



# **Delegated Powers and Law Reform Committee Inquiry: Framework legislation and Henry VIII Powers**

## **Submission**

31.10.24

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

Our understanding of the use of the term 'framework' legislation is that it is a term used to refer to a piece of primary legislation passed by parliament which sets out the framework within which subordinate / secondary legislation can be created by a Government Minister or others to whom specific law-making powers have been delegated.

Other terms used to describe acts delegating law making powers include 'enabling' legislation or 'skeleton' legislation.

Though these terms are often used interchangeably, when analysing their appropriate usage, a distinction should be drawn between 'framework' and 'skeletal' legislation. In a more precise (pure) definition 'true framework legislation' sets out a clear policy content and direction on the extent of the delegating powers. Such a framework enables challenge by way of judicial review to determine whether the Government Minister (or others) to whom law making powers have been delegated have acted within the delegated powers granted. The term 'skeletal legislation' should be used where no policy justification is outlined, or, if some policy justification is outlined it does not detail how the delegated powers should be used and the boundaries of those powers.

**Q2. What, in your view, is the appropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation appropriate?**

In our experience law students are traditionally taught that framework legislation is of benefit when laws and rules need to be created to regulate involved complex subject matter, require industry specific knowledge, relate to a profession, or would benefit from the specialist knowledge of experts. Experts and professionals have the required knowledge to draft such detailed legislation, and this can save parliamentary time.

Framework legislation can be suitably used for:

- Setting out policy (whilst ensuring that the subordinate / secondary legislation is meaningful in detail to deliver that policy).
- Issues of social relevance.

Possible criteria that could help inform framework legislation include:

- Specificity. Ensuring that powers given to Government Ministers or others to make delegated legislation are clear, concise, and precise. This could assist in the prevention of powers intended in one area from being used in other ways or in unintended ways in the future.
- Linking. Indicating the links between the policy / aim to be achieved and the powers delegated.
- Boundaries. Ensuring these are clear by adopting a structure for enabling acts to ensure clarity of what is being delegated, to whom, for how long and why and whether there are any review periods.

- **Clarity.** Ensuring titles provide a trail that can be followed. This may require a rethink of title protocols.
- **Limiting.** Ensuring the limits of the purpose for which delegated powers are to be used are clear. Distinguish between subordinate / secondary legislation which delegate powers to create laws and those that repeal laws. Again, a title protocol could be developed.
- **Ensuring.** Creating a procedure for scrutiny that is appropriate for accountability. Again, a distinction could be made between those creating law and those repealing laws.
- **Accessible.** A clear and navigable path for stakeholders to enable them to follow the relevant law and regulations with ease.
- **Amending.** Create a stage at which the proposed subordinate / secondary legislation could be amended during scrutiny.
- **Review.** Set a time frame after which there will be a formal review of the operation of the subordinate / secondary legislation to identify whether the intention(s) of the delegating law makers is being achieved and, if not, have an established process for review and change. This could be undertaken by a specialist unit engaging with stakeholders and others.
- **Format.** To enable easily accessible and user 'friendly' navigation, transparency, and familiarity.

The challenge for any reviewing body is that framework (and enabling / skeletal) legislation and the associated subordinate / secondary legislation are now ingrained into, and inextricably linked to parliamentary law making. In the Scottish Parliament (and the Senedd) the processes are more recent and

initially more rigorous scrutiny was enabled when compared with the UK Parliamentary processes which are rooted in tradition.

There are many examples of primary legislation which delegates law making powers. It is challenging however to identify which primary legislation that fits within a narrower definition of 'framework' legislation.

**Q3. 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?**

There is no formal definition of 'framework' legislation within parliamentary procedures.

Inappropriate use of framework legislation includes legislation that delegates powers that are too wide or are ill defined, delegates powers to third parties without an appropriate scrutiny and review process and any framework legislation which excludes scrutiny by or accountability to parliament.

The use of such legislation can prevent appropriate budget scrutiny, undermine financial planning and control, can delegate powers to organisations to make regulations with little Ministerial or parliamentary accountability, little scrutiny on their subsequent use and without power to amend. Framework legislation can provide mandates to create plans but without requisite detail of what the plan will include, can delegate powers to make regulations, for example in health, to professional bodies without providing Ministerial powers to scrutinise or amend those regulations.

**Q4. 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.**

The challenges differ and depend on the stakeholder groups who may need to engage with scrutiny. The system and the terminology used can often be confusing and seem overly complex. Whilst guides and information, for example on the Scottish Parliament's website, can be helpful navigating this system of delegated law making the reality is that navigating it can be a challenge for many stakeholders.

For experts within their subject the process of scrutiny is likely to be less daunting as it is within an area of their familiarity. However, an appreciation for the wider context within which the scrutiny sits would be required to ensure that the scrutiny is achieving its aim.

