Response by the Faculty of Advocates

to the

Scottish Parliament Consultation:

Framework Legislation and Henry VIII powers

Introduction

In responding to the call for views issued by the Delegated Powers and Law Reform Committee, we have proceeded on the basis that the Committee is primarily interested in views on framework legislation and Henry VIII powers, in the context of legislation passed by the Scottish Parliament. We do, however, draw on experience of Westminster legislation to inform some of our comments.

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

   Please provide your response in the box provided.

There is no formal definition of a 'framework bill' in the Scottish Parliament's Standing Orders. However, framework legislation is generally understood to be legislation which leaves the content of policy to be almost entirely decided through the enacting of secondary legislation (i.e. 'delegated' legislation and usually made by ministers on behalf of the executive), as opposed to the content of policy being determined by means of standalone primary legislation which is subject to full parliamentary scrutiny. The primary legislation thus provides the 'framework' and the detail is, in this way, reserved for delegated legislation.

2. What, in your view, is the appropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation appropriate?

   Please provide your response in the box provided.

The Committee may feel that the rationale for introducing framework legislation as opposed to standalone primary legislation on any issue is similar to that militating in favour of permitting the executive to use statutory powers generally. That is, the sheer volume of legislation that is felt to be necessary today means that parliament does not have the capacity to enact all of it.

It may also interest the Committee, who will doubtless already be aware, that the UK Cabinet Office 'Guide to Making Legislation' (last updated 15 August 2022) (https://www.gov.uk/government/publications/guide-to-making-legislation/guide-to-making-legislation-html) considered that appropriate uses of framework legislation included:

- Filling in the detail of minor, technical or administrative matters.
- Situations when amendments to legislation might be needed more frequently than could reasonably be carried out by Parliament through the primary legislation process.
- When consultation is needed on the detail of a policy such as the level of a fee.
- When operating in a new area of policy to give ministers "an acceptable level of flexibility" to make changes in the light of experience.
- To allow flexibility for policy to be made differently for different groups or areas.
- Where there are precedents for using delegated powers and where it is uncontroversial to do so (Para 15.1).

The Faculty of Advocates does not consider it appropriate to express a view on specific or real-life examples of what might be deemed an 'appropriate use' of framework legislation. However, it submits that the focus of concern in this area ought to be on

whether, in a parliamentary democracy, those powers that are delegated are subject to adequate control and safeguards and whether the extent of the executive's lawmaking powers is appropriate.

3. What, in your view, is inappropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation inappropriate?

   Please provide your response in the box provided.

The Committee may feel that the use of framework legislation outside the list of 'appropriate uses' suggested by the UK Cabinet Office above might be deemed an inappropriate use. In particular, the Committee may feel that so-called 'hyper-skeletal' ('skeletal' in this context being synonymous with 'framework') legislation is an inappropriate use of framework legislation in a parliamentary democracy. Such legislation is legislation which is entirely or virtually devoid of policy content, enabling ministers to have very wide powers by means of delegated legislation to make provision across multiple policy areas.

Once again, the Faculty of Advocates does not consider it appropriate to express a view on specific or real-life examples of what might be deemed an 'inappropriate use' of framework legislation. However, it would be concerned at the use of framework legislation which was not subject to adequate control and safeguards, such as where delegated legislation permitted to be made by the executive under framework legislation led to an undermining of parliamentary scrutiny or where there was no mechanism to ensure that the scrutiny of delegated legislation was commensurate with its policy content. Debate on affirmative instruments in particular ought not to be cursory. Nor is democracy effective in a situation where, for example, the content of delegated legislation is going to be changed by the executive in a period of time less than the 40 day period required under the affirmative procedure, such that challenge in effect becomes impossible. We comment on this further below.

4. Do you consider there to be any challenges associated with scrutinising or engaging with a piece of framework legislation? Any specific or real-life examples would be helpful if you can refer to them.

Please provide your response in the box provided.

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

When the detail is added by way of secondary legislation, there are other issues of scrutiny. Firstly, secondary legislation is very often subjected to limited scrutiny in general terms and certainly not the level of scrutiny afforded to primary legislation. Indeed, depending on the form of secondary legislation, it may be brought into immediate force subject to negative procedures, removing the possibility of scrutiny at all prior to its implementation.

A reported example of such a difficulty can be seen in *Philip v Scottish Ministers* 2021 SLT 559. In that case, the Court of Session determined that regulations made during the covid-19 pandemic in relation to the closure of places of worship had been unlawful, but those regulations had been made in a manner which meant they came into force as soon as they were laid before Parliament and Parliament had 28 days to approve them (i.e. affirmative procedure). Therefore, there had been executive regulations, subject to no scrutiny by Parliament prior to their coming into force, ultimately found to be unlawful because they were outwith the competence of the Parliament and so outwith the devolved competence of the Scottish Ministers. There is a considerable risk in such circumstances of a democratic deficit.

