OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 21 January 2025

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 21 January 2025

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DELEGATED POWERS AND LAW REFORM COMMITTEE

3rd Meeting 2025, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*Roz McCall (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Finlay Carson (Galloway and West Dumfries) (Con)
Kenneth Gibson (Cunninghame North) (SNP)
Mike Hedges MS (Senedd Cymru)
Sir Jonathan Jones KCB KC (Linklaters LLP)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 21 January 2025

[The Convener opened the meeting at 09:35]

Interests

The Convener (Stuart McMillan): Good morning, and welcome to the third meeting in 2025 of the Delegated Powers and Law Reform Committee. I remind everyone to switch off their mobile phones and other electronic devices or set them to silent.

The first item of business is a declaration of interests. In accordance with section 3 of the code of conduct, I invite Katy Clark MSP to declare any interests that are relevant to the committee's remit.

Katy Clark (West Scotland) (Lab): I have no relevant interests to declare.

The Convener: I welcome Katy Clark to the committee. I take the opportunity, on behalf of the committee, to thank Daniel Johnson MSP for his hard work and his valuable contribution. Daniel recognised the importance of the committee's work and was a diligent member. We wish him well in future.

Decision on Taking Business in Private

09:36

The Convener: The second item is to decide whether to take agenda item 7 in private. Are members content to do so?

Members *indicated agreement.*

Framework Legislation and Henry VIII Powers

09:36

The Convener: Under item 3 we will continue taking evidence as part of the committee's inquiry into framework legislation and Henry VIII powers.

I welcome to the room Finlay Carson MSP, convener of the Scottish Parliament's Rural Affairs and Islands Committee and Kenneth Gibson MSP, convener of the Finance and Public Administration Committee. Joining us online are Mike Hedges MS, chair of the Senedd's Legislation, Justice and Constitutional Committee, and Sir Jonathan Jones KC, senior consultant at Linklaters LLP.

Witnesses should not worry about switching on their microphones, because that will be done for you. If you would like to come in on any question, please raise your hand or indicate that to the clerks. It is no problem at all if you do not want to answer all the questions. We plan to spend around an hour on questions today.

The written evidence that we have received so far has been very helpful and our two previous evidence-taking sessions have also been enlightening. I invite the witnesses to share some of their experiences of engaging with framework legislation and their reflections on the main scrutiny challenges of doing so. I know that the Finance and Public Administration Committee has highlighted the issue of the financial cost of bills and that the Rural Affairs and Islands Committee has considered a couple of different definitions of "framework".

Kenneth Gibson (Cunninghame North) (SNP): There has been an element of frustration within the ranks of the Finance and Public Administration Committee regarding some of the legislative proposals that the Scottish Government has introduced. We take the view that stakeholder engagement and co-design are really important parts of the legislative process but that that should take place before we get to primary legislation.

The reason for that is straightforward. First, it is far easier to scrutinise primary legislation than subordinate legislation. When the Government enacts legislation after a bill has been passed, it is quite difficult for us to scrutinise that.

Even before we get to that stage, if we do not have a proper bill design that includes all the proposals that the Scottish Government intends to implement through that bill, we cannot ascertain the ultimate costs for the Scottish Government or for stakeholders, which is very inefficient in our view. That also poses risk to the Scottish budget. A bill could be introduced that has been costed at £X million, but we could find that cost multiplied by several factors once secondary legislation has been added.

Our view has been consistent across the legislative profile in the Parliament that framework bills, although we are not particularly keen on them, if they are to be used, all the co-design work and stakeholder engagement should be done prior to the bills coming to the committee, so that we can fully analyse the costs.

Finlay Carson (Galloway and West Dumfries) (Con): I echo much of what Kenny Gibson has suggested. We have dealt with four framework bills: the Agriculture and Rural Communities (Scotland) Bill; the Good Food Nation (Scotland) Bill; the Hunting with Dogs (Scotland) Bill; and the Wildlife and Muirburn (Scotland) Bill. Although they could all be described as framework bills, they are all slightly different. For example, much of the detail that was not in the Hunting with Dogs (Scotland) Bill or the Wildlife and Muirburn (Scotland) Bill surrounds licensing schemes and guidance, which have either been difficult for the committee to scrutinise, or it does not have a place to do so.