A set of questions to aid scrutiny could assist but care would need to be taken to avoid this becoming used as a checklist rather than an aid to ensure full scrutiny.

Consistency. There seems to be an uneven approach in the level and detail of scrutiny. Different committees undertake scrutiny at the current time, but it is unclear how they liaise over their processes and procedures.



The complexity of the system can be illustrated in several ways. For example, if you were seeking to research an area which was a devolved area of competence, but one within which the Scottish Parliament had approved a legislative consent order, it would be a lengthy process. The researcher would have to trawl through a range of sources to establish if the Scottish Parliament had produced legislation, when the legislative consent order was approved and then going through the processes used in the UK Parliament. In the UK Parliament there are several committees whose role it is to scrutinise enabling legislation. In the House of Commons The Procedure Committee. In the House of Lords, the Delegated Powers, and Regulatory Reform Committee (DPRRC) and the Constitution Committee. There are also other, less often used processes. There are negative and affirmative procedures. Within the Scottish Parliament subordinate / secondary legislation will be considered by 1 or more committees. There are several procedures for scrutiny: affirmative, negative, no procedure or laid only, provisional affirmative and super-affirmative.

**Q5. Thinking of the scrutiny of framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles?**

It is unclear what induction for parliamentarians / committee members / legislative drafters / civil servants / other stakeholders in relation to framework legislation is. If there is no specific induction, training, or mentoring, then a practical change could involve these.

A skills audit may prove to be a useful tool to assist an annual evaluation of effectiveness:

- Enable parliamentarians to determine the scrutiny process that applies and set this out in the Enabling Act.
- Ensure that appropriate resources are available to support parliamentarians in their scrutiny, for example in briefings.
- Review and refine processes to support new acts to outline and define new processes.
- Establish a review period after which there would be a review and further scrutiny of the subordinate / secondary legislation to determine whether the aims have been / are being achieved. Currently there is little review once powers have been delegated (and what does exist appears as ad hoc).
- Analysis. Undertake an expert review of proposals by a specialist team to ensure consistency of scrutiny with a publicly available report to the committee as part of the formal scrutiny process.

There are a fixed number of parliamentarians involved in the law-making process and there are significant other demands on their time. It is unclear to the general public how allocations to committees are made and the impact consistency / lack of consistency of membership has and the impact that may be caused by delays in establishing committee membership following elections (this point applies to each of the legislatures within the UK).

**Q6. 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?**

Reduce the number of procedures and ensure all subordinate / secondary legislation is subject to a review either by a committee or specialist review body.

Parliamentary websites currently provide helpful information on the procedures for scrutiny but are less clear as to why which procedure has been chosen. If, for example, a stakeholder is researching something other than an SSI or SI navigating around the sites to find the required information can be daunting. The Scottish Parliament website has helpful information on the passage of bills and other information but there is no list of powers delegated under which legislation, to whom and whether they have been used.

**Q7. 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?**

Henry VIII powers have developed from the actions of Henry VIII an English Tudor King. The Proclamation by the Crown Act 1539 (also referred to as the Statute of Proclamations 1539) which 'An Act that Proclamations made by the King's Highness, with the Advice of His Honourable Council, shall be obeyed, and kept as though they were made by Act of Parliament'. Although subsequently repealed the use of such powers began to re-emerge in the late 19th century. They have becoming more frequently used. However, their use is subject to increasing criticism as they:

- enable the bypassing of parliamentary authority and
- are wide ranging so it is impossible to tell at the point of creation what they may be used for in the future.

Their use by UK Ministers in devolved matters without the consent of relevant Scottish Ministers or the Scottish Parliament goes against the spirit of the devolution settlement even if legally permissible

The House of Lords constitution committee (amongst others) has noted that 'the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle'.

Henry VIII powers provide Ministers with a power to override primary legislation by way of delegated legislation. The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. It must be questioned as to whether they are appropriate in a modern society given their origins in enabling the use of despotic power. Empowering an individual, such as a Government Minister, to make sweeping changes with little scrutiny, does not seem to fit with the aspirations of a modern democratic state, with the principles of the rule of law and an international rules-based order.

There are several constitutional questions to be considered. Have Henry VIII powers have been transferred to Scottish Ministers? The constitutional genesis of Henry VIII powers predates the Union with England Act 1707. Is Article IV of the Treaty of Union broad enough to confer on current Ministers of the Scottish Government such powers or do the provisions of the Scotland Act 1998, in particular, section 28, confer such powers? In addition, as ruled by the UK Supreme Court, the powers reserved UK Government Ministers and UK Parliament under section 28 (7) of the Scotland Act 1998 enable a UK Minister to use Henry VIII powers to amend primary Scottish legislation.