But, beyond that matter, the legislature, when carrying out its function at this stage, is considering only the secondary legislation. Therefore, at that time, it is considering only part of the overall picture when it comes to the statutory scheme by which the policy in question is being implemented. This stage is the corollary of the difficulty faced with assessing the primary legislation.

There is generally no single point at the legislative stages where the whole of the statutory framework is being considered as a cohesive piece of law in a way that allows legislators to consider the complete manner in which it will operate. That is very different from a legislative scheme that is contained entirely in a single piece of legislation where the whole of the scheme can be considered, and where it is likely that inconsistencies or difficulties will more readily be identified.

Inevitably, the use of framework legislation will also require those who are using and interpreting the legislation to have regard not only to the secondary legislation where the detail will be found, but also to the primary enabling legislation in order to discern the purpose of the legislation as a whole.

That latter point can create considerable difficulties when the legislature is one with a limited legislative competence such as the Scottish Parliament, because it makes it very difficult to determine the extent to which the legislation as a whole is within or outwith the competence of the Parliament. A practical example can be seen in the Tied Pubs (Scotland) Act 2021 in which section 1 of the Act provides only as follows:

> "*(1) The Scottish Ministers must, by regulations, impose requirements and restrictions on pub-owning businesses in connection with tied pubs.*
>
> *(2) Schedule 1 makes provision about the exercise of the power conferred by this section.*"

Schedule 1 then sets out certain parameters which require to be included in the secondary regulations, but the detail of the entire policy is effectively left to secondary legislation.

What that meant was that the relevant committee at the Scottish Parliament – and indeed the Parliament as a whole – was reviewing and commenting on legislation that provided only the most basic of frameworks for a new policy. The committee and the Parliament, therefore, were unable properly to assess how the framework would affect landlords and tenants of pubs in Scotland and had to make an assessment only at a high level.

That is problematic for the Scottish Parliament because of the requirement to ensure that the legislation is within its legislative competence. As a result, the 2021 Act was lacking in clarity, and – because of the nature of its policy purpose – it was unclear whether the Act related to a reserved matter (Section C3: Regulation of anti-competitive practices and agreements). As a result, the 2021 Act was subject to challenge in the Court of Session in both the Outer House and Inner House where the court is required by section 29(3) of the Scotland Act 1998 to consider the legislative competence challenge "by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

But the court cannot have regard to the effect of the primary legislation "in all the circumstances" because its effect is implemented in large part by way of the secondary legislation and, at the time of the challenge by way of judicial review, the secondary legislation was not yet in force. But, if the challenge had waited until the secondary legislation had been published, the challenge to the primary legislation would almost certainly have been time barred. (see *Greene King Ltd v Lord Advocate* 2023 SC 311)

There is therefore an issue with scrutiny of the legislative implementation of a policy at every stage 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.

Whilst, of course, this does not mean that every piece of framework legislation results in sub-optimal law, it does at least appear to increase the risk of that occurring and, when it does, to increase the difficulty in having the matter resolved by the courts.

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

   Please provide your response in the box provided.

The Faculty of Advocates offers no view on potential practical changes which could assist parliamentarians and/or stakeholders in the legislative scrutiny of framework (primary) legislation in the Scottish Parliament. It is, however, appropriate to reiterate that it is inherently difficult to subject framework/skeletal primary legislation to an appropriate degree of scrutiny. As is noted in response to Question 4, the division of policy detail between primary and secondary legislation means that scrutiny of framework legislation is required to take place absent the full detail of how the policy will ultimately be implemented. In other words, the primary legislation constitutes an incomplete picture which is intended to be filled in at a later stage by secondary legislation. That renders scrutiny of the primary legislation, including even high-level consideration of whether the primary legislation fulfils the objective it is intended to meet, a very difficult task.

6. Thinking of the scrutiny of secondary legislation resulting from framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles scrutinising and engaging with legislation?

   Please provide your response in the box provided.

Other than the high-level comments which follow hereafter, the Faculty of Advocates offers no view on specific practical changes which could assist parliamentarians and/or stakeholders in the legislative scrutiny of secondary legislation. The Faculty of Advocates notes that committee-level engagement with secondary legislation is likely to play an important role in achieving improved scrutiny of secondary legislation. The remit of the Delegated Powers and Law Reform Committee (***DPLRC***) includes considering and reporting on:

- "*any subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011*";
- "*proposed powers to make subordinate legislation in particular Bills or other proposed legislation*"; "*general questions relating to powers to make subordinate legislation*"; and
- "*whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation*".

