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Convener, Delegated Powers and Law Reform
Committee
Scottish Parliament
EH99 1SP

By email: DPLR.Committee@parliament.scot

17 April 2025

Dear Stuart,

I am writing to set out the Scottish Government's response to the Committee's inquiry into framework Bills and Henry VIII powers.

I want to recognise the rigorous way in which the Committee conducted the inquiry. It is clear that considerable effort has gone into ensuring the Committee obtained a wide range of opinion and experience, and in ensuring different perspectives and viewpoints were represented in the report. I commend the Committee, and the clerks who have supported it, for that approach.

I attach an annex to this letter which sets out the Scottish Government's response to each of the Committee's conclusions and recommendations.

In general, I welcome the overall direction of the Committee's Report. I am happy to recommit the Scottish Government to ensuring that the Scottish Parliament is provided with sufficient information to understand why a proposed delegated power is considered to be appropriate and proportionate, and how that power is expected to be used.

I strongly believe the focus going forward should be on the quality of the justification and information provided by the Scottish Government rather than becoming overly focussed on creating a specific definition of "framework legislation". Rather, the Scottish Government should ensure that it provides a clear justification of any and all delegated powers it proposes to take, whether some might call them "framework" or not, and the Scottish Parliament should ensure the Government is held to account for that. If any MSP or committee considers that what is set out in a Delegated Powers Memorandum falls short of expectations then I would expect and encourage them to raise that with the relevant Minister at the earliest opportunity and seek the additional information or justification which they consider to be necessary.

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I also recognise that, regardless of the quality of information which the Government provides, there may be fundamental disagreement between Government and Parliament about whether a power is appropriate or is framed correctly, and that Parliament may seek to amend Bills accordingly. Although I would hope that the Government will be able to persuade Parliament of its case, I think it is important to recognise that it is ultimately up to Parliament to determine whether or not it is content with any proposed delegated powers in a Bill. The Bill that emerges from the Parliament is, after all, the Parliament's not just its proposer's and the delegation referred to in the phrase "delegated powers" is a delegation of the Parliament's legislative power. Deliberation and decision on these matters is a quintessential part of our parliamentary democracy.

For my part, I will ensure that my Ministerial colleagues understand the need to clearly justify all proposed delegated powers in Bills, and that they stand ready to address any concerns which MSPs or committees of the Parliament may have. I intend to raise this matter with them directly, and in addition I have asked my officials to ensure that relevant Scottish Government guidance is updated to take account of the Committee's Report and the Scottish Government's response to it.

I hope you will find this response to be helpful and I would be happy to answer any questions which the Committee may have.

Yours,

JAMIE HEPBURN

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Recommendation	Comment
<p>(1) The committee proposes the following definition of framework legislation:</p> <p><i>“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”</i></p>	<p>The Scottish Government notes the definition suggested by the Committee and that this reflects a broad consensus of views amongst academics and practitioners. However, whether this definition or any other definition is used it will always be subject to interpretation and potential disagreement amongst interested parties. As noted in the covering letter, the Scottish Government’s preference would be to focus less on definitions and more on whether the Scottish Parliament is satisfied that the Scottish Government has provided clear justification of any proposed delegated powers.</p>

Recommendation	Comment
<p>(2) “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.”</p>	<p>The Scottish Government accepts this point. It also acknowledges that in the very limited circumstances in which it may not be possible to set out a high degree of detail on the face of a Bill such an approach will require to be clearly justified and explained.</p>

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Recommendation	Comment
(3) “In appropriate and very limited circumstances, the Committee considers that there may be a case for framework powers, primarily in order to provide flexibility.”	The Scottish Government welcomes the Committee’s conclusion that a flexible approach to incorporation of delegated powers in legislation may be appropriate.

Recommendation	Comment
(4) “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.”	The Scottish Government’s position is that it would already expect to provide a clear justification at a Bill’s introduction, through the extensive material which will be set out in a Delegated Powers Memorandum (DPM), about why the approach on any delegated powers is appropriate in the circumstances. The Scottish Government accepts that the more expansive the powers a Bill contains the more thorough the justification that will be required, and the Government will continue to develop its approach to how it justifies proposed powers, taking account of the issues which the Committee has identified in its report. This is something that will be reemphasised across Government to ensure that those involved in developing legislation are cognisant of their responsibilities.

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Recommendation	Comment
(5) “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 call 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 information.”	The Scottish Government accepts these points. They reflect the undertakings which the Government has already given to the Finance and Public Administration Committee (FPAC) on how it will address the financial consequences of Bills. I wrote to FPAC on 6 March 2025 to confirm that the finance guidance note on preparing financial memoranda (which accompanies the Scottish Public Finance Manual) had been updated to ensure the Committee’s views were given greater prominence. Similar updates were made to the Government’s internal guidance on the preparation of Bills. I have also highlighted the importance of these issues directly to Bill Teams and Ministers, and that message continues to be reinforced.