Kenny Gibson mentioned bill design. It is difficult if all the important policies are not in the bill when it is first introduced to the committee. For example, important policies, such as the barring of snares and additional powers to the Scottish Society for Prevention of Cruelty to Animals did not appear in the Hunting with Dogs (Scotland) Bill when it was first introduced. With regard to the Good Food Nation (Scotland) Bill, there was no proposal for a food commissioner, which was ultimately part of the bill at the end of the process. That is an important policy consideration.

In addition, it might be appropriate to say that there is no requirement for the Government to respond to a stage 1 report. For a framework bill, that response is often where the committee is able to tease out some of the policy objectives of a bill, which can assist with agreeing to its general principles, too. We have found ourselves not quite sure what all the desired outcomes for some bills would be. In one case, we did not have a Government response to our stage 1 report prior to the stage 1 debate and the Parliament voting on the general principles. Those are the areas of concern in relation to the points that you asked us to comment on, convener.

Mike Hedges MS (Senedd Cymru): The Legislation, Justice and Constitution Committee has become increasingly concerned about the use of framework legislation by the Welsh Government during the sixth Senedd. Framework legislation is being used more frequently in the Senedd compared with other United Kingdom legislatures, with framework bills accounting for 43 per cent of

all primary legislation that was introduced between May 2021 and March 2024. It is creating a shift in the balance of power away from the Senedd to the Welsh Government.

As you all know, with framework bills, it is difficult to get effective scrutiny of secondary legislation. We have raised concerns about delegated powers being taken just in case they were needed or to enable future proofing and flexibility. In general, the committee has serious concerns that we are not seeing everything and that the detail starts coming out down the track, once the legislation has been agreed to.

09:45

Sir Jonathan Jones KCB KC (Linklaters LLP): Thank you very much for inviting me. My experience is mainly of the Westminster Parliament. It might be worth saying why any of this matters and why it is right to be concerned about the increase in the use of framework bills or the overuse of secondary powers. There are three points.

First, whatever form secondary legislation takes, it is the law in the same way that primary legislation is the law, so it matters just as much to ordinary citizens and businesses. It is the law that they are required to obey. It can affect the way in which they live their lives and do business, and it might carry criminal, regulatory or civil sanctions. For those reasons, it is right to be concerned about the quality and the nature of secondary legislation.

Secondly, there is an issue of democratic legitimacy in relation to the scrutiny of secondary legislation, which other witnesses have touched on. Do elected representatives have a proper opportunity to debate, scrutinise and influence the legislation that is being made? Do they even understand the laws that are being made in their name, and therefore do they and their constituents have any real stake in those laws?

The last general point is around the quality of legislation. Legislation that is properly debated and scrutinised is likely to be better legislation. It is more likely to avoid errors, unintended consequences and misunderstandings of what the law is intended to be. Obviously, better laws are good for citizens and society, and they make it less likely that correcting legislation will be needed.

Those are the reasons why this topic matters. It is difficult to produce a clear-edged definition of what framework legislation is. There is a continuum—it is not a binary issue in which one category is bad and another is okay.

Many years ago, as a Government lawyer, I worked on the Financial Services and Markets Act 2000. That was one of the first major uses of what we can regard as framework legislation, because although it set the framework for financial services regulation, much of the detail was to be set out in secondary legislation. Whatever you think of the policy on financial services, it worked, and that approach has survived as a way of making really complicated law that has to change from time to time but does not require going back to Parliament and enacting new primary legislation every time a relatively minor change is needed.

However, there are plenty of much worse examples; the Retained EU Law (Revocation and Reform) Act 2023 is at the other end of the spectrum. It gives very wide powers to ministers and devolved Administrations to change previous EU law in almost any way that they want. For example, under section 14, a national authority has the power to

"make such alternative provision as the relevant national authority considers appropriate."

That is a very wide power. That is an example of primary legislation not setting any policy direction at all. It is simply a wide, open power. In truth, it is more like a blank cheque.

Those are examples from two ends of the spectrum and some reasons why I think that this topic matters.

The Convener: Thank you for that. Finlay Carson wants to come back in.