(https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee)

The high volume of secondary legislation made by the Scottish Ministers may mean that the DPLRC lacks adequate time and resource to engage with each piece of secondary legislation at the desired level of detail. For example, at the 28th meeting of the DPLRC on 8 October 2024, the DPLRC considered six secondary legislative provisions. The Report of the meeting records that the session began at 10.06am and ended at 10.08am. The Committee did not engage in substantive discussion in respect of any of the six provisions. Similarly, at the 27th meeting of the DPLRC on 1 October 2024, the DPLRC considered eleven secondary legislative provisions. Consideration of the eleven provisions began at 10.03am and concluded at 10.05am. The Committee did not engage in substantive discussion in respect of any of the eleven provisions.

The Faculty of Advocates notes that the scrutiny of secondary legislation may be improved by more detailed engagement and discussion of individual legislative provisions by the DPLRC. It is recognised that the functions of the DPLRC are likely to be limited to some degree by resourcing constraints. In general terms, it is difficult to envisage how secondary legislation could be adequately scrutinised without reference to the primary legislation under which it has been made, as well as any other secondary legislation which has been made under that provision. It is suggested that adequate scrutiny of secondary legislation also requires detailed consideration of the legislative competence of each piece of secondary legislation, whether by the DPLRC or otherwise. The resources available to the DPLRC and whether those could be enhanced, as well as the practical division of responsibility between the DPLRC and other parliamentary committees, are beyond the scope of the Faculty's area of expertise.

7. What views do you have on Henry VIII powers? In particular, are there any contexts in which you consider their use to be particularly appropriate or inappropriate?

In some contexts, Henry VIII powers may be considered necessary to allow Ministers to make minor and consequential amendments to a narrow and technical area of law.

In some circumstances, a wider Henry VIII power may be considered acceptable, for example in the instance of a public health emergency. In such instances, what safeguards are in place are of increased importance to ensure that the Executive can be properly held to account for their exercise.

There are occasions when the use of Henry VIII powers are questioned. Some people consider that these powers are too wide, allowing Ministers to amend acts in ways which are seen as unacceptable.

Please provide your response in the box provided.

The so-called “Henry VIII” powers refer to the power of Ministers of the Crown to make delegated legislation which would amend or repeal an Act of Parliament.

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. Following the Act of Union, the same powers have been conferred upon Ministers by legislation which relates to the whole UK and, indeed, to Scotland specifically.

Upon the devolution of powers to the Scottish Parliament and Scottish Ministers in 1998, the Scottish Ministers have been granted Henry VIII powers by primary legislation on a few occasions. Some examples would be the Public Services (Scotland) Act 2010, under which the Scottish Ministers are generally empowered to “improve” the exercise of public functions by amendment of the legislation.

The powers are regarded as controversial by some. A particular controversy arose in respect of their use by UK Government Ministers in respect of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020, particularly in relation to the 2018 Act, which empowered Ministers to make or unmake a variety of laws which would have otherwise required primary legislation made by parliament.

On one view, the powers might be considered necessary for efficient government, where the amendment or repeal of legislation involves minor considerations which are comfortably left to the executive’s discretion, such as with transitory provisions anent effective dates. The House of Commons Library Research Briefing on Delegated Powers and Framework Legislation describes 'incidental or consequential provisions' as follows:

> “Incidental and consequential provisions are minor changes needed for consistency and coherence of the statu[t]e book. Transitory provisions concern how an Act of Parliament comes into effect and may deal with any transition to new legal arrangements resulting from that primary legislation.”
>
> (https://researchbriefings.files.parliament.uk/documents/CBP-10046/CBP-10046.pdf)

Such practical use of Henry VIII powers would appear to be uncontroversial, though we do not present any strong opinion on the matter.

On another view, and particularly with regard to those statutory provisions which confer wider discretionary powers on ministers, there is an argument that Henry VIII clauses can create a democratic deficit, where ministers are empowered to act as if they were primary legislators, thereby limiting the supremacy of the elected legislature. The powers are therefore open to a degree of abuse and they are not subject, in an obvious way, to the same level of scrutiny as any parliamentary bill.

That said, any exercise of the powers is susceptible to judicial review. Therefore, there is a mechanism by which the exercise of the powers can be challenged directly. In Scotland, any regulations enacted by Ministers are laid before parliament and can also be nullified by parliament, so to an extent there is also an ability for parliament to use its own procedures to hold ministers to account.

Appropriate Use of Henry VIII Powers

It is not within our remit to opine about when the exercise of the powers would be appropriate or inappropriate.

However, 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. Further, a clear understanding of the conditions in which the powers might be used could reduce the likelihood of legal challenges to any exercise of the powers, and indeed it would provide more legal certainty as to the limit and extent of executive power.