Recommendation	Comment
(6) “The Committee considers powers allowing flexibility “just in case” are unlikely to meet the test for the necessity of the power, and as such be considered inappropriate.”	The Scottish Government accepts this general point but notes, given the wide range of circumstances which legislation might be required to deal with on a more or less urgent basis, there could be situations in which the Scottish Government considers this approach to be appropriate. Where that is the case the Scottish Government acknowledges that it would require to provide clear justification and that the Scottish Parliament, if not persuaded, may disagree that the power(s) should be included in a Bill.

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Recommendation	Comment
(7) “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.”	The Scottish Government accepts this point and would normally seek to engage with stakeholders on the development of the provisions of a Bill and any subsequent subordinate legislation. In accepting the general point it should be borne in mind that there will be instances when it might not be possible such as regulation making powers that relate to fees, benefits and registration costs which are subject to regular changes and can only be developed on an ongoing iterative basis.

Recommendation	Comment
(8) “The Committee considers that, as a general rule, a lack of policy development is not an appropriate justification for introducing framework legislation.”	The Scottish Government accepts this general point.

Recommendation	Comment
(9) “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.”	The Scottish Government notes the Committee’s position on this matter and accepts that it is ultimately up to it to determine whether development of such guidance is necessary. We would of course engage with and assist in the development of such guidance if the Committee was minded to take this an approach.

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Recommendation	Comment
(10) “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.”	The Scottish Government’s response to recommendation (4) above covers this point.

Recommendation	Comment
(11) “The Committee... 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.”	The Scottish Government notes the Committee’s position. It accepts that in some circumstances, providing Parliament with information on how a power has been used (recognising that Parliament will itself obviously be aware if a power has been used given its scrutiny role) or intends to be used, may be appropriate. However, the Scottish Government would caution against a proliferation of such requirements being put onto the statute book. The Scottish Government would encourage committees to take a proportionate approach and consider all non-statutory options, and engage in dialogue with the lead Minister for a Bill, before seeking to add statutory reporting or review provisions to Bills. Where any committee requires more detail or information in considering legislation at Stage 2 then the expectation is that lead ministers and Bill teams provide that. Again, this is something that will be reemphasised across Government as set out in the response to recommendation (4).

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Recommendation	Comment
(12) “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.”	The Scottish Government notes, and agrees with, the Committee’s conclusion on this point.

Recommendation	Comment
(13) “The Committee supports the use of super-affirmative procedure to enhance effective parliamentary scrutiny.”	The Scottish Government notes the Committee’s point. It agrees that there is a place for super-affirmative procedures in certain circumstances, but these should only be created where there is genuine need. As at the responses to recommendations (4) and (11) this will be reemphasised across government.

Recommendation	Comment
(14) “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”.	The Scottish Government notes the Committees recommendation and will take it into account in the development of future Bills.

Recommendation	Comment
(15) “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.”	The Scottish Government notes the Committee’s observation, and also notes that committees can exert influence by engaging with consultations on the development of instruments being brought forward under other types of procedure.

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Recommendation	Comment
(16) “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.”	The Scottish Government notes the Committee’s observation. In most relevant scenarios the development of secondary legislation will be informed by a consultation process, and that consultation process will be brought to the attention of the relevant subject committee. The Scottish Government would encourage relevant subject committees to engage with that process where it wishes to influence the development of policy.

Recommendation	Comment
(17) “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.”	The Scottish Government notes the Committee’s conclusion on this matter. The Government would highlight the challenges around timescales and proportionality which would arise in seeking to create a process for amending secondary legislation. On a more general point, the Government would note that the purpose of delegated powers is that when scrutinising any proposed powers Parliament needs to consider whether or not it is content to delegate the power, knowing that it will still have the opportunity to scrutinise the use of that power in future and be able to reject or annul regulations depending on what procedure they are made under. The Government is not clear that a formal think again power is necessary in the context of the Scottish Parliament’s procedures for scrutinising delegated powers, which already provide it with the ability to systematically scrutinise any subordinate legislation which the Government brings forward.

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Recommendation	Comment
(18) “The committee does not consider further exploration of a sift process necessary at this time.”	The Scottish Government notes, and agrees with, the Committee’s conclusion on this matter.

Recommendation	Comment
(19) “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.”	The Scottish Government accepts this recommendation, which is in line with its current practice in the development of delegated powers which can be used to amend primary legislation.

Recommendation	Comment
(20) “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.”	The Scottish Government agrees that it will ordinarily be clear from a DPM that a proposed power will be capable of being used to amend primary legislation. However, Scottish Government officials are happy to work with clerks to consider what approaches to the formatting and presentation of information in DPMs might help make this as clear and as accessible as possible.

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Recommendation	Comment
(21) “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 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.”	The Scottish Government’s response to recommendation (11) above covers this point. The Government would again highlight the need for a proportionate approach, the consideration of all non-statutory options, and the need to engage in dialogue with the lead Minister for a Bill, before seeking to add statutory post-legislative scrutiny provisions to Bills.
Recommendation	Comment
(22) “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.”	The Scottish Government notes, and agrees with, the Committee’s conclusion on this matter.

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