Generally, when Henry VIII clauses are introduced, they are often said to be necessary. In addition to their increasing use in the UK there has recently been a significant increase in the use of “Henry VIII” clauses in other common law jurisdictions, for example, in New Zealand they were used, in the context of the earthquakes that struck Canterbury in 2010 and 2011. Using such powers for a reason of ‘necessity’ carries the risk that they become habitual, and ‘necessity’ is often behind the justification for infringements of human rights. By enabling such powers to become habitual, and with little scrutiny and no option for a parliament to amend them, there is a danger of becoming indifferent to them, and to the fact that they are being enacted without scrutiny, policy constraints and transparency.

There is a wealth of literature which critiques the use of such powers based on an analysis of their increased use. The legal methods used to enable the UK to leave the EU and those used during the pandemic provided a rich source of

examples for critique and an accusation of 'normalising' such widescale delegation and restrictions on freedoms. The volume of legalisation created under enabling acts is producing new constitutional challenges. The literature originates from a wide range of sources including academic research, parliamentary committees and reviews and debates within the parliamentary chamber itself.

**Q8. What, if any, additional safeguards might alleviate any concerns you have about the granting and / or use of Henry VIII powers?**

These powers seem to be out of touch with modern society. One first step could be the use of an alternative name (see comment under the response in the general comments section in relation to terminology).

The ultimate safeguard within the current system for Henry VIII powers would be review by the judiciary. This is costly, time consuming and as a process has complex requirements. A wider debate over appropriate methods of ensuing checks and balances on the power of Ministers (and those with delegated law-making powers) and greater transparency would be timely.

An independent body drawn from stakeholders and experts to review laws made under enabling legislation and the use of Henry VIII powers and to arbitrate, for example, if there is a dispute over terminology, could be one way to move forward. This body could be independent from the committee process.

Alternatively, the framework legislation could require those with delegated powers to keep registers of how the powers were used and the outcome (including any legal challenges). This could become a publicly available record enabling stakeholders to access this information and provide greater transparency and accountability.

The following could be considered:

- Traceability. Enabling a mechanism to provide ease of access to access of information to both origin and use.
- Volume. To make an exception and move from an increasing habitual use, especially on controversial topics or topics of public interest.
- Checks and balances. To provide a mechanism to enable parliament to intervene and overturn or amend the regulations created. There is currently no power for parliament to amend and insufficient checks and balances on Ministers that avoid complex legal proceedings.
- Interpretation. A mechanism to provide advice and guidance.
- How law making can be made accessible to stakeholders and the general public to encourage engagement with scrutiny and use.

**Q9. 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.**

In societies where the rule of law is seen as fundamental careful consideration is required to ensure that the laws governing that society are transparent and accessible.

We have several general comments. These include:

- Consideration of the adoption of more inclusive language both about and within legislation (whether enabling or subordinate).
- Provision of greater transparency and enabling navigation between the framework / enabling act and subsequent subordinate / secondary legislation.
- Underpinning the concept of the rule of law are transparency and accessibility.

For many stakeholders and those not legally trained the use of framework acts and secondary legislation is an overly complex system which requires determination and investigatory skills to navigate and an understanding of the legal framework and constraints on the use of delegated powers.

- A clear timetable of when each becomes actual law rather than statute book law. The Scottish Parliament website has a very helpful navigation as to the stages of bills, debates etc but this requires both digital and information literacy skills to navigate with ease.
- Is the terminology outdated? Has the historical significance been lost? 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.

- Is the terminology sufficiently descriptive of the legislation, its hierarchy and purpose?
- Is the structure of this approach to legislative framework sufficiently accessible to individuals with protected characteristics?
- Has an analysis been undertaken as to why the volume has been increasing and whether effective controls have been provided?
- The challenge of defining the legislation as framework or skeletal is that in practice much delegating legislation blurs the boundaries. Using the term delegating more clearly captures the purpose.

In providing these comments we looked at several acts to assess the ease with which stakeholders could engage in identifying the relevant law on a topic and delegated powers to Ministers. These examples included the Tied Pubs (Scotland) Act 2021 and the associated Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024, the Wildlife Management and Muirburn (Scotland) Act 2024, the Visitor Levy (Scotland) Act 2024, Agriculture and Rural Communities (Scotland) Act 2024 and School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004. It is not uncommon to see words within legislation that note, for example, 'Any power of the Scottish Ministers to make regulations under this Act includes power to make different provision for different purposes'. To follow the trail set out in primary legislation was time consuming, required considerable cross referencing and research skills.

An example of skeletal legislation from the UK Parliament which also impacts Scotland, is the Medicines and Medical Devices Act 2021, which gave Ministers “very wide powers to almost completely re-write the existing regulatory regimes for human and veterinary medicines and medical devices”.