In *Martin v HM Advocate* [2010] UKSC 10, Lord Rodger discussed the merits of ministerial powers to make minor amendments to legislation:

> "to be effective, legislation on a matter for which one department [has] responsibility might require that a piece of legislation falling within another department's sphere of responsibility should be amended… perhaps involving little more than updating statutory references or

> bringing the language of existing legislation into conformity with the language of the proposed legislation."
>
> *Martin v HM Advocate* per Lord Rodger at [72]

Though the above noted discussion in *Martin* did not concern the use of Henry VIII powers, the principle remains true; incidental, consequential and temporal changes to legislative provisions by the executive may be appropriate in many cases and indeed conducive to effective government.

However, the court has noted that skeletal legislation which allows ministers to make substantial amendments to primary legislation may be 'unconstitutional':

> "As Lord Hoffmann explained in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 , 131, "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost", and so "Fundamental rights cannot be overridden by general … words" in a statute, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"."
>
> *R (ex parte Miller) v The Prime Minister* [2017] 1 ALL ER 593

Therefore, any exercise of Henry VIII powers must remain within the confines of common law principles of legality. While this is a principle of our law, and a basis upon which a legal challenge to any exercise of the powers might be mounted, it would be far more desirable if, in the first place, the legislature had regard to these principles when inserting the Henry VIII clauses into legislation, in order to minimise the excessive use of executive power. The use of Henry VIII powers by Scottish Ministers is rendered potentially more complex, given the limited legislative competence of the Scottish Parliament.

Finally, we note that it has been suggested in the past that the powers should not be used in respect of changes to "constitutional arrangements", which are properly the remit of the UK parliament (The Constitutional Standards of the House of Lords Select Committee on the Constitution, UCL Constitution Unit, January 2014, page 12: https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/constitutional-standards-third-edition.pdf). We note this only to suggest that major constitutional

changes should, generally speaking, only be made where the will for such changes is democratically justified.

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

   Please provide your response in the box provided.

In terms of the granting of Henry VIII powers, democratic accountability requires that the government should justify to parliament the need for any such powers. Any provision granting Henry VIII powers should explicitly limit the scope of the legislative powers conferred on ministers by clearly setting this out in the Bill itself. The Bill ought also to include a requirement for parliamentary oversight when a power is being exercised.

It has long been recognised that parliamentary oversight of delegated legislation is somewhat limited. Whatever the procedure followed, whether it be affirmative or subject to negative resolution, there is currently no power to amend delegated legislation. The delegated legislation is either approved or annulled in its entirety. Concerns have also been expressed about the grouping of decisions to approve delegated legislation which reduces the opportunity to criticise one instrument in a group. (see Himsworth: Subordinate Legislation in the Scottish Parliament, Edin L.R 2002, 6(3), 356-379 at p.371:

https://www.euppublishing.com/doi/abs/10.3366/elr.2002.6.3.356)

It does not fall within our expertise to comment in detail on the workings of the Scottish Parliament, its committee system and the interaction with the executive. We do, however, offer some observations on the principles which should be followed in a democratic legislature.

In the setting up of the Scottish Parliament, the Consultative Steering Group on the Scottish Parliament stated this in relation to delegated legislation:

> "There should be meaningful consultation on secondary legislation before it is laid before the Scottish Parliament. The Parliament should

> seek to ensure that significant provisions are included in primary rather than secondary legislation."
>
> (Report of the Consultative Steering Group on the Scottish Parliament at section 3.5, para 29: https://www.parliament.scot/-/media/files/history/report_of_the_consultative_steering_group.pdf)

Those principles remain important if the Scottish Parliament is to function as an effective check on executive power.

The Hansard Society in its Working Paper on 'Proposals for a New System for Delegated Legislation' explained why scrutiny of delegated legislation matters:

> "When Parliament is unable to perform its essential scrutiny function, laws made by Ministers are subject to insufficient test and challenge, and omissions and unintended consequences are not (or not sufficiently) explored. Ultimately, the price of poorly-conceived, poorly-drafted, and poorly-scrutinised legislation is paid by citizens across the country who are subject to its detrimental effects. And it should not be left to the courts to act as a safety net when Ministers have exceeded their powers or applied them inappropriately."
>
> (p.4: https://www.hansardsociety.org.uk/publications/reports/proposals-for-a-new-system-for-delegated-legislation-a-working-paper)

We respectfully agree with those observations. It ought not to be overlooked that legislation, whether primary or delegated, has real-life effects and real-life consequences for the constituents whom elected parliamentarians serve.

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

   Please provide your response in the box provided.

We refer to our comments above on framework legislation and Henry VIII powers. In relation to Westminster legislation, it has been suggested that framework legislation has become more prevalent in recent years. (House of Commons Library Research Briefing on Delegated Powers and Framework Legislation at section 2.3, p.18, linked supra).