated Powers and Law Reform Committee. *Official Report*, 21 January 2025, Col 9

151 Delegated Powers and Law Reform Committee. *Official Report*, 14 January 2025, Cols 9 - 11

152 NFU Scotland. Written submission.

153 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 12

154 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 21

155 Delegated Powers and Law Reform Committee. *Official Report*, 7 January 2025, Col 24

156 Delegated Powers and Law Reform Committee. *Official Report*, 28 January 2025, Cols 8 - 9

157 Hansard Society. Written submission.

158 Professor Jeff King and Dr Adam Tucker. Written submission.

159 Law Society of Scotland. Written submission.

160 Scottish Crofting Federation. Written submission.

161 Age Scotland. Written submission.

162 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 26

163 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

164 Professor Richard Whitaker. Written submission.

165 NZET Committee. Written submission.

166 House of Lords Delegated Powers and Regulatory Reform Committee. Guidance for Departments on the role and requirements of the Committee. November 2021.

167 Dr Pablo Grez Hidalgo. Written submission.

168 Hansard Society. Written submission.

169 SOLAR. Written submission.

170 Scottish Environment LINK. Written submission.

171 Professor Colin Reid. Written submission.

172 Senators of the College of Justice. Written submission.

173 Scottish Crofting Federation. Written submission.

174 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 25

175 The Open University in Scotland. Written submission.

176 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Cols 43 -44

177 Professor Jeff King and Dr Adam Tucker. Written submission

178 Dr Pablo Grez Hidalgo. Written submission.

179 House of Lords Delegated Powers and Regulatory Reform (“DPRR”) Committee 12th Report of Session 2021-22 Democracy Denied? The urgent need to rebalance power between Parliament and the Executive (HL Paper 106)

180 Professor Jeff King and Dr Adam Tucker. Written submission.

181 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

182 Law Society of Scotland. Written submission.

183 The Senators of the College of Justice. Written submission.

184 NFU Scotland. Written submission.

185 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 17

186 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 14

187 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

188 RCN Scotland. Written submission.

189 The Scottish Human Rights Commission. Written submission.

190 Professor Jeff King and Dr Adam Tucker. Written submission.

191 Law Society of Scotland. Written submission.

192 The Constitution Society. Written submission.

193 The Open University in Scotland. Written submission.

194 Scottish Environment LINK. Written submission.

195 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 41

196 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 19

197 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 41

198 Professor Colin Reid. Written submission.

199 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 19

200 Hansard Society. Written submission.

201 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 32

202 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 10

203 Professor Colin Reid. Written submission.

204 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 24

205 Delegated Powers and Law Reform Committee. *Official Report* , 21 January 2025, Col 16

206 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 26

207 Note of Committee fact-finding visit to London, Friday 6 December 2024

208 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Cols 20 - 21

209 ibid

210 Hansard Society. Written submission.

211 Professor Jeff King and Dr Adam Tucker. Written submission.

212 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

213 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Cols 29 -31

214 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 32

215 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 33

216 Delegated Powers and Law Reform Committee. 6th Report, 2024 (Session 6). *Delegated powers in the Agriculture and Rural Communities (Scotland) Bill at Stage 1* (SP Paper 515). See comment on Section 4(3).

217 Dr Andrew Tickell, Dr Nick McKerrell and Dr Catriona Mullay. Written submission.

218 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 37

219 Age Scotland. Written submission.

220 NFU Scotland. Written submission.

221 Dr Kat Fradera. Written submission.

222 Professor Jeff King and Dr Adam Tucker. Written submission.

223 Hansard Society. Written submission.

224 Dr Pablo Grez Hidalgo. Written submission.

225 NZET Committee. Written submission.

226 Legislative Assembly of Alberta. Written submission.

227 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 38

228 Law Society of Scotland. Written submission.

229 The Scottish Crofting Federation. Written submission.

230 The Constitution Society. Written submission.

231 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 34

232 Senedd’s Legislation, Justice and Constitution Committee. Written submission.

233 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 20

234 The Scottish Human Rights Commission. Written submission.

235 Senators of the College of Justice. Written submission.

236 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 36

237 New Zealand Regulations Reform Committee. Written submission.

238 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 53

239 The Open University in Scotland. Written submission.

240 Faculty of Advocates. Written submission.

241 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 34

242 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 22

243 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 22

244 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 39

245 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 21

246 Senators of the College of Justice. Written submission.

247 Senedd's Legislation, Justice and Constitution Committee. Written submission.

248 Professor Colin Reid. Written submission.

249 Dr Pablo Grez Hidalgo. Written submission.

250 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 21

251 SOLAR. Written submission.

252 NZET Committee. Written submission.

253 Age Scotland. Written submission.

254 New Zealand's Regulation Review Committee. Written submission.

255 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

256 Ibid.

257 Professor Jeff King and Dr Adam Tucker. Written submission.

258 Delegated Powers and Law Reform Committee. *Official Report,* 14 January 2025, Col 44

259 Delegated Powers and Law Reform Committee. *Official Report,* 21 January 2025, Col 21

260 Age Scotland. Written submission.

261 Professor Shaun Bevan. Written submission.

262 Faculty of Advocates. Written submission.

263 Senators of the College of Justice. Written submission.

264 Dr Pablo Grez Hidalgo. Written submission.

265 Note of Committee fact-finding visit to London, Friday 6 December 2024.

266 Dr Robert Brett Taylor and Professor Adelyn M Wilson. Written submission.

267 Delegated Powers and Law Reform Committee. *Official Report,* 7 January 2025, Col 16

268 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 23

269 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Col 24

270 Delegated Powers and Law Reform Committee. *Official Report,* 28 January 2025, Cols 22 - 24

271 Delegated Powers and Law Reform Committee. 12th Report 2022 (Session 6). *Inquiry into the use of the made affirmative procedure during the coronavirus pandemic.* (SP Paper 110)