Finlay Carson: It is important to put on the record that the committee appreciates that things have changed. With technology and the speed of change, we are in a different world now, so it is important that legislation is flexible and adaptable. However, the overriding concern is about the challenges for scrutiny, particularly as framework bills, in effect, legislate to delegate powers to the Scottish ministers and others, without Parliament being able to understand what those powers are.

That gives cause for concern, for example, over the costs that might arise due to a lack of detail in a bill. Take the Agriculture and Rural Communities (Scotland) Bill. There is a budget of £660 million for support. However, there is an information void in the bill on the purpose of the funding and on how it will be allocated, and there is a lack of clear policy outcomes.

We also had issues with the licensing scheme in the Hunting with Dogs (Scotland) Bill. Some people believe that the licensing scheme has gone beyond the spirit of the legislation. However, as the previous witness said, secondary legislation is still the law. Ultimately, we are allowing laws to be

made at a level where the Parliament has little or no involvement.

Kenneth Gibson: One key issue is that there is no clear definition of a framework bill. It seems that every cabinet secretary and minister has a different view on that and, indeed, sometimes, they do not even agree with their own bill team. For example, the Finance and Public Administration Committee looked at the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill's financial memorandum, about which we had some concerns. The bill team advised us that it was a framework and enabling bill, but the cabinet secretary, when she came before us, told us that it was an amending bill. There is a real issue there.

We tried to get clarification on that from a number of people in the Scottish Government, including from the Minister for Parliamentary Business, the Presiding Officer and so on. The permanent secretary said that he would put

"something in writing around the definition so that we can be clear about what is and what is not in that bracket".—[*Official Report*, *Finance and Public Administration Committee*, 21 May 2024; c 12.]

So far, we have not had that clarification.

You probably know that the UK Government Cabinet Office's "Guide to Making Legislation" calls a framework legislation

"A bill ... that ... leaves the substance of the policy, or significant aspects of it, to delegated legislation",

which might amount to a series of powers providing for a wide range of things that could be done, leaving the detail on those things to be set out in the regulations. It is yet to be seen whether the Scottish Government and Parliament will consider a definition of a framework bill that aligns to that one or whether it will be something different.

The Convener: I am conscious of the time. On the definition point, the evidence that the committee has heard has been unanimous about how difficult it would be to obtain one. It was considered that it is a spectrum, as opposed to something that is fixed.

As I touched on in my opening comments to Finlay Carson, there are two definitions in the submission that came in from the committee alone, which is one of the challenges when attempting to arrive at any definition of one sort or another.

Kenneth Gibson: If it is going to be a spectrum, it might be helpful to at least know the parameters in a specific piece of legislation, which would make the scrutiny function much easier for whichever committee is scrutinising.

The Convener: Okay. Thank you. I bring in Roz McCall.

Roz McCall (Mid Scotland and Fife) (Con): Good morning, everybody. I would like to come back to you, Mr Gibson.

Kenneth Gibson: Sure, aye.

Roz McCall: In the Finance and Public Administration Committee's fantastic piece of work on the Circular Economy (Scotland) Bill, the committee stated that

"The increasing use of 'framework' bills that ... provide future Governments with enabling powers"

does not provide "the best estimates" of all likely costs and

"undermines Parliamentary scrutiny. It also risks the Parliament passing legislation which may in the end, once outcomes are fully understood,"

lead to significant cost increases. I accept that. The bottom line, which I want to highlight, is

"whether ... the outcomes the bill seeks to deliver ... outweigh any financial or affordability considerations."

It is the outcomes that I really want to question.

Given the ambiguity around what a framework bill is or is not, and given the fact that we sometimes do not know that even at the inception of the bill, how important are the outcomes? Should they outweigh any financial situation? Should that be sacrosanct? Are we not putting enough emphasis on outcomes in the first place? Is it about saying that we just do not know what a framework bill is at the outset and that we should do more, especially from a financial position?

Kenneth Gibson: It is important that we focus on outcomes, but they have to be funded. We must therefore have an element of realism in a financial memorandum. If there is going to be a framework bill, we need to know that the outcomes that the Scottish Government seeks to achieve will be fully funded. The Finance and Public Administration Committee took evidence from stakeholders that suggested that the delivery cost of the bill could be as much as twice what the Scottish Government said it would be. Clearly, that level of difference gives serious concern.

