

Current use of framework legislation and Henry VIII powers
Delegated Powers and Law Reform Committee Call for Views
2024

https://yourviews.parliament.scot/dplr/framework-legislation-henry-viii-powers/consult_view/

Deadline for sign up: 30 October

Submission deadline: 31 October

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

LINK members understand framework legislation as an Act which provides powers to Ministers to act through regulation, with only limited detail in the Act determining how these powers should be used.

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?

As a matter of principle, LINK members believe that the default assumption should be that significant decisions are taken by parliament passing primary legislation. In some cases it is reasonable, or preferable, for Ministers to be empowered to act through regulation.

A report commissioned by LINK discusses this in the context of statutory nature targets, learning from the example of the UK Government's Environment Act 2021, which took a framework approach. This report argues that:

“The UK/England experience highlights one challenge: if the primary legislation is ‘too generic’, the decisions rest entirely with Government, who can be unwilling to set targets that are challenging (and, given the way in which secondary legislation is considered/approved, it is then hard to seek improvements). On the other hand, seeking to incorporate the full detail into primary legislation can be equally problematic because there needs to be a degree of flexibility (as can be provided by regulations) and primary legislation, establishing processes/principles, is often enacted before all the data/information to complete the task is (or could be) available.” (1)

Broadly we would consider the Environment Act 2021 to be an appropriate use of framework legislation as it contained a number of essential elements: 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.

The approach to Scottish targets recommended in this report is a “halfway house” with the primary legislation incorporating more detail and structure but the exact numeric metrics defined in secondary legislation. Such an approach would allow necessary flexibility but would still require Ministers to act within limits agreed by parliament.

(1)

<https://www.scotlink.org/wp-content/uploads/2023/08/Nature-recovery-targets-a-report-for-Scottish-Environment-LINK.pdf>

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?

The recent passage of the Agriculture and Rural Communities Act is a useful example. In establishing a farm payments system to replace the Common Agricultural Policy, it was inevitable that Ministers would desire a degree of flexibility. To some extent, LINK members agreed with this. The Act is likely to serve as the legislative basis for agricultural payments for decades, and it would be impossible to include a high level of detail in primary legislation that would determine how these payments will be made far into the future. The needs of industry, the scientific understanding of best practice, and the objectives of public policy will all develop over time, and this will require Ministers to adapt how payments are made at successive Rural Support Plans and even during the term of an individual Plan.

However, LINK members argued that the Act should have been used to set a much clearer direction of travel for the future of agriculture. The initial draft Bill empowered Ministers to make payments for agricultural purposes, but these powers were drawn in such a way that it was very difficult to interpret whether the CAP replacement – an enormously significant policy change – would be fit for purpose.

LINK members made a range of suggestions as to how the legislation could be improved, and we are grateful for the engagement of Ministers and MSPs from across parties. The final Act was improved, though still does very little to require Ministers to act in any particular manner. For example, the Act empowers Ministers to include targets on environmental outcomes in the Rural Support Plan, but does not require them to do so.

Another example of inappropriate use of framework legislation is the recently passed Circular Economy (Scotland) Act. Given the need for urgent action, LINK members called for more details, such as quantified targets, policy measures and timeframes, to be included in the primary legislation of the bill. The Act does not include these, leading to unnecessary delays in action. In its stage 1 report on the bill, the NZET Parliamentary Committee said the CE Bill is a framework bill and that it had concerns that “the Bill is being put forward as partly a stop-gap.”

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.

The passage of a Bill is the point at which there will inevitably be greatest scrutiny from parliamentarians, stakeholders, the media, and the general public. If a Bill simply sets a framework, it is clearly more difficult for those focused on outcomes to engage effectively.

As described above, committees have less time to scrutinise secondary legislation which is in some cases more impactful and consequential than the primary legislation.

Both the Agriculture and Rural Communities Act and the Good Food Nation Act provide for a subsequent delivery plan to be laid before Parliament. However, it is not clear what powers Parliament has to amend these plans which have by then become executive in nature.

In both these cases, the financial memorandum was wholly inadequate. The Good Food Nation Bill provided only a (poor) estimate of the costs of producing the delivery plans, not the potential costs of implementing the principles of the legislation. The Agriculture and Rural Communities Bill simply rolled forward the existing budget on the grounds that future spending could not be predicted.

Similarly, the Policy Memorandum accompanying each Bill was weak, with too little review of the impact of previous policies or serious exploration and analysis of policy options.

Finally, neither Bill was accompanied by a Strategic Environmental Assessment (SEA), despite both legislating in areas of major environmental significance. Again, this was on the ground that the environmental impact could not be assessed until the detailed policies were developed. In the case of the Good Food Nation national plan, Government has again claimed that there is no need for an SEA for the plan.

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

Both the policy and financial memorandum accompanying any framework legislation should meet higher standards of analysis and modelling and should set out much more explicitly the policy goals which the legislation is intended to enable.

Committees should have the resources to commission and publish an independent assessment of these memoranda to aid their scrutiny.

All framework legislation should include provision for independent scrutiny and reporting to Parliament on progress. This provides an additional safeguard. This provision was secured in relation to the Good Food Nation Act through a late concession by Government to establish a statutory Scottish Food Commission, but this is not the only suitable mechanism.

Some strengthening of the provisions for monitoring implementation of the Rural Support Plan were introduced at Stage 3 of the Agriculture and Rural Communities Bill, but these are still too vague. By contrast, the NAO has compiled three reports to date on the implementation of parallel reforms by DEFRA in England.

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?

The steps above allow secondary legislation to be tested against these more specific and measurable intentions.

In the case of the Agriculture and Rural Communities Bill, the delivery plan (Rural Support Plan) should be in place before secondary legislation is lodged, as otherwise Parliament is not well placed

to understand the combined impact of a series of regulations lodged over a period of time. However, this may be a special case.

LINK members propose a new way of considering secondary legislation. At present, there are negative, affirmative and 'super-affirmative' procedures that involve a pre-legislative consultation with the Scottish Parliament.

It should be questioned whether secondary legislation could be subject to a multi-stage procedure such as general principles and amendments. It could be that such a procedure might be introduced for the 'exceptional' circumstances of legislation that may be considered as Framework Bills so that parliament can properly consider and, if necessary, amend the detail.

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?

LINK previously produced a briefing on Henry VIII powers in the context of UK legislation.(2)

(2) <https://www.scotlink.org/wp-content/uploads/2022/08/Levelling-Up-Bill-Briefing-FINAL.pdf>

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

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.

Framework legislation is appropriate when the subject matter crosses numerous parts of Government and has long-term policy intent (for example Good Food Nation and climate legislation).

The Circular Economy (Scotland) Act includes a commencement section where all but two sections of the Act 'come into force on such day as the Scottish Ministers may be regulations appoint'. This is a common approach which can render the rest of the Act meaningless, as there is no requirement for Ministers to enact the changes until a time of their choosing. Little scrutiny is given to such provisions.

It is less appropriate for legislation on a more specific topic such as Agriculture. Government should have made much more progress on detailed policy development before bringing this Bill forward. For example, it should have included a five year budget envelope, intervention logic and success measures for the four tiers. This is particularly important if we want to ensure delivery on closely interdependent priorities such as nature and climate.

(By contrast, the US Farm Bill weighs in at over 500 pages and includes detailed descriptions and budgets for everything from the milk promotion programme to the loans available to farmers.)

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For more information contact:

Dan Paris
LINK Advocacy Manager
dan@scotlink.org



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