OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 14 January 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 14 January 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rosemary Agnew (Scottish Public Services Ombudsman)
Lloyd Austin (Scottish Environment LINK)
Michael Clancy (Law Society of Scotland)
Vicky Crichton (Scottish Legal Complaints Commission)
Jonnie Hall (NFU Scotland)
Kay Springham KC (Faculty of Advocates)
Adam Stachura (Age Scotland)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 14 January 2025

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the second meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch to silent or turn off their mobile phones and other electronic devices.

The first item of business is to make a decision on taking business in private. Does the committee agree to take agenda items 5 and 6 in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

Rural Support (Improvement) (Miscellaneous Amendment) (Scotland) Regulations 2025 [Draft]

09:30

The Convener: The committee will now consider an instrument that is subject to the affirmative procedure. No points have been raised on the draft instrument. Is the committee content with the instrument?

Members *indicated agreement.*

The Convener: Does the committee wish to note that the original draft of the instrument was withdrawn and the present version laid following questions that the committee raised with the Scottish Government?

Members *indicated agreement.*

Instrument subject to Negative Procedure

Bread and Flour Amendment (Scotland) Regulations 2024 (SSI 2024/387)

09:30

The Convener: The committee will now consider an instrument that is subject to the negative procedure. No points have been raised on this Scottish statutory instrument. Is the committee content with the instrument?

Members *indicated agreement.*

Framework Legislation and Henry VIII Powers

09:31

The Convener: We move to agenda item 4, which is an evidence session for the committee's inquiry into framework legislation and Henry VIII powers. I welcome our first panel of witnesses. Rosemary Agnew is the Scottish Public Services Ombudsman, Lloyd Austin is the convener of Scottish Environment LINK, Jonnie Hall is the deputy chief executive officer and director of policy at the NFU Scotland, and Adam Stachura is the associate director for policy communications and external affairs at Age Scotland.

Do not worry about turning on the microphones, because that will happen automatically. If you would like to answer a question, please raise your hand or indicate to the clerks. There is no need to answer every question, but please feel free to provide a written follow-up to any question after the meeting. We plan to spend approximately one hour on questions before we move on to our second panel of witnesses.

In your written submissions, you have all expressed your views on when framework bills are appropriate and when they are less appropriate. Are there particular policy areas for which framework legislation might be more appropriate? If so, why? If not, why not?

Jonnie Hall (NFU Scotland): I am happy to kick off. I represent farming and crofting interests, so I will refer to the Agriculture and Rural Communities (Scotland) Act 2024, which was passed by the Parliament last June. The world of farming and crofting is integral to Government policy and objectives around things including food, climate change, biodiversity and rural communities.

Farming and crofting are long-term issues, so we need to be able to adapt and develop policy over time. The flexibility of a framework bill is very much what we require and it is very much what we got in the 2024 act. That means that ministers have powers to do a wide range of things that are set out in part 2 of that act. The approach provides flexibility for the future, as things change and as the dynamics of what Scottish agriculture is facing up to and what it is asked to deliver change.

A framework approach provides scope for whatever ministers decide to do in setting objectives, in consultation with us and other stakeholders, to adjust and amend things. If things were written into a bill and were therefore fixed for a significant time or required further primary

legislation to amend them, we would not have flexibility and adaptability.

Lloyd Austin (Scottish Environment LINK): Thank you for inviting us to give evidence today.

I agree in part with a lot of what Jonnie Hall said. The issue is that there is no hard and set rule about what is appropriate and what is inappropriate. It is important to use a framework approach to provide flexibility, but the caveat is that there should be limits on that flexibility and, where decisions are substantive, primary legislation should set limits to the policy.

I agree with Johnnie Hall that a framework approach on the agricultural and rural communities side of things was appropriate, but where I disagree with him is in that the Agricultural Support and Rural Communities (Scotland) Bill was so framework-led that it could have resulted in all sorts of outcomes, some of which the NFUS might not have liked. The NFUS was slightly trusting in that it thought that all the political parties were pushing in the same direction and that, therefore, the secondary legislation was going to deliver. We at Scottish Environment LINK felt that the framework in the bill could have been more substantive by, in effect, defining the policy outcomes and objectives more clearly.

Rosemary Agnew (Scottish Public Services Ombudsman): Good morning. I agree in principle with a lot of what my colleagues are saying. There cannot be a hard and fast rule because each bill has to be considered based on circumstances, what it is trying to achieve and what its set outcomes are.

Generally, it is helpful to have a framework-type approach, particularly when setting up a new organisation, because you have the flexibility to develop some of the lower-level policy, including the organisation's processes and how it is governed and run. If there is too much in a bill, organisations risk operating in such a way that they are constantly trying to meet what the legislative text says rather than the outcomes that the bill is trying to achieve. The Regulation of Legal Services (Scotland) Bill is a really good example of a bill in which that has happened—I know that the Scottish Legal Complaints Commission will speak after me. There was so much in that bill that it restricted the extent to which organisations could operate effectively.

The other side of the issue relates to the point in time when things happen. If you are trying to put substantial policy in place before you have the framework legislation to deliver it, you need some form of policy framework. I have observed that in relation to, for example, the national care service, which is being co-designed and legislated for at the same time. It is quite difficult to say what a service should look like if the policy and legislative side has not been up to a point articulated.

My final point is about long-term risk. A bill is passed in the context of the Parliament and Government that are in place at the time. If a bill is too flexible with regard to its framework and the secondary legislation that can be passed, a different Government and a different Parliament might take a completely different view and end up with something that was not the original intent of those who passed the bill in the first place.

Adam Stachura (Age Scotland): I will be brief. As the NFUS has described, there will be circumstances in which a framework bill has worked well for a particular purpose.

We have all seen examples where things move at a fast pace. The Coronavirus (Scotland) Act 2020 is one example where the Parliament had consensus and the flexibility to adapt to fast-moving and changeable circumstances that were outwith its control. That meant that members could see the bill's purpose and the direction in which they were going, and they could make sure that the Government had the necessary fast-acting powers to adapt.

There are certainly circumstances in which that approach is possible. However, in the light of the evidence that the committee has received thus far, and as we scrutinise the whole process, it is quite hard to find a definition of what that approach should look like, or how consistent it should be.

To respond to the ombudsman's final point, I note that a Government or a Parliament can change its view on what is necessary, depending on whether the votes are there.

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. We have seen a few examples of that, thus far.

The Convener: That takes us nicely to the next question regarding definitions. Last week, the committee heard evidence on whether there should be a definition of framework legislation, and it came across very clearly that that that would be difficult, because such legislation is a spectrum rather than something that is set hard and fast. That has helped to shape what the evidence sessions going forward will be. We also considered whether framework bills should be labelled as such when they are introduced in Parliament. Would labelling bills as framework bills be useful for stakeholders and help to improve scrutiny? If so, why?

I will start with you, Adam, since you went into this debate first.

Adam Stachura: I will take the second part of your question first. Labelling a bill as a framework bill might not, in itself, be hugely helpful, because that can be a bit jargony. That is my personal view. Doing so might be fine for stakeholders who are professionally in tune with things. However, we can look at a bill and as soon as we see that there is hardly any detail, we will probably guess that it is a framework bill. That can be seen either by the word count or the page count, or by its being wholly vague.

It is really important to make sure that Scotland's legislative process is open to the public and that people understand what bills are about. We have quite a good process anyway, with policy memorandums and explanatory notes when draft bills are published. Those are available in more accessible and clearer text.

It is not just for stakeholders to understand bills: it is for the general public, as well. For instance, it is important that, when you are consulting on a bill, through whichever committee and at whichever stage, you do not just rely on contributions from professional organisations or on people who do that as their trade and craft.

We need to make sure that a definition does not create jargon. Is "framework" the right word? I am not entirely sure, but my guess is that it might not be.

Rosemary Agnew: My answer reflected partly on the comments that were made in previous evidence. When we sent our written submission to the inquiry, we thought that everybody generally understands what is meant by a framework bill. Yes—there is likely to be a spectrum. Some bills will be very much framework bills and some will be marginally framework bills. 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.

On the whole, I think that the framework-type approach, on whatever part of the spectrum, gives the flexibility that colleagues have talked about. However, there is also a risk that, if you go too far in pinning down a definition, you give people an opportunity to work around it, as opposed to providing something that is relatively flexible and on which the expectation is that what is put forward will be examined, scrutinised, challenged and developed.

Lloyd Austin: I agree particularly with Rosemary Agnew's point about scrutiny. I read the evidence from last week's witnesses, and I think that the point about there being a wide spectrum—from a strong framework to a weak framework, so to speak—means that it is very difficult to pin down a single definition. It is much more important to scrutinise the structure of the framework and whether or not that framework is within clear policy objectives and sets a clear purpose for the legislation.

Secondly, there is the issue of what happens next. What is the scrutiny process for either the secondary legislation, the plan or the strategy? We have noticed that often framework-type legislation does not result in secondary legislation, but results in plans or strategies.

09:45

In our field, as well as the rural support plan under the Agriculture and Rural Communities (Scotland) Act 2024, which Jonnie Hall mentioned, we have the Climate Change (Scotland) Act 2009, for which there is a climate change plan, and the Circular Economy (Scotland) Act 2024, for which there is a circular economy strategy. Those plans and strategies, some of which have to be subject to parliamentary scrutiny and some of which do not, are, in effect, the implementation of framework legislation, even though they are not in themselves secondary legislation. They are, therefore, equally important. How they are scrutinised and developed is much more important than a definition or a label.

Jonnie Hall: I probably agree strongly with colleagues on that. I do not see an absolute need for a distinct and clear definition of whether a bill is a framework bill. As colleagues have said, it is far more important to look at its content.

I refer again to the Agriculture and Rural Communities (Scotland) Bill—which is now the 2024 act. To me, part 1, which set out the clear objectives of the legislation, is far more important than whether the bill was described or labelled as a framework bill. Those objectives having been set out in part 1, it was then about what proposed powers in part 2 of that legislation became of significance. In other words, how do you create the policy environment to deliver on those objectives?

That brings us back to the point about scrutiny because, clearly, through part 2 of the 2024 act different powers will involve use of either the affirmative procedure or the negative procedure. That goes back to the flexibility that we have all referred to: on occasion, Governments need to be fleet of foot, for want of a better expression, in order to take actions to rectify or improve a situation, whatever that might be.

What I particularly like about the 2024 act is, as we have referred to, the rural support plan, which the Scottish Government has an obligation to produce. That production will be done through

consultation, and there should therefore be scrutiny in the Scottish Parliament, as well. We can all then operate that framework—I must use that word, I am afraid—and see where we are going.

Primary legislation does not need to involve a binary choice about whether it is a framework. It is more about what is in the objectives, and then what the powers are for delivering those objectives. That is far more important, in my opinion.

The Convener: From respondents who have sent us information, we have heard a range of views on whether there should be guidelines on when framework legislation can be introduced. What are your thoughts on the establishment of set criteria to govern when framework bills can be introduced?

Certainly, the submission from the NFU Scotland highlighted three points, which I will read out. It says:

"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."

Jonnie Hall: We have probably touched to a degree on some of those issues already. In the first place, an understanding of the policy objectives is clearly required. An awful lot of that comes out in discussion and negotiation with the Government. Certainly, in terms of agriculture and rural issues, the Scottish Government has set out very clear objectives about where it wants to be. It has a vision of sustainable regenerative agriculture and it has objectives on ensuring that agriculture and land use meet climate change targets as well as continuing to produce high-quality food, and all the rest. The vision or end point is relatively clear.

The issue is then about how Scottish Government engages with key stakeholders, of which there is a range. It is not just about farming and crofting interests; it is also about environmental interests, community interests and so on. Therefore, you need to consider how much co-design happens even before you get to a bill being introduced. That has been important and it has certainly been the approach with agricultural policy in Scotland since Brexit. Yes, we had to have a degree of stability, and we had the Agriculture (Retained EU Law and Data) (Scotland) Act 2020, which provided continuity around the common agricultural policy in order to continue to deliver much of the same policy through the period 2018-19 to 2020-21 and so on.

However, in the background, there was also thinking about how Scotland could do that for itself. That is quite challenging, because so much legislation on agriculture and rural development—and, indeed, the environment—has come from Europe. It has been a case of adapting European policy and directives to meet Scotland's needs. There has been some scope to do that, but there has been a long history of doing that through engagement with stakeholders. 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. Scotland is a pretty small community, certainly in terms of rural issues, and our relationship with other stakeholders and with the Scottish Government in developing such things has been critical in getting the right outcomes.

Lloyd Austin: On the original question about guidance and criteria, if you do not have a single definition or label, to what are you giving guidance and applying criteria? That is the difficulty. Therefore, to some extent, the guidance should be about the legislative process in general.

The second question relates to things that some of last week's witnesses said—namely that, whatever form it takes, guidance is only as good as the extent to which Parliament is willing to enforce it. If a future Government seeks to stretch the boundaries of the guidance, Parliament must be willing to say no and reject a proposal. Otherwise, the guidance will not be taken seriously.

In more general terms, on what might be in such guidance, I kind of agree with much of what Jonnie Hall said and with the NFUS criteria that you listed, convener. However, the overall outcomes point is absolutely vital, because, in a sense, that is what provides the real structure to whatever the framework is. A framework must clearly set out the broad policy direction and intent. Although I agree in part with some of what Jonnie said about the 2024 act, what was in the act itself did not reflect in full the vision for agriculture and co-design or the fact that subsequent policies must be consistent with that vision. It was a slightly weak framework, and the link between the purposes and the powers that were provided was relatively weak.

The same can apply to other things, but, equally, I agree that flexibility is important. In the environmental world, one of the reasons why we can see benefits of using framework legislation or leaving some things to secondary legislation is that science is always moving on. Some things need to be changed and updated quite quickly as new technologies are developed, new discoveries are made and circumstances change, so you would want any policy framework to have that sort

of flexibility and the ability to adapt to circumstances.

Rosemary Agnew: I will add to what my colleagues have said, rather than repeating anything. There is a relationship between framework legislation and the term "co-design" that we are all hearing and using. A point was made about guidance and criteria. I agree that it would be difficult to specify criteria without specifying exactly what framework legislation is going to be, but there are some general guidelines that should made clear.

I was very taken with the NFUS's three points. It is important to be flexible and adaptable to meet evolving needs over time. That is also critical to stakeholder engagement—and I will come back to that point. However, the objective or outcome is fundamental. I have experience of being part of a co-design approach to the legislation to create the role of the independent national whistleblowing officer. That role was created through secondary legislation. It was a positive experience and there was co-design of both what went into the order and what it might look like when implemented. On reflection, what made that a good and positive experience was that the policy intent was very clear and had, up to a point, already been decided, so that our job was to have legislation to deliver that role and to know what that delivery might look like.

When we look at any form of guidelines, it is worth separating the co-design of the policy that informs the framework and the legislation from the co-design of how that policy will be delivered. Those are two quite distinct things but they get used too interchangeably and are often used at the same time but for two different reasons.

To summarise, flexibility is important, as is ensuring positive stakeholder engagement from everyone, including those who deliver services as well as those who are in receipt of them. Clear policy intent is fundamental. That does not have to go to the nth degree, but it should go one step further than vision.

Adam Stachura: I have nothing to add.

The Convener: Daniel Johnson has a supplementary question before I bring in Roz McCall.

Daniel Johnson (Edinburgh Southern) (Lab): I will push Jonnie Hall and Lloyd Austin on a couple of the points that they raised.

I understand the point about flexibility, but you have discussed the need for consultation and scrutiny. When powers are delivered through secondary legislation, there is actually less of a requirement. Parliament has very clear rules: our three-stage process is clearly laid out and is open, allowing people make submissions. However, there is no pre-configured format for what consultation the Government might require for legislation—sometimes, it is not specified at all. If you want scrutiny and consultation, would you not be better off with primary legislation?

Jonnie Hall: I go back to the Agriculture and Rural Communities (Scotland) Act 2024, which created powers but does not specify how those powers are to be used. That will come in secondary legislation.

Daniel Johnson: Is that not a problem?

Jonnie Hall: No. As I outlined earlier, we must be able to adapt, develop and be flexible over time. I will give you an example. Provisions in part 2 of the 2024 act allow the Scottish Government to deliver a market intervention to shore up a commodity because of some external crisis, perhaps relating to a geopolitical event such as the unfortunate war in Ukraine. If those powers were not there in the first place, ministers in Scotland would have their hands tied, but if those powers had been written into the bill and were part of primary legislation, they would be fixed and rigid, with no flexibility.

10:00

I will give you a real example of that. Following the floods of October 2023, the Scottish Government was able to move quickly on the back of having already created the flood bank restoration scheme. Flood banks had been blown out, and it was able to provide financial support so that farmers could fix and restore flood banks very quickly, using that funding.

If we do not have that sort of flexibility through our own legislation, which we have had to a degree—I refer to the common agricultural policy stuff and how that worked out in practice in Scotland over time—we might end up in situations where we do not have that adaptability.

I totally accept that we want scrutiny and co-design, but there are certain times when a Government might need to act pretty quickly. Also, as the objectives change, or when there are what Lloyd Austin referred to as science and evidence changes, you might want to change the way in which you are delivering current policy, by using different mechanisms. You might want to change the levers, such as financial support or capital investment—or whatever it might be—in order to bring about a certain outcome or to prevent an outcome that would be an unintended consequence.

Daniel Johnson: We can probably legislate without using emergency procedures in a three to four-month period. In emergency situations—

Jonnie Hall: 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, for example. Lots of diseases are circulating in Europe now, and a foot-and-mouth disease case was just confirmed in Germany. I think that a foot-and-mouth disease issue would actually be dealt with on a United Kingdom basis and not as a Scottish Government decision only; however, if we had an outbreak of a disease as horrific as that—just to give an example—what measures could any Government put in place quickly if it did not have the flexibility and power to do those sorts of things? That would be a danger.

Daniel Johnson: Are you talking about legal restrictions or financial measures?

Jonnie Hall: Both.

Daniel Johnson: Financial things are at the discretion of the Government, are they not?

Jonnie Hall: They are, but the Government needs a legal basis on which to give financial support. It cannot—

Daniel Johnson: That is what the budget is for.

Jonnie Hall: Yes, but no Government anywhere can just hand out money to third parties without having some sort of legal basis for doing so.

Daniel Johnson: I think that it can, but I will leave it there.

Roz McCall (Mid Scotland and Fife) (Con): Good morning, everyone. You have already touched on the topics that I am looking to speak about, especially co-design.

I come back to something that Lloyd Austin mentioned—the idea of having a weak framework to start with and then secondary legislation coming in. One of my biggest concerns about this issue has always been, again, the financials. A financial memorandum is attached to a bill, but if there is no detail coming through, you have no idea, and we always end up with legislation that does not have the financial clout on which to follow through in secondary legislation.

Is that a legitimate concern if we do not get the framework side of things right in primary legislation, right up front? What are the consequences of weak bills and co-design, where everything seems come in secondary legislation?

Lloyd Austin: As we wrote in our evidence, judging the substance of the policy memorandum and the financial memorandum can be difficult if you have no idea what the content of the secondary legislation—or, indeed, the plan or strategy—and its consequences will be. That is why we would definitely favour a stronger framework that sets out—as I think Rosemary Agnew said earlier—a clear policy position on what the Government is trying to achieve with it.

On Johnnie Hall's answers to Daniel Johnson, I agree that the Government needs the flexibility to address circumstances, but that can be part of a framework. When there is no emergency or when there is no particular event, dear boy, you want clarity around what the framework is trying to achieve. Within that framework, you can have a provision for an option to act quickly in certain circumstances.

One piece of legislation that we expressed concern about was the Circular Economy (Scotland) Act 2024. 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?

If you have a framework approach, you need to build into it clear parliamentary oversight of the subsequent measures. Questions were debated at last week's committee meeting about the processes for secondary legislation, plans and strategies, and if we are going to have more framework approaches, the way forward might be to spend less time on the primary framework and more time on the secondary stuff, so that instead of having the simple negative or affirmative procedures, we have some kind of new mechanism for secondary legislation on plans and strategies.

Roz McCall: Does anyone else want to come in on that?

Adam Stachura: It is obvious that the NFUS feels that there has been a framework bill that is working really well. It gives flexibility and the consultation feels that it is working well. However, if we look at some more recent bills, such as the National Care Service (Scotland) Bill, co-design, co-production, secondary legislation and regulations are doing a lot of heavy lifting. We have been looking at the issue for four years, so there must come a point at which we suggest that, if there is enough detail, it can be changed from being a framework bill into something more substantive. Setting aside the absolute necessity for the reform of social care, the whole parliamentary process has been about lack of detail and a lack of understanding of the financial implications of the legislation.

We are now on the political point about what the Government is going to do and what changes it will make. We are on First Minister number 3 and the second responsible minister since the National Care Service (Scotland) Bill was introduced. At any point, a First Minister could decide that they want to do something completely different.

On a minor point, the previous First Minister, Humza Yousaf, decided that the arrangements for accountability and responsibility would change and there would be a tripartite agreement that was not in the original legislation, but it was not built into the framework. The politics can change quite quickly, not just when there is a new Parliament or a change of Government, but even when there is a new First Minister.

I am not necessarily saying that the National Care Service (Scotland) Bill has changed radically, because there was not much there to begin with. It was hard for us to disagree with any of its objectives or the values behind it. However, it is quite hard to see the outcome of the extensive co-design and co-production processes that have been happening for many years and, once it is in the machine, the interventions that have been made and accepted or adopted.

With stage 2 amendments to that bill, we found that, although there was co-production through the expert legislative advisory group that we are part of, my goodness, it was hard to work out what we were meant to be doing.

Roz McCall: Is that purely because the key outcomes were not as defined as they should have been, or were they there but, as the co-design went through, it became more obvious that the outcomes were not achievable? I am sorry to be daft about that.

Adam Stachura: It is not a daft question. The general outcomes were there but, over time, some of them shifted in regard to what they would look like. In the case of that bill in particular, the Government wanted to get it into the Parliament so that Parliament could start its scrutiny and so that the Government could come up with this stuff. It is a difficult thing to do, to be honest.

However, there have been many years of this, and it is still quite hard to see the detail if you are a charity or other organisation—how might you amend it and where is the hook? There is nothing in the framework to show things that you might think are absolutely necessary, and you have to have a lot of trust in the Government.

About 18 months ago, I attended perhaps three committees that were scrutinising the NCS bill; they were all asking the same questions. One of the questions from committees was whether I thought that a framework bill was appropriate, and, on a couple of occasions, my answer was, “I don’t know—do you?”. It is about the power of the Parliament and the committees to consider whether something is relevant, and, to go back a couple of questions to the convener’s question about where these things might be appropriate, it is about the degree to which committees have the power or strength to send something back to the Government and say, “It is not good enough—come back with it, because it’s not right”.

There is the politics and the trust in some of these things, and secondary legislation and so on is doing so much heavy lifting that it is really hard to know where the right interventions are happening. There are some occasions where that is happening, but it might not be the case for everything, as we have seen.

Roz McCall: It goes back to the case-by-case basis that was mentioned earlier. I will have to wind up so I return to Rosemary Agnew. In an earlier answer, you spoke about the co-design core principles. Will you give me an idea of when a framework bill is the wrong approach? As Adam Stachura has just said, for the national care service, is a framework the wrong approach? Please give us your insight on that, as well. I am throwing it all at you now, unfortunately, Rosemary, but I have a limited timeframe.

Rosemary Agnew: I will start with the co-design bit and build on something that I said earlier. The word “co-design” is misused, and it should not be a process for deciding policy. As my colleagues have described, it is critical to have good stakeholder engagement to get all the views on what a policy should be. However, the design bit is what it says on the tin: it is about how you design a service to deliver that policy.

Because the national care service is so big, those two elements have, at times, been mixed up, so we have had a bit of what is called “co-design” on what the policy should be, whereas what we probably needed was a bit more stakeholder engagement on the policy and then co-design on how we deliver the policy intent.

I will touch on something that Daniel Johnson raised. I recognise his concerns. When we come to the guidelines and the question whether a framework is appropriate, I do not think that it is about whether the framework is appropriate; it is about the way in which a bill, in its particular circumstances, is taken forward. It might not be a case of criteria; it might be a case of there being guidelines that you must ensure are on the face of everything.

There must be a clear intent; there must be some form of statement on what is known about the financial side of it and on what needs to be known; and, at the very least, there must be some indication of what need is being met. In some

framework approaches, it is not always clear what unmet need the bill is there to address. The guidance is probably more about what you are expected to have done before you even bring the bill to us.

I will stop there because you are short on time.

Roz McCall: Thank you. My apologies to Jonnie Hall, but I think that other witnesses have answered on where they think this is a good idea. I do not want to encroach on that.

Jeremy Balfour (Lothian) (Con): Good morning. Thank you for coming. Before I move us on a wee bit, I am interested in returning to something that Lloyd Austin said in his previous answer, which is about spending more time scrutinising secondary legislation than primary legislation. We discussed that a wee bit last week. From a stakeholder perspective, how do you see that happening, and how would you like it to happen?

10:15

Lloyd Austin: There could be a number of ways of doing it, but one of the criticisms of primary legislation that is overly frameworky, if I might put it in that way—too far along the spectrum in one direction—is that the associated secondary legislation or the plans or strategies that are implemented are not subject to sufficient scrutiny, and that that approach is a way of avoiding scrutiny and debate. There are two answers to that challenge: either put more detail in the primary legislation, or increase the scrutiny and debate about the secondary legislation, plans and strategies.

In relation to secondary legislation, the instinct at the moment is to move more things from negative to affirmative or from affirmative to super-affirmative procedure, but I support the witnesses who spoke last week about new ways of scrutinising things that could generate substantive debate about potential amendments, or whatever. I do not suggest a three-stage approach for every statutory instrument—far from it—but, for major things, that might be an approach.

I will use the example of the climate change plan. When the previous climate change plan update was presented to the Parliament, it was considered by four committees. The Environment, Climate Change and Land Reform Committee, as it was called in the previous parliamentary session, collated the recommendations from the three other committees plus itself. In total, there were 166 recommendations to the Government on changes and improvements that might be made to the climate change plan; however, none of them was made, and the plan was simply adopted as it had been presented. That was partly due to the electoral cycle and the fact that the Parliament was to be dissolved the following week. The Government was caught between a rock and a hard place; it could not do the sensible thing either way. There could be some mechanism to ensure that the recommendations that committees make on secondary legislation are somehow followed through.

Jeremy Balfour: Jonnie Hall, I know that you are concerned about having the flexibility and speed of secondary legislation, particularly in an emergent situation. Would you have any concern around the greater scrutiny of secondary legislation, or is your concern more about its not holding anything up too much?

Jonnie Hall: Yes, it is about expediency more than anything else, I guess. I fully agree with what Lloyd Austin has just said: there is a need for scrutiny. At the end of the day, both the Parliament and the committees within it are there to act as the check and balance—to ensure that, whatever objectives and outcomes the Government is pursuing, consideration is put in place and that we go through due process.

Some things in the world in which I operate should absolutely go through an affirmative, if not a super-affirmative, approach, so that there is proper scrutiny. However, on other occasions, things need to be acted on with a degree of urgency. I therefore have no difficulty with secondary legislation being more thoroughly examined.

I will, if I may—if I am allowed to say this, and without wanting to upset anybody—point out that, on occasion, committees can become too party oriented, with politics at play. I have seen that on several occasions in committees to which I have given evidence. As a stakeholder, I do not find that helpful. I genuinely think that scoring points of party politics is not what committees are for; it is more about being objective and scrutinising both primary legislation—when you go through the stages of a bill—and, equally, secondary legislation. I do not mean that dismissively, and I hope that it is not seen as offensive, but it is very much my observation that sometimes, at committee level, it becomes about point scoring. As a stakeholder, or as someone who is representing an interest that will be fundamentally affected by the outcome of the process, that is not necessarily helpful.

The Convener: I think it is fair to say that, certainly in this committee, because it is not a subject policy area committee, a lot less of that takes place. That has been a consistent approach for many, many years in this committee, in contrast to other committees.

Jonnie Hall: That has come across clearly this morning.

Jeremy Balfour: I could change that.

The Convener: I am sure that you could. [*Laughter*.]

Jeremy Balfour: No, actually, it is a fair point to make. Parliament was set up on the presumption that members would lay aside their party politics and take much more of a scrutinising role as committee members, but I think that we have seen a change to that in the past 25 years.

I will move on, because I am conscious of time. One reason that the Scottish Government gives us for having framework bills is that much more scrutiny can be done once the bill has been passed—we can involve stakeholders, it can be co-designed, and all the other lingo that we use. Is that a reality for you? Would it be possible to do that heavy lifting—as Adam Stachura described it—before the legislation came to Parliament so that it could be put into primary legislation or is it easier to do it further down the road?

Rosemary Agnew: You are giving me the easy questions.

I think that we need to go back to where we started with framework bills. We are almost falling into a habit of talking about either primary or framework legislation and, in effect, if it is passed as a bill, it is primary legislation.

One approach is about saying, "We are delivering the whole thing—here it is." The other is about delivering a bill in stages. It may be that there is too much to do all in one go or it may be that there is a recognition that it is in quite a dynamic area so you do not want to pin everything down right at the start, because you need to look at the learning and some of the stakeholder engagement. The level of scrutiny is then a matter of looking at the delivery of that clear intent. Some of the heavy lifting on the policy side probably needs to be done first so that there is a clear understanding of what everybody is aiming for, but the level of scrutiny of the secondary legislation is perhaps where we can start thinking differently.

If we think about the purpose of scrutiny—so that all voices are heard, so that things are ironed out and so that we know where we are going—the amount of it needs to be proportionate to what we are putting in place. That is perhaps where some of the guideline-type approaches could help.

It is also important to differentiate between secondary legislation that is delivering on a framework and a policy intent and secondary legislation that is changing much clearer existing primary legislation. To give an example of the latter in relation to my role, for parliamentary supported office holders, there is the super-affirmative process, which is really important because that process means that if there is a proposed change to primary legislation that changes my function in any way, it gets proper parliamentary scrutiny, to make sure that the will of Parliament is not also being changed at the same time.

When you are looking at secondary legislation within that framework context, it is probably closer to the scrutiny that you would have had of the primary legislation in the first place. It is about asking what we are trying to achieve and whether the supplementary bit will deliver that. That is where the co-design bit becomes important, because that is about asking whether we are sure that what we are proposing meets the policy intent.

I appreciate that I have not given you a tick list of things that we could do, but we are probably at a point where we are having to slightly change our thinking rather than focus on process, if that helps.

Jeremy Balfour: Does anybody else want to come in on that point?

Adam Stachura: There are some good examples of how the Government engages with people. Although it is not secondary legislation—I cannot say that phrase today; my apologies—I think that the strategy that underpinned the Hate Crime and Public Order (Scotland) Act 2021 and the consultation process on it was exceptional. The Scottish Government officials' approach to consultation and their organisation of it, as well as their willingness to go out of their way to listen to views, was generally some of the best work that I have been involved with, and I have been around this place for 20 years. My comment refers to the strategy in itself, not necessarily secondary legislation—I was able to say that phrase once.

On the point about co-design, I will go back to the National Care Service (Scotland) Bill—although not to dwell on it too much. I genuinely believe that Kevin Stewart, when he was the minister responsible, really wanted to ensure that it worked. I think that he was really committed to understanding more about what was going to be necessary. The Government may not really have known what a national care service would look like. Over time, scrutiny of the bill became difficult, because it was not clear what the Government had come up with.

Lived experience co-production draws on a lot of people's time. Often, they do not have a lot of time or energy to give, but they have given everything that they possibly can and have not seen an outcome. It is a case of, "We said this and we agreed to it, but the reality is something completely different." I think that the feedback loop is very difficult.

Lots of people were involved in the national care service expert legislative advisory group, but nobody felt that that was a good process. The experts who were involved felt that there was an obvious outcome from those discussions and that the group was organised pretty poorly, but that it came under the guise of consultation and co-production.

Much of the time, people can put a lot into the system and do not see anything from their involvement, nor do they understand why there has been no outcome from the process. There are good uses of those kinds of process, but there are also some sub-par examples.

Jeremy Balfour: That is helpful. I will briefly touch on one other point. When we have a framework bill, there are questions about how well we can scrutinise the financial implications of secondary legislation. Obviously, we would have a financial memorandum, which my colleague Roz McCall has pointed out. Does anyone have experience, either positive or negative, of making sure that what the Government has said that legislation will cost is delivered, at the expected price?

Jonnie Hall: It becomes more challenging and, I would have thought, harder to predict once we get into different elements of secondary legislation. Certainly, from our point of view, there are many different pieces of secondary legislation that cover all sorts of aspects, not just agriculture, but rural development and land use issues. Having a financial framework up front is one thing, but what happens once we get further down the track and there are different demands on what will be a limited resource?

It is also important, not only at the primary legislation stage but particularly when we get into secondary legislation, to consider how good the regulatory impact assessments are. It is one thing to look at how Government funding will be developed and distributed, and all the rest of it, but, equally, we need to consider the outcomes, including financial and business implications, of some secondary legislation. Sometimes, I think that that is also lacking.

Bill Kidd (Glasgow Anniesland) (SNP): Thank you for the detail that you have come up with, because you have answered some of my questions. I will combine a couple of wee things, if you do not mind. Henry VIII powers allow ministers to change primary legislation by secondary legislation. Do you think that the nature of Henry VIII powers are well enough understood by stakeholders? Are those powers explained to them, or is it just assumed that they can fit in with them? From your experience of being involved in scrutiny of a bill that proposes to grant Henry VIII powers, what are your reflections on how the scrutiny process could be improved? What could make that process work better?

10:30

Adam Stachura: To make a quick point, I will say that it is sometimes about the name itself—"Henry VIII powers" is about as antiquated as it gets. It is for people on this committee who are—to paraphrase Mr Balfour, whom I met the other week—legislative geeks to be in the weeds of that. I do not mean that with any disrespect at all; if anything, it is, for me, the highest compliment in the land.

When you dig into it, what does the name mean? I think that the public and lots of stakeholders who are quite new to this, and who might have big contributions to make, do not really know about the powers and would not be able to report back properly on when they have been used, how they have been used and what opportunities there are to use them. Some people might see an opportunity to change something throughout the course of the session of Parliament.

To be perfectly honest, the title is antiquated but the mechanism might be necessary. However, it is hard to reflect properly on when the powers have been used and what scrutiny there can be of them by the committee or Parliament.

Bill Kidd: The nature of the title sounds very much like a diktat, does it not—that something is being done whether you like it or not? That is the type of unpleasant and nasty idiot that Henry VIII was.

Even if we have to keep that title, do you feel that there are better ways that organisations such as yours can achieve scrutiny and move things on in a stronger way?

Rosemary Agnew: I do not want to labour the point about the name too much, but I actually think that it is not just inappropriate, but a barrier.

I have a different experience of the Henry VIII powers—or however they are named. The starting point is how uncontroversial and straightforward the powers that you are giving to change things are. Within my body's legislation there is a provision that allows for new public bodies to be added to the list of authorities that are under my jurisdiction. It is a process called an order in council. It is very rarely used, but it is straightforward and uncontroversial. It might be that there is a public body that was missed or that should have been added when primary legislation went through Parliament. That type of thing is not just about flexibility; it is also about procedural efficiency.

I do not think that the extent to which the general populace might understand that really matters: it is important that committees and legislators understand it.

The framework approach has been described as giving Henry VIII powers, but the powers do not sit well with that concept. A lot of what we have been talking about today is about engagement, co-design and consultation. That does not, for me, fit in the concept of Henry VIII powers, which is about allowing one person to make a load of changes, irrespective of what everybody else thinks.

It is almost an antiquated concept, because what we are talking about is provision that can just go through—we are talking about speed, efficiency and, sometimes, flexibility. There might also be secondary legislation, but we are perhaps talking about something that is in between the two, because there is more parliamentary scrutiny and, by definition, more stakeholder and public commentary. I think that there probably needs to be greater understanding of that side of the matter.

Lloyd Austin: I very much agree with Rosemary's point that it rather depends on what the power is applied to. As her example shows, it can be a simple administrative and procedural update—for instance, changing a financial figure annually to uprate it by inflation. That kind of administrative update by changing primary legislation by secondary legislation seems to be quite an administrative efficiency.

Secondary legislation is subject to approval by Parliament through either negative or affirmative procedure, so it is not really a case of one person, or the executive, saying that something must happen. It will be perceived that way only if Parliament nods it through without thinking about it. To some extent, I will throw the question back to you, as parliamentarians, and ask to what extent you scrutinise secondary legislation.

What matters is that committees are scrutinising the primary legislation that establishes a Henry VIII power—or whatever modern title you give that. One difficulty is that those powers often appear towards the end of bills, but committees are pressed for time and focus on amending the earlier parts of a bill, where the policy substance often sits. That can mean that the procedural things at the end of a bill do not get so much attention.

In practice, the only environmental experience that we have had of a Henry VIII power was in a Brexit-related Westminster bill that affected Scotland and which became the Levelling-up and Regeneration Act 2023. Our concern was more about devolution than about primary and secondary legislation, because the bill created a Henry VIII power for UK ministers to amend Scottish legislation. We did not agree with that at the time and probably still do not agree with it now, but that might be a historical matter because the new UK Government is not pursuing that line. That is another area where we have experienced interaction between the two Parliaments regarding Henry VIII powers.

Bill Kidd: Jonnie Hall, do you have anything to add?

Jonnie Hall: Other than to endorse what has been said, particularly by Rosemary Agnew, I have nothing more to say.

The Convener: Daniel Johnson has some questions.

Daniel Johnson: This has been an interesting discussion. I will go back to the subject of my previous supplementary question. There are issues with scrutiny and the ability for other people to give input. Those are baked into our parliamentary processes, but it is incredibly rare for evidence to be taken regarding secondary legislation, under either the negative or affirmative procedure, and it is rare to have any sort of a formal parliamentary scrutiny beyond placing a matter on this committee's agenda and, perhaps, on the agenda of a lead committee. There is some parliamentary oversight of the substance of SSIs, but it is not just a little bit less than there is for primary legislation: it is almost completely absent.

Do we need to re-examine what happens? Do we need a parliamentary change or should the Government think about how it frames secondary powers within legislation? I put that question to Lloyd Austin first, because he was circling round those points in some of his previous answers.

Lloyd Austin: The simple answer is that you should consider the degree to which secondary legislation is scrutinised. That is in no way a suggestion that all secondary legislation needs more scrutiny, but the trouble is that there is wide diversity in secondary legislation—from simple one-line SSIs to quite substantive SSIs that deliver policy. The legislation at that end of the spectrum probably needs more scrutiny—in particular, when instruments will implement provisions from a framework act. The question is where to draw the line and how to choose the level of scrutiny to give to each instrument.

I also go back to the point that I started with, which is that the issue does not relate only to secondary legislation—quite a lot of legislation is now implemented in that way. The detail is in strategies and plans that are required by the primary legislation, but some of the strategies and plans are subject to parliamentary scrutiny and some are not. When they are subject to parliamentary scrutiny, there is no specified

process by which the Government has to take account of the scrutiny process. Some acts simply say that the strategy or the plan has to be laid before Parliament. Some acts say that it has to be laid before Parliament in draft form for a specified number of days. The climate change plan has to be laid for 120 days, but it is different for different plans. Again, there is no specification of how the Government should respond to parliamentary scrutiny.

Daniel Johnson: You mentioned guidance and parliamentary scrutiny, earlier. Bills might specify that guidance needs to be laid before Parliament but, in essence, that is a notice period before the guidance is introduced. That process does not actually require any input, and there is no ability for Parliament to amend or update the guidance, although committees could take evidence, if they want to. Are you suggesting that some thought should be given to a parliamentary role in relation to guidance, particularly when it relates to a substantial matter?

Lloyd Austin: Yes. Earlier, I gave the example of the last climate change plan. Four committees scrutinised the plan and produced a series of recommendations. The Government formally responded to those recommendations, but some of the responses said, "This is a matter for the next Government", because it was in the run-up to an election. Whether the next Government did anything is still unclear.

With all these forms of secondary implementation processes, the devil is in the detail. Whether it is scrutinising the processes or doing post-legislative scrutiny, which is another means of checking implementation, that is a crucial role for Parliament. More power to your elbow in doing that.

Daniel Johnson: Rosemary Agnew, I was interested in some of your previous answers. What you said was similar to some things that were said last week about there not necessarily being a hard and fast distinction between framework bills and non-framework bills, and the idea that the issue is more about how powers that are delivered through secondary legislation are framed and structured. You can have very broad and open powers and other powers that are very well specified. The broad parameters are set, but the issue is the detail or the levels that are left to secondary legislation.

Does that need to be an area of greater focus, so that we have models for framing secondary powers? Most legislation will involve some secondary powers—it is very rare for legislation to have none. Are you suggesting that we think about how secondary powers are framed and structured, rather than focus purely on whether a bill is a framework bill or not?

Rosemary Agnew: To an extent, yes. As I have been listening to the discussion, the two words that have come into my head are "passive" and "active". A lot of secondary legislation is quite passive, if it is done through even a basic affirmative process. You said that, when the legislation is laid, that is more like a notice period. It might be time to reflect on the discussion that happens as a framework bill—or whatever you want to call it—is being passed in order to give a view on which pieces of secondary legislation the Parliament would like to scrutinise in greater detail. At that point, there is an opportunity to take a wider view.

We could say, "Those things are about flexibility and administrative efficiency, whereas these things are at the heart of what the bill is about and what we are trying to create with it." It might be that we think less about doing point A, then point B then point C and more about the primary discussion at the first stage setting a marker for where we believe that greater scrutiny is required. There would then be an opportunity to be more active at the second stage.

The point that I am coming to is that there is no hard and fast rule. If we started to write such a rule, we would just go round in circles, because everything depends on circumstances. However, some general approaches are possible, which would be a development and an evolution of what is already done.

10:45

Daniel Johnson: I will bring in Adam Stachura, then Jonnie Hall. Are there broad things that you would like to be implemented to improve scrutiny and the process for secondary legislation in Parliament, particularly in relation to consultation or even an ability to amend secondary legislation?

Adam Stachura: There is a huge role for the parliamentary committees. Every committee that I have been at in the past couple of years has asked in some way whether there is scope for more opportunity to scrutinise. The committees' power to do that scrutiny is really important. As Jeremy Balfour alluded to earlier, that reflects the way that the Parliament was set up and the intention at that time. Has it always worked that way? It has probably not—with the exception of this committee, of course.

We also have to think about consultation and the huge amount of time and effort that are put in for stakeholders to take part in that. It is an industry in itself and, a lot of the time, it is incredibly frustrating not to see engagement on your consultation response from the parliamentary committee, the Government or local authorities.

I am thinking about what has not changed. Committees could look at evidence that was submitted previously and ask to what extent it is still relevant and whether it captures the relevant points, rather than going back to people again and again. I do not want to labour the point about the national care service or other areas of policy, but in many cases the landscape has not changed much because the world has not changed in three, four or five years. If it is still desperately needed for people, do you need to keep going back to ask how desperately needed it is? I do not think that that is necessary.

There is certainly a big role for the committees, because they have a degree of independence. We might consider how conveners could work together in a wider committee to scrutinise things and give the views of their committees. However, it is really important that the committees think about the evidence that they already have from the first wave of consultation, and consider how relevant it still is. As a follow-up, stakeholders could then be asked for documents that are required to fill in the blanks.

Last year, Age Scotland took part in 35 policy consultations, but we do not have a huge number of people undertaking that work. A lot of consultation goes on behind that, because it does not just involve Adam Stachura sitting there and saying, “This is what I think”. That is as far as it could be from what we do. A huge amount of effort is involved, so it is important that the committees also work with what they already have.

Daniel Johnson: Finally, I will bring in Jonnie Hall. The thrust of my previous supplementary question was that, sometimes, powers are set out in legislation that are so broadly stated that they could almost be used for entirely opposite objectives to those that were intended. I understand the point about flexibility, but is there a need to have more scrutiny and input on such things when instruments are going through Parliament? If so, do you have any thoughts on what that could look like and what would be useful—without impeding the flexibilities, which are clearly important—if there are pressing issues?

Jonnie Hall: I agree. I fully support what my colleagues have just said. I particularly liked Rosemary Agnew’s comment that it would be impossible to set strict rules on how different pieces of secondary legislation should be handled because they are so varied and there are different needs and circumstances.

However, I like the set of principles or guidelines on the passive versus the active. The active side involves doing something different and fundamentally changing policy by implementing something new or different stemming from a new piece of primary legislation. That is when full scrutiny needs to be undertaken, and that should involve all the stakeholder input and consultation that you think is relevant and right.

There are other occasions when secondary legislation needs to go through a process to provide business as usual and continuity. Certain things have time limits or just need to be renewed, and those things do not require the same levels of scrutiny. We need some sort of differentiation. Some guidelines on that—rather than hard rules—would help.

Daniel Johnson: The classic example is changing a price that is specified, because prices have to keep pace with inflation. You do not want to go through the primary legislation process every time you do that.

Within the parameters that you were setting out in relation to the agricultural support legislation—the Agriculture and Rural Communities (Scotland) Act 2024—do you think that, to safeguard future Administrations in future sessions, such powers need to be accompanied by corresponding duties on ministers to have regard to particular purposes or outcomes? You might not be specifying what happens in minute detail, but you would at least be establishing and framing what things ministers should be having due regard to or seeking to achieve through the use of the powers, if they are broadly stated.

Jonnie Hall: I agree, and that is why there is a requirement in the 2024 act to have a rural support plan. That almost goes back to the point that Lloyd Austin made about the fact that so much of what we are trying to deliver in terms of policy outcomes is guided by some sort of strategy or plan. The legislation has to conform to that. Equally, however, the policies themselves need to be reviewed from time to time: nothing can be set in stone, because we live in a changing and dynamic world.

I think that there needs to be a framework. I spoke earlier about the clear objectives under the 2024 act. There are clear objectives in part 1; part 2 is all about delivering on those objectives. The how—the mechanism bit—is in part 2, and that is where the secondary legislation comes in. Clearly, you want to ensure that that is done properly—which goes back to the point about having the right sort of scrutiny at that level.

Lloyd Austin: To follow up on your comment, Mr Johnson, on ministers having regard to objectives or to a framework—what Jonnie Hall calls the agriculture policy objectives—when ministers produce the rural support plan, they must have regard to those objectives. The difference between Jonnie and me is that we differ on how detailed those objectives should be, if you

see what I mean. I think that the objectives could be further developed to provide a stronger framework for ministerial regard when the rural support plan is produced.

Daniel Johnson: Thank you: that was a really helpful addition.

The Convener: I thank the witnesses for their contributions in their submissions before the meeting and for your contributions today. If there are points that you wish to highlight that you have not put on the record today, please do so in writing to the committee afterwards.

10:53

Meeting suspended.

10:59

On resuming—

The Convener: I welcome our second panel of witnesses. Michael Clancy is director of law reform at the Law Society of Scotland; Vicky Crichton is director of public policy at the Scottish Legal Complaints Commission and Kay Springham KC is from the Faculty of Advocates.

Before we start, I remind witnesses not to worry about the microphones because they will be switched on automatically, and do not feel that you have to answer every question. Simply indicate if a question is not for you—that is fine—and if you want to come in, please indicate to me or the clerks. We plan to allow approximately one hour for questions. Panel 1 overran a little.

I move directly to questions. I am conscious that the witnesses were sitting in the public gallery for the first evidence session, so you will have heard some of the first panel's comments, and you will have seen the *Official Report* of last week's meeting. Should a definition of framework legislation be agreed between the Scottish Government and the Scottish Parliament, and if so, why? How would a definition aid scrutiny? The first panel of witnesses discussed that a great deal. Could having a definition have any unintended consequences?

Kay Springham KC (Faculty of Advocates): I begin by saying that I am here to speak to the response from the Faculty of Advocates, and if I say something beyond the response, it is my personal opinion.

On your first question about whether there should be a definition of framework legislation, I do not think that we express a view about that in our response. However, having listened to some of last week's evidence and read some of the responses to the committee, I can see some value in having a definition of what a framework bill is, if there will be some consequences to that.

Some of the academics who attended the committee meeting last week said that having a definition would be helpful for their research but, with all due respect to them, that is not the main point. The reason why one could see some advantage in having a definition is that it would enable you as legislators and us as lawyers to understand when we are in the territory of framework legislation.

However, there have to be consequences to that. From a parliamentary perspective, could there be accompanying expectations on what should happen if there is a framework piece of legislation? It is clear that we need to know whether there will be consequences if we are in the territory of framework legislation.

From the point of view of someone who appears in court looking at legislation, whether it be primary or secondary, the greater the understanding that we have of what Parliament was trying to achieve, perhaps the easier it is for us to understand whatever challenge to the legislation has been brought forward.

That would be my view on the rationale for having a definition, but I also agree with what some witnesses on the first panel and some witnesses last week said, which is that these are not hard and fast rules; it is on a spectrum, so anything that you do would have to be by way of principles. We can look at those principles and say, "Yes, we tick the box on that, and we tick the box on that, which probably means that we are in the territory of framework legislation," but what consequences flow from that? I hope that that is helpful.

Michael Clancy (Law Society of Scotland): It is an interesting question, and I take the point that Kay Springham raises. It is the "So what?" provision that would be important to know. Let us say that there is a supplementary question. Would primary legislation establish what framework legislation is? Would an amendment to the standing orders of the Parliament set out what framework legislation is? Would there be guidance from the Parliament or the Government about what framework legislation is? That issue of consequence follows, to the extent that one can see that there might be various gradations of consideration to certain types of framework legislation.

I am not sure whether a definition is something that we need. The analysis from the Scottish Parliament information centre sets out that people generally—at least, those who responded to the consultation—have a pretty good idea of what the nature of framework legislation or skeletal

legislation, or whatever you want to call it, is; it is all the same. If a general understanding has arisen out of common law development, as it were, or academic work, to focus the attention of people such as thee and me on the issue, so be it.

However, the real point is, if there were to be a definition, what would we expect from it? How would it change attitudes in the Parliament to the way in which it deals with legislation? How would it change the attitudes of Government? Would Government behaviour's shift in any appreciable way, except in compliance with whatever the Parliament decided was the definition of framework legislation?

I hope that that is helpful.

The Convener: It is helpful, and it is very thought provoking. Thank you, Michael.

Vicky Crichton (Scottish Legal Complaints Commission): Good morning. I agree with everything that has been said, and in particular with comments from previous panels about the idea of a spectrum. It is ultimately for the Parliament to decide how much detail is sufficient in any given case. That judgment would be very much based on the detail of any particular piece of legislation and the context in which it operates.

For me, there is perhaps more a question that the Parliament or an individual committee should ask itself when it looks at a particular piece of legislation: 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.

From the Scottish Legal Complaints Commission's specific perspective, the previous panel noted that, obviously, secondary legislation flows from primary legislation, but so do the plans and strategies that the Government might write. Rosemary Agnew has helpfully teed me up to say that the legislation that sets up public bodies often requires those bodies to write statutory rules, for example, for how they deliver their powers. I add that to the mix: powers are granted not to ministers but to other bodies. In those circumstances, that question of scrutiny is again really important. What does the legislation say about how the public body delivers those powers and how it consults on things such as its statutory rules? We have to consult on ours with a wide array of organisations. What are the requirements for scrutiny from the Parliament—for example, on the laying of budgets in the Parliament—and so on?

There are multiple layers of where that scrutiny is required, and it will look different for different pieces of legislation.

The Convener: We heard last week about the spectrum. It is fair to say that it would be difficult to get to an exact definition of framework or skeletal legislation. However, we heard last week and this morning about a potential set of criteria for considering framework or skeletal legislation.

I read out the three points that NFU Scotland made in its submission earlier and I will read them out again for the witnesses to hear:

"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."

Would those three points aid any definition of or assistance with what people consider to be framework legislation and the scrutiny of said legislation? I will start with Vicky Crichton.

Vicky Crichton: I think that they would. They speak to the issues that have come up throughout the inquiry that play out in different ways in different pieces of legislation. It is important that the Parliament has a clear idea of the policy intent and that all stakeholders understand it, as a bill becomes an act and moves into its implementation.

The point about flexibility is also incredibly important. As you will have seen from our evidence, insufficient flexibility can cause real issues. In our case, as a public body discharging our duties and being able to react to changing circumstances, it is important that the Parliament sets out its expectations of public bodies and what outcomes it intends them to achieve, and that it holds public bodies to account for those. However, the how we do it should give us the flexibility to be able to react to circumstances. When that is not possible, it can call into question whether the public body is truly able to fulfil those objectives.

I can give some more detailed examples, if that is helpful.

The Convener: Yes, if you would like to.

Vicky Crichton: As Michael Clancy and Kay Springham will be well aware, the legislation that sets out the Scottish Legal Complaints Commission's powers is absolutely at the opposite end of the spectrum in terms of legislation. It sets out a detailed process, which, in a parliamentary debate on a bill, can be reassuring for stakeholders in order to understand what is going to happen, but that legislation is now 18 years old, so there are things in there that we could not possibly have foreseen when it was passed. A really good example is the definition of documents, which is very much about paper documents, which raises the question whether that definition includes

the electronic documents that legal services are now using.

More fundamentally, on trying to respond to situations that arise, 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.

11:15

The Convener: That was helpful—thank you. Do you want to comment, Kay?

Kay Springham: I do not want to specifically comment on the legislation that my colleague Ms Crichton has mentioned. However, on your question, which was about NFU Scotland's views on how to define framework legislation, I think that I am right in saying that the Hansard Society's response gives some suggestions for how one might reflect certain principles in defining what framework legislation is. On behalf of the faculty, I would simply want to refer the committee to that.

As I have said, and as we have all acknowledged, 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. Therefore, any principles that are framed must have flexibility if we are to get at the heart of the question whether something that parliamentarians are looking at is framework.

Michael Clancy: As for whether something is framework or not, that actually begs part of the question, because most legislation is frequently part framework and part substantive. That is an important consideration when we are talking about this, because the life of a bill can change very quickly from the moment that it is introduced, through its stage 1 process to stages 2 and 3. As we know—and this is a nod to something that we were talking about before the session began—a bill can, at stage 2, turn out to have 537 amendments lodged to it. That is not the record—I think that that record is held by other legislation—but, nevertheless, whatever will happen, that bill will, when it reaches the statute book, be different from what was introduced in Parliament. I think that that is probably as far as I will go in talking about that particular bill.

In our submission, we talk about the appropriate uses for framework legislation, and in connection with that, we drew, as I think the faculty did, on Cabinet Office guidance. Such uses would include filling in the detail of minor technical or administrative matters, or dealing with situations in which amendments to legislation might be needed more frequently than can reasonably be carried out by Parliament through the primary legislation process. It could also be used when consultation was needed on the detail of policy, such as the level of fees; when operating in a new area of policy to give ministers an acceptable level of flexibility to make changes in the light of experience, or to allow flexibility for policy to be made differently for different groups or areas; and where there were precedents for using delegated powers and where it was uncontroversial to do so.

Of course, if those are the instances in which framework legislation would be appropriate, the reverse of those statements would be the circumstances in which it was not. If you are not filling in just minor technical or administrative matters—or if it is more than that—you should use primary legislation. If consultation is needed on a detail of policy, such as the level of fees, you should be asking, "Why are we doing consultation after the event? Should we not be doing consultation before it, and populating the bill as introduced with the results of that consultation?"

As for where there are precedents for using delegated powers and where it is uncontroversial to do so, the fact is that delegated powers are, of course, necessary. Indeed, the Scottish Parliament information centre briefing picks up our views on that issue of the balancing act between substantive and framework legislation, the need for appropriate consideration of delegated powers and the need for such powers to be used properly. For example, some years ago, James Chalmers and Fiona Leverick from the University of Glasgow did a paper on the number of criminal offences created in subordinate legislation. I think that they focused on Westminster, but the same could be said here, too. It is just a thought, but it might be inappropriate to have criminal offences created in subordinate legislation, given that we know that the level of scrutiny in that connection is not as high as it is for primary legislation.

Flexibility is necessary, and NFU Scotland is quite correct to raise it as an issue. However, I am not sure about its view that that will make sure that there would be no future challenges. Future challenges live exterior to the legislative process; someone who is affected by a piece of legislation might consult an advocate in order to make a challenge against future legislation or even current

bills that are going through. In fact, we have seen in a number of instances over the past few years those who have been affected by a piece of legislation or who have had a particular interest in it taking court action in connection with it, even though it had not yet passed into law.

Therefore, future proofing against challenge is not, I would think, a function of subordinate legislation, unless there is a rush to make an order or a statutory instrument if the Government is alerted that there is going to be a challenge. Even then, I think that that would probably be improper—I am not sure, but it is a possibility.

Another tranche of NFU Scotland's contention is that work should be done before to ensure that the legislation is as tight as possible. Making something tight might mean putting in a lot of detail, but the decision to make primary legislation—that is, an act of the Scottish Parliament—rests with St Andrew's house; with committees, which can bring forward legislation in the Scottish Parliament; or with members, who can introduce primary legislation in the Scottish Parliament, too. The question that I ask, then, is this: how deep is the thinking about the necessity for primary legislation in every instance? Can we look at the underlying law in a particular area?

I said that I would not do this, but I am just going to drop this little thought: in documents under the Requirements of Writing (Scotland) Act 1995, both old-fashioned and electronic writing are permitted. I am not going to get into a big argument about that—that is a story for another day—but I would just point out that there is legislation on electronic communications, although how far it has gone in changing our thinking is another matter.

The Convener: Thank you very much. I call Roz McCall.

Roz McCall: I want to narrow things down a little bit. The information that you are giving is very interesting, but I want to delve into NFU Scotland's criteria, which the convener started to look at. After all, we are looking at this from a scrutiny and accountability point of view when it comes to secondary legislation.

In your opinion, if we are looking at this through a scrutiny and accountability lens, should there be additional safeguards and controls to ensure appropriate use of framework legislation, given the secondary legislation that will follow? I will start with you, Mr Clancy, because I think that that follows on very nicely from your last answer.

Michael Clancy: I am not sure that my previous comments tell us much about additional scrutiny or assisting scrutiny.

There are attempts in the Scottish Parliament to ensure that members are acquainted with the underlying thinking. The policy memorandum, the explanatory notes and the financial memorandum that accompany a bill as it is introduced are all important documents that give us a lot of detail about Government thinking in bringing forward legislation. Can that be augmented for subordinate legislation? It can.

At the end of an SSI, there is a short explanatory note that is focused on the legal basis for the SSI and other things of that nature, although it does not go into deep thinking about policy requirements. Could there be an explanatory note for the most important subordinate legislation? There is a broad range of subordinate legislation made by Government, but there are also, in the same category, rules made by professional bodies and public bodies, regulations and by-laws. The Interpretation Act 1978 provides for that connection.

We would have to define how we would be able to do that—namely, by getting additional material put into the explanatory note in a Government SSI. In other forms of subordinate legislation that might be put to the Parliament but would not be expected to be acted upon, one would have to take a value judgment as to whether MSPs would need that level of detail, and whether, if they got that level of detail, they would be able to use it, and to what purpose. I am not sure about that.

I would favour, when a bill is going through Parliament with provision for subordinate legislation in it, the Government doing a nice thing and producing the draft order or regulations before or at the same time that the bill is introduced. I have seen that done at Westminster. For the life of me, I cannot remember the name of the bill, but it was in the early 1990s. The bill was in trouble in the House of Lords because peers were anxious about the subordinate legislation provisions in it. In order to get through the debate, the unfortunate minister at that time, who was under the cosh, made an undertaking to bring forward draft regulations in order to pacify the opposition that was being encountered in connection with the legislation.

We should not have to get to that point for the Government to disclose its hand regarding what it is going to do in subordinate legislation. We could easily do something sooner, and to greater effect.

Roz McCall: That is helpful.

I will go to Vicky Crichton, and then to Kay Springham. With regard to the idea of improving scrutiny and accountability in relation to secondary legislation, should we be looking at any safeguards or controls?

11:30

Vicky Crichton: From the Scottish Legal Complaints Commission's perspective, I have nothing specific to add to what Michael Clancy has said. The only point that I would make is that it makes complete sense that with any type of secondary legislation, or anything else that flows from primary legislation, you would want to have something that helps to explain what it does. For example, when we consult on our statutory rules, we provide a policy memorandum and something that is not quite explanatory notes but is of that nature. That is because we want to make sure that even expert stakeholders understand what we are trying to do and are able to question and challenge that. When consulting with consumer groups, we want to make sure that they absolutely understand what we are trying to do. If it is reasonable for us to do that when consulting on statutory rules, it makes sense in other contexts.

Roz McCall: Absolutely. Thank you. Kay, do you have anything to add?

Kay Springham: Yes. This may go beyond what the faculty said in its response, but I will try to keep my answer within the framework of our response in relation to democratic accountability.

As a Parliament, you are here to represent your constituents and to legislate for the common good, and that is obviously what you all want to do. It occurred to me in listening to some of the evidence sessions that if we wanted to get to a specific point, we would not start off from the situation that we are in currently. The Parliament has evolved to a point where there is a lot of framework legislation. That is not new, but from what I understand, it is increasingly the case. The circumstances mean that there is scrutiny of secondary legislation—which is essentially "the" legislation, because with framework legislation, it is the secondary legislation that really details the policy.

We do not have a system that is fit for purpose. As I say, having listened to all the evidence sessions, I think that that is what contributors have been grappling with. They are saying, "If we have framework legislation and it is here to stay, what do we do to improve accountability and scrutiny?" As you know, it is not only about holding the executive to account, but about the citizens of this country. We will all be bound by that legislation in some shape or form, depending on our situation.

That is a very convoluted way of saying that, in the territory of framework legislation, as I said at the beginning, there would be some benefit to setting those parameters out, because the situation tells us that something more than "normal" scrutiny is likely to be needed. I do not know how you as a Parliament would fashion that—I do not know enough about the parliamentary processes and what is and is not possible, but if you had a blank bit of paper and you were starting again, you could probably get some good ideas down about what you would like to achieve.

Roz McCall: That is very helpful, thank you. My next question is on Henry VIII powers. Are they appropriate or inappropriate?

Kay Springham: I can start off. Again, we took a pretty neutral position on that, but the answer goes back to us living in a democracy, it being for Parliament to legislate and there being circumstances in which the executive will require, for various reasons, to be able to amend primary legislation.

With that as a context, there can be circumstances when a Henry VIII power is appropriate, but it has been suggested in some of the material that I have seen that it should be seen as the exception rather than the rule.

One of the responses—I cannot remember which one—went through various acts of the Scottish Parliament and ticked them if there were Henry VIII delegated powers in them. Pretty much all of them were ticked, so it seems that for those powers to be in legislation is the rule rather than the exception. 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.

Roz McCall: To follow on from the other answers, if Henry VIII powers are appropriate at the right time, how can we improve that scrutiny and accountability? That is the angle that we are looking at when it comes to subordinate legislation.

Vicky Crichton: In answering that, I can give you an example of how the Government has tried to use such powers in a particular context and what happened.

In our founding legislation, there is what you might call a Henry VIII power. Significant work took place alongside the policy development for the Regulation of Legal Services (Scotland) Bill, which is going through Parliament just now, to look at whether those powers could be used to achieve what were variously called "quick fixes" or "medium-term changes"—things that could be done in the interim to improve the system while the primary legislation and the policy development were worked through.

The Government developed that work very collaboratively with stakeholders through what was probably similar to a normal primary legislation process, in that it developed a policy

memorandum with stakeholders, on which a public consultation took place in the normal way and which set out what would be delivered. Ultimately, because the Government was trying to work quite openly and collaboratively, rather than how you might expect that type of power to be used, the process took almost as long as primary legislative policy development would take. Those things have now been rolled into the bill—the primary legislation—that is going through, rather than being taken through under that power.

If you want a power that allows Government to do something but then you consider the scrutiny that is required, at what point does that tip into being primary legislation anyway? It is more appropriate to do it through that system than to use the Henry VIII power type of approach.

Michael Clancy: Having had a campaign that singularly failed to have Henry VIII powers in Scotland renamed James VI powers—[*Laughter.*]—this is a good opportunity for me to say, "Let's try again." However, the Proclamation by the Crown Act 1539 is a difficult piece of legislation to get over.

Kay Springham mentioned the reference in acts of the Scottish Parliament—towards the end, after the transitory powers that ministers are given—to the power to, essentially, amend any other legislation. That is a persistent theme. It is just something that ministers put in their back pocket to be used at a future time—although probably not by the ministers who brought the legislation into being. Therefore, to have such a provision in a bill that then becomes an act could be an uncontrollable element in our legislative experience.

I suppose that the question is: does one need it? Well, part of the anxiety that I think that I am detecting here and at Westminster comes from the fact that we have seen Henry VIII provisions used in UK legislation in connection with both Brexit and Covid. The Brexit spillover—say, in the European Union (Withdrawal) Act 2018—was about fixing deficiencies in UK law, and that cascaded down to devolved executives, so that Scottish ministers, Welsh ministers and the Northern Ireland Executive were given the same powers that UK Ministers had been given. That allowed for very wide subordinate legislation making to fix deficiencies in those areas where our law had provisions on EU membership that had to be changed. Similarly, in the Covid legislation, there were provisions on the use of health regulations to deal with movement and so on, and those powers were very broad indeed.

Therefore, using such powers in extremis—I think that that is the phrase that we use in our submission—is all very well, and one could argue that Brexit and Covid were extreme circumstances, but I am not entirely convinced that they should be used as a kind of ordinary add-on.

Roz McCall: Thank you. That was very helpful.

The Convener: I call Jeremy Balfour.

Jeremy Balfour: Good morning. I want to follow up that point—and briefly, because I do not want to go too far down a rabbit hole.

In the witnesses' opinion, given their expertise and knowledge, are we having more of these types of bills now than we had in, say, the 1980s and 1990s? If so, can they give us a reason why?

Kay Springham: 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.

Michael Clancy: One of the submissions to the committee mentioned a text written in 1920 that complained about the use of subordinate legislation, calling it problematic. Obviously, subordinate legislation has a place. Where there is insufficient time to consider all the elements of a bill, you can rely on subordinate legislation coming later, if there might be a need for change in the future and so on. We are not averse to the idea of subordinate legislation being referred to in bills, or to the idea of framework legislation having a place in the legislative panoply.

The important thing is that, where there is subordinate legislation provision, the Government discloses as much as it can about what it expects to be included in that subordinate legislation, and that it does so early enough so that people can say, "Hold on, let's think about this", and so that there can be more consultation with more of the affected people, whether they are affected directly by the bill or by what the Government anticipates will be included in the subordinate legislation.

11:45

Is there more of such legislation? I remember looking at legislation more than 20 years ago that

had subordinate legislation provisions that were of significance. The Law Reform (Miscellaneous Provisions) Scotland Act 1990 covered a whole host of areas in the law, including regulation of not only the legal profession but charities, as well as licensing law and all sorts of other things. As a Government, you can pack into a bill as much as you are prepared to stand up and support. As time is of the essence in Parliament, if you want your bill to go through quickly, it should contain less. If you cannot prevent a bill from going slowly, you should have thought about the content of the bill beforehand.

Jeremy Balfour: That is helpful.

We have already picked up on this, but I want to dig a wee bit deeper into the scrutiny of secondary legislation. One frustration of non-Government politicians is that they cannot amend secondary legislation—it is either a yes or a no. Last week, there was some talk, particularly from the academics, about devising a scheme of not necessarily amendments, but some kind of procedure whereby a committee or the Parliament could at least raise concerns and suggest how changes might be made. From a practical perspective, could that work in practice? Do you have experience of other jurisdictions that have that model?

Michael Clancy: In your meeting with Lord Lisvane, he said that amending subordinate legislation is like mopping the floor while the flood is still happening. He was always one for a colourful turn of phrase. Another one that he used was "unexploded ordnance". I know that I will have to pay for this later, but that is not a point on which I would necessarily agree with him whole-heartedly. 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.

However, I can see that a question could easily be asked about that approach. If we have provision for amending subordinate legislation, that might drive more legislation to be made by subordinate legislation, because the Government would say, "You can amend it if you like." The answer to Government pressure to use subordinate legislation for emergencies is to say to the Government, "Why don't you use expedited legislation provisions, which are available, or the emergency provisions in the standing orders that are available for a bill." That would at least give the Parliament as a whole the opportunity to consider the provisions, with the opportunity to amend in the ordinary course of events at stages 2 or 3. That seems to be an orderly way to proceed when the Parliament's standing orders make provision for those opportunities.

Jeremy Balfour: Thank you. I have just one final question.

Kay Springham: May I just add to that previous point?

Jeremy Balfour: Sorry—I could not see you.

Kay Springham: I would expect that it would not be the wish of parliamentarians that amendment could be made to any piece of subordinate legislation—it would not be necessary for that to be in play. However, to go back to something that I suggested earlier, if you have a definition of framework legislation, you can say, "Well, these are the consequences." If you are in the territory of framework legislation, maybe one of the consequences is that there is a possibility of amendment of at least some of the statutory instruments that are being proposed. In that way, you achieve the parliamentary scrutiny and the democratic accountability that would have been achieved had it not been a framework piece of legislation in the first place, if that makes sense.

Jeremy Balfour: It does.

Kay Springham: That is all that I wanted to add about that.

Jeremy Balfour: Thank you for that—it was helpful.

Michael Clancy: I just want to add that, apart from those sort of back-pocket provisions, there are a few legislative provisions that allow for amendment by regulations. The Human Rights Act 1998 has provision for remedial orders to be made by way of regulations. A very recent example of a remedial order is that which is going to amend the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 and which was introduced just before the UK Parliament broke up for Christmas. That is quite an involved process, with significant provisions about information and explanatory notes and things like that. That could be the model that one might use in thinking about how to amend legislation by way of regulations.

Jeremy Balfour: That was really helpful.

My final question is for Vicky Crichton. Secondary legislation powers are granted to your organisation, although I suspect that most MSPs are not aware of that. You have quite wide-ranging powers, as do other organisations. Do you feel that, in some way, MSPs should be more involved in that and should be consulted? Obviously, from your perspective, it is easier if we do not get involved at all, but perhaps you could lay aside

your self-interest for a second. As a general point, we grant third parties quite a lot of powers without any kind of accountability back to Parliament—that applies even more to Westminster. On reflection from your experience, should your successor have more accountability?

Vicky Crichton: I am going to hope that my chair and chief executive are not watching while I answer this question. It is right that the Parliament, in scrutinising the primary legislation to set up a body or to amend its powers, thinks carefully about the scrutiny that it expects of that body. That generally is set out in the primary legislation. As I said previously, the primary legislation can require consultation on statutory rules, laying budgets in Parliament, laying annual accounts in Parliament and being subject to external audit by Audit Scotland, for example. There has been discussion about what laying something in Parliament means in terms of scrutiny, but if Parliament was minded to change that, that is possible.

It is right that Parliament decides what scrutiny is appropriate for a public body or any other body that is granted powers. It is always open to Parliament to decide to require public bodies to appear. If there is a reason to do so in a particular context—for example, because something appears to have gone wrong—it is right and proper that that should happen.

Another route that is open, which Michael Clancy might have mentioned earlier, is the recourse through court that exists to enable decisions that public bodies have made to be looked at. In our case, there are statutory rights of appeal in relation to some of our decisions, but all public bodies are subject to judicial review. We have been judicially reviewed. That power exists to challenge the way that a body has used its powers, and it is right and proper that that should be available.

Jeremy Balfour: Thank you. I am conscious of the time, so I will leave it there.

Bill Kidd: Practically everything that I had been going to ask has already been asked. However, if you could make one change to improve the scrutiny of the granting or exercise of delegated powers in framework legislation, what would it be? Is there one particularly strong suggestion that you would like to put forward?

Michael Clancy: Post-legislative scrutiny. There was a great fashion for post-legislative scrutiny a while ago, although this was not one of the committees that had post-legislative scrutiny tagged on to its remit. Since then, the enthusiasm seems to have waned a little—maybe that is just me getting older.

Post-legislative scrutiny is important, because 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—for example, did it result in a judicial review action or whatever? Those are the sorts of things that would come out of post-legislative scrutiny.

In addition to whatever else we are going to think about changing when it comes to framework legislation—I am thinking of issues such as that of a definition, which have been discussed this morning—I earnestly hope that the Parliament will grasp the opportunity to undertake post-legislative scrutiny, perhaps not in what remains of this session, but in the session following the elections in 2026.

Vicky Crichton: This committee delivered a very strong report to the Equalities, Human Rights and Civil Justice Committee on the delegated powers in the Regulation of Legal Services (Scotland) Bill. It is for the committee to use the powers that it has to do that, where it feels that the use of delegated powers in framework legislation is not appropriate. As Michael said, there is perhaps also the feedback loop on whether that has changed the nature of the legislation. However, I think that it is as much a question of using the powers that exist as it is one of looking at other opportunities that might exist.

Bill Kidd: Do you believe that the power that you mentioned, which already exists, is not used often enough?

Vicky Crichton: I do not know that I would be able to comment on how often it is used. I have certainly seen examples of cases in which it has been used to good effect to raise such concerns.

Kay Springham: I do not have much to say in response to your question, although I am interested in the point that Mr Clancy made about post-legislative scrutiny. It occurs to me that, for example, in relation to the Henry VIII powers that are regularly included in legislation, it would be a learning point to find out whether those are actually being used and, if they are not being used, to consider why it is necessary to have them in the first place. That might enable parliamentarians, when dealing with future legislation, to say, “You have put this Henry VIII power in, but you have it in similar legislation and have never used it, so why do you need it?” It could be a learning point. I am interested in that idea, but I have nothing to add beyond that.

12:00

Bill Kidd: That is very helpful. Thank you.

The Convener: Before I bring in Daniel Johnson, I will ask a supplementary question. I

touched on this issue last week. This is a Parliament of minorities. The Senedd and the Northern Ireland Assembly are, too, which is in contrast to the UK Parliament, which tends, apart from a very short period of time when there was a coalition, to be a Parliament of majorities. On the suggestion of the potential to amend subordinate legislation, notwithstanding what has already been said, if that were to happen in a Parliament of minorities, could you foresee a situation in which the Government of the day finds it difficult to get anything done or to make any legislative changes, compared with a Parliament where there is an absolute majority?

Kay Springham: We are getting into political territory, which I am not very comfortable speaking about. I go back to the point about framework legislation. If you imagine that a piece of legislation was not framework legislation but was fully fleshed, you would have to get that through Parliament, would you not? Why would it be different for secondary legislation that is fleshing out a framework bill? I suppose my question is this: why should it be easier for a Government to get that through? If it had been in the primary legislation, the Government would have had to get the provision through Parliament.

Because we seem to be in different territory in relation to the amount of framework legislation and what is being left to secondary legislation, I am slightly struggling to understand why you would think that being able to push through secondary legislation that puts in the detail for primary legislation should be an easy task. I am not sure—from a democratic point of view—that it should be. I do not want to trespass on political matters, but it might be that the reason why the Government cannot get a piece of secondary legislation through is that there is a problem with it.

Michael Clancy: When I was looking at the bill that created the Scotland Act 1998, it became quite clear that it was the Government of the day's intention that the Scottish Parliament should be a Parliament of minorities: it was designed not to give any one party a working majority. That being the case, any party that takes up the cudgels of being the Government in Scotland would know that, and except in extraordinary circumstances, it would know that from the moment when the Scottish general election had results.

Therefore, the question would be, should the Government get its programme through, if it is a minority Government? One might say that the largest working party forms the Government and that there is therefore some kind of right there, and that if the people had voted for a minority Government, we must assume that the electorate knew what it was doing in making that choice.

I am not making a political point here because, as you know, I am not a politician. The important point is that the electorate has made a decision. If the Government is finding it difficult to get its proposal through Parliament, it is time to sit down and talk with other parties to figure out where common ground can be found. To me, it seems that that would fulfil the original idea behind the Scotland Act 1998 and the legislation that created the Parliament.

The Convener: Vicky?

Vicky Crichton: I do not have anything to add.

Daniel Johnson: I will start by following on from the answers to Bill Kidd's questions, which also relate to some other points.

On post-legislative scrutiny, part of it might be about amending, updating and fixing. Michael Clancy pointed out earlier that there are other expedited legislative processes. Are alternative ways of viewing legislation part of what needs to be looked at? Should we have more legislation that addresses updates and fixes to the law, or shorter pieces of legislation that are more focused?

I was looking at the standing orders. Through the normal processes, in theory, without using emergency legislation, legislation could be got through in seven or eight weeks, given what is stipulated for the time between stages. Rather than always thinking that legislation needs to be big and long and drawn out, should we be using it to update and improve law as we go, as opposed to using secondary legislation to achieve the same effect?

Michael Clancy: Kay?

Kay Springham: I will put that one back to you.

Michael Clancy: And then there was one. [*Laughter.*]

The important thing to remember is that the question of which legislation is introduced is the province of the Government. Parliament is there to make sure that the Government is scrutinised and held accountable for its proposals.

In an epoch in which majority Governments are the thing that people want, we must be aware that a majority Government can be a challenge for Parliament. The issue of small fixes to small problems was one that the many Law Reform (Miscellaneous Provisions) (Scotland) Acts were designed to deal with. That was due to a problem of Westminster timing, because Westminster could not allocate enough time for a bill in each of those portmanteau areas, such that there could be a bill for charity regulation in Scotland, or for licensing law changes in Scotland, or for legal services

changes in Scotland. There was a compression on the parliamentary calendar and timetable.

The experience of the Law Reform (Miscellaneous Provisions) (Scotland) Bill of 1990 was so scarring for the Government of the day that—it was said to me—Mrs Thatcher decided that there would never be another miscellaneous provisions bill in her Government. I think that that has continued to the present day.

We could ask the Law Commission to look at small fixes in the law—say, in leasehold law or family law—but we might just get a scattergun approach, which would be difficult to consult on and difficult to get public buy-in to, and which would be technocratic in various ways. It might be difficult to sell that to Parliament and, indeed, to stakeholder interests, because stakeholders would say, "Hang on a minute—I have a change that I would like to put in, and we're prepared to brief people to do that." If that approach were seen to be successful, others would follow.

I suggest that quick fixes might be something to think about as a longer-term project, as would codification: codification of our law in various areas might be a more advantageous outcome. I see that Kay Springham has not fainted yet—I know that there are various views in the legal professions and elsewhere about the value of codification, but it would certainly allow a long-term look to be taken at a particular area. It has been done in areas such as mental health and disability, and it has almost—but not quite—been done in land law, and in family law. Those two competing ideas could produce some benefit.

Daniel Johnson: That was helpful. Ms Springham, do you want to comment?

Kay Springham: I think that your question was about having smaller pieces of legislation and—

Daniel Johnson: It was more broadly about whether there is more than one way to skin a cat. We are using secondary legislation to update things, but are there other ways of doing that?

Kay Springham: It is all about parliamentary time, is it not? You might have smaller pieces of legislation coming through Parliament, but is there parliamentary time to look at them? I do not know.

Daniel Johnson: I am smiling, because that is what the Government likes to say. However, when you look you will see that most weeks we are not legislating. In fact, if we were to have a stage 3 once a month, we would say that that was quite frequent. I think that the Parliament has scope to do more legislating, if it wanted to. In theory, it is an interesting point, but the situation is not the same in the Scottish Parliament as it is at Westminster.

Kay Springham: Obviously, I defer to your greater knowledge on these matters.

Daniel Johnson: It is just my opinion. I am sure that my colleagues scowled when I said that.

Kay Springham: As you have said, it is horses for courses. What is appropriate to put before the Parliament and what is appropriate to be put in delegated legislation is, at the end of the day, going to be a matter of judgment.

I do not really want to get into the subject of codification. Interestingly, on the mental health legislation that Michael Clancy cited, at least one judge has commented that it is the most difficult piece of legislation to understand. I can confirm that, having grappled with it myself on several occasions.

Daniel Johnson: It must be bad, then.

Kay Springham: Not all of it.

Michael Clancy: That is why it needs to be amended.

Kay Springham: Some of it is good, and the intention is great, but there we are.

Daniel Johnson: Ms Crichton, did you want to comment?

Vicky Crichton: No.

Daniel Johnson: My substantive line of questioning, which was on practical suggestions that you might have, has, I think, largely been dealt with by others, certainly with regard to amending and other such matters. However, I was interested in the Law Society's evidence, which makes a number of recommendations on framework legislation, including on provision of enhanced supplementary material, enhanced consultation and the possibility of legislation being amended.

In that respect, I have two questions. First, are you suggesting, essentially, that we should have a different process for framework bills in order to cover those things? I also noticed that the submission suggested—as you have, Michael—that draft regulations could be put alongside such bills to give greater clarity.

Is that about having a different process for framework legislation? If so, should that process also apply to secondary powers, such as those that might not be in full-blown framework legislation, but which have some of those characteristics? Is the implication that there should be some sort of sifting mechanism to decide when such a process should be employed?

12:15

Michael Clancy: That is an interesting set of questions. There would be room for there not being a process that is different from the regular one for stages 1, 2 and 3 of an ordinary bill. Supplementary material is already brought to the Parliament's attention for legislation that affects the islands, for example, or when an equality impact assessment is necessary. Such things do not disrupt the process for stages 1, 2 and 3.

When writing what I did, I envisaged that MSPs would want to know more about what the provision to lend legislative power to Scottish ministers was all about. What would ministers do with that power? There was a conversation earlier about how much the implementation of such a power would cost and so on. I was thinking that what I set out could be done without overburdening MSPs or, more likely, their researchers. It would augment the current arrangements for information on which MSPs might ask questions. That could lead to use of question times for questions about current legislation. For example, in plenary, an MSP could ask a minister, "What does this all mean? Why are you doing this? The material that you have provided is unsatisfactory. It does not give us anything to go on," or they could say, "Congratulations, minister. You have done exactly what we wanted, and this will be a great help in making this legislation work."

Daniel Johnson: You are such an optimist—it is heartening. [*Laughter*.]

Ms Springham and Ms Crichton, do you have thoughts about enhanced material or other things that should be requested along with a framework bill?

Kay Springham: I agree with Michael Clancy that, in the territory of framework legislation—assuming that we know what that is—there are arguments, from a democratic point of view, for having more information than we might ordinarily have. The idea of equality impact assessments going along with equality legislation gives us an analogy for what one would expect.

At the end of the day, MSPs not really having a grasp of what legislation will mean for their constituents cannot be a very comfortable position to be in. You should expect to have as much information as possible, so that if your constituent comes along and says, "Mr Johnson, does that piece of legislation mean this?" you can, I hope, answer the question.

Vicky Crichton: As well as additional information and documentation potentially being provided, it is about the discussion that takes place as part of scrutiny. Scrutinising framework legislation is hard, because you want to ask clear questions about what it will mean and, as Michael Clancy said, what the Government will do with the power. You want to ensure that such questions are explored in the scrutiny and that you ask the question that somebody at last week's meeting asked: what could be done with the power by a different minister, a different party or a different Government?

Ultimately, that is not the same thing as needing to bake the detail into primary legislation, because that is the point at which you start restricting what can happen, unless it is appropriate to restrict things in that way. As well as thinking about what additional information could be provided, you should think about what additional conversation you want to have as part of scrutiny, when you explore such issues.

Daniel Johnson: The convener has asked me to stop there, so I will.

The Convener: I thank the witnesses for their contributions. If you would like to put more comments on the record, please do so in writing after today's meeting.

12:20

Meeting continued in private until 12:38.

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