The committee took a lot of evidence on the National Care Service (Scotland) Bill, and you will be aware that it was not willing to accept the Scottish Government's financial memorandum. It had to completely rethink not only the financial memorandum and the costs inherent in it, but also its objectives and outcomes. For example, the initial proposal to have 32 boards became a proposal to have one board, and the proposal to transfer 75,000 council workers to those boards was dropped. We have to get the finance right if we are going to deliver the outcomes that we

want, but we cannot do that if we do not know what the bill will ultimately deliver because that is not set out in the primary legislation.

Roz McCall: That is very helpful. Thank you.

The Convener: Mike Hedges wants to come in. I will then hand over to Jeremy Balfour.

Mike Hedges: My point is similar to Kenneth Gibson's point. We ended up sending the Additional Learning Needs and Education Tribunal (Wales) Bill back for a new financial estimate, because it seemed to be substantially wrong. Indeed, there were aspects for which the costs were an order of magnitude higher. It is important that we know what things will cost when we agree to them, rather than hoping that the money will be found at some stage in the future.

Jeremy Balfour (Lothian) (Con): My question is for Jonathan Jones in the first instance. On the presumption that we can have some understanding of what a framework bill is, would it be helpful to have guidelines or an agreement between the Government and Parliament on how such bills should be dealt with and a governing framework that would ensure that both parties could work constructively together? Is that possible?

Sir Jonathan Jones: I agree with that. It should be possible, and it would be a good idea, to have some guidelines. I was part of a working group on UK governance that suggested such a thing for the Westminster and Whitehall Administrations.

I do not think that it will be possible to have a hard-edged definition of what a framework bill is. You might take the definition that is in the UK "Guide to Making Legislation". That does not say that all framework bills are bad; it simply describes what one is.

I do not think that it is necessarily the case that all bills with powers to update, for example, for changes in technology are necessarily bad, and there might be occasions when that kind of framework is justified. The idea of having guidelines by which you can judge whether such a bill is appropriate would be a good idea. That might involve, for example, analysing the extent to which the overall policy is set out in the bill rather than there being a completely blank cheque—I mentioned that with regard to retained European Union law.

Such guidelines might look at the scope of the powers—that is, how tightly they are defined in the bill and what level of scrutiny would apply to the exercise of those powers—or it might go further. For example, there might be an assumption that secondary legislation cannot create criminal offences or that it can create criminal offences only up to a certain level. Or it might not be possible to use secondary legislation to interfere significantly with fundamental rights, because that must be done in primary legislation.

You could at least have presumptions and guidelines, which would limit the blank-cheque approach. If, for whatever reason, a Government—whether the Scottish Government or any of the other Governments—thought it necessary to go beyond those guidelines, it would then have to explain why. It would have to justify why it had taken particular powers and why it had adopted a framework approach in a particular case. All of that is worth having.

As I say, we recommended that for Westminster, and the Attorney General, Lord Hermer, has expressed some support for the idea that there needs to be some reining in of the use of framework bills and secondary legislation. I do not think that the Government in London has gone so far as to adopt that kind of guideline, but it looks as though it is thinking about it, and it is worth thinking about.

10:00

Jeremy Balfour: Has that been thought about in Wales? Is it something that you are thinking of taking forward?

Mike Hedges: The labelling of a bill as framework legislation by a committee, which is what we do, can help to raise awareness among legislators, stakeholders and the public, and it could lead to increased scrutiny of the regulations that are made using the powers in the act. There is no Government definition of a framework bill. We, as a committee, decide that a bill is a framework bill, and we challenge the Government to tell us that it is not. As yet, it has not done that. A substantial number of secondary legislation activities, some using Henry VIII powers, often take place without any scrutiny at all.

Finlay Carson: I am not sure that we should get too concerned about the definition of a framework bill, because it ignores the real issue, which is the need for effective scrutiny of the Government and the powers that are delegated to Scottish ministers. We are discussing whether a bill is defined as a framework bill, but the issue is that, if there are going to be more framework bills, however they are defined, the way in which the Parliament scrutinises legislation must keep pace. I am not sure that it is doing that at the moment.

When policies are introduced after stage 1 of a bill, the committees have not had clear oversight of the objectives or policy outcomes, and the Finance and Public Administration Committee is concerned that it is almost impossible to create a financial memorandum because we do not know the policy outcomes. For example, the Agriculture

and Rural Communities (Scotland) Bill had four overriding but wide objectives that were so wide-ranging that they were less than helpful, and it was difficult to cost those objectives and the policies that might deliver them.

We should not, therefore, get too tied up in defining what a framework bill is or is not. We need to spend more time on improving the way in which the Parliament scrutinises legislation, no matter how it is defined.

Jeremy Balfour: Would it be helpful to have some kind of framework whereby, if there was a major change in policy between stage 1 and stage 2, there would be an opportunity for the relevant committees to carry out further scrutiny before stage 3? Could that work in practice, or would it just make more work for the committees?

Finlay Carson: Certainly, when it came to scrutiny of the Good Food Nation (Scotland) Bill, I vividly remember the conversation that I had with the committee clerk about whether we should be scrutinising the bill at all at stage 1, because there was nothing to scrutinise. It was so framework that it just set out delegating powers to Scottish ministers, and more time absolutely needed to be spent on it at stage 2 or, indeed, a year on when looking at the secondary legislation. Maybe the Parliament needs to spend less time on initial bill scrutiny, with a shorter and lighter process, and spend more time on a more in-depth exercise when it comes to the secondary legislation. That is how the good food nation legislation will ultimately pan out. Also, with the Agriculture and Rural Communities (Scotland) Bill, the bulk of the policy delivery and the bulk of the funding allocation will happen a year on from when the Parliament passed the bill in the first place.

Maybe we need to rejig how Parliament keeps pace with the ever-increasing number of these so-called framework bills.

Jeremy Balfour: Mr Gibson, in your experience of a number of different committees, is there a role for the lead committee in taking further evidence between stage 2 and stage 3?

Kenneth Gibson: That is not really the point that we want to make as the Finance and Public Administration Committee. The committee has been very clear that we want to see the scrutiny prior to stage 1. We are keen to have a definition of a framework bill. It does not have to be written in tablets of stone, but the problem is that, if it is too woolly, we might be comparing apples with oranges and we might be in a situation whereby the Government's view of a bill is X and ours is Y. We do not want to be in that position.

Some of the bills that we are talking about can involve hundreds of millions of pounds, so, certainly with the financial memoranda, we need to batten down the hatches a wee bit before we get to stage 1.

Jeremy Balfour: I think that our witnesses have touched on this next issue, but they might want to expand on what was said. One of the Government's justifications for having such bills is that it wants to make the process much more about consultation and taking stakeholders with it. The Government argues that that is easier to do once a framework bill has been passed. Are you sympathetic to that view, or should the consultation and development of policy with stakeholders take place before a bill appears in Parliament?

Finlay Carson: I agree with the latter. With the Agriculture and Rural Communities (Scotland) Bill, we had a vacuum of information on policy. The Government had done some stakeholder engagement—or, if you like, co-design—but the outcomes of those discussions were not clear and were not in the public domain, so there was a void in the information. Also, only selected organisations played a role in that co-design. There needs to be wider consideration involving all stakeholders and potentially some sort of legislative process, to ensure that consultation and co-design are far reaching and do not focus only on certain groups. That was certainly an issue with the Agriculture and Rural Communities (Scotland) Bill.

Jeremy Balfour: Mr Jones, from a UK or Westminster perspective, we hear about co-design as well. Does that take place post or pre a framework bill being passed?

Sir Jonathan Jones: As a general rule, you would want to consult as early as possible. If we take the view that the worst type of framework bill is one that does not set any policy at all but just includes a load of powers that are then exercised later to set out the policy, you might argue that, by then, it is all too late, because there has not been a proper opportunity to consult or for legislators to comment on the bill—the primary legislation. At that point, the die is already cast, and it becomes much more difficult to influence the development of policy later.

That goes back to my point about democratic legitimacy and the quality of the law. If legislation is introduced that has not been tested with stakeholders, experts and members of the public, it is more likely to be flawed and not to work properly. As a general rule, you would want to have tested the policy and consulted on it at the earliest stage—that is, before a bill has been introduced. It may then be necessary to have further consultation on the exercise of powers, and it may be that the primary legislation expressly provides that there must be consultation. Imposing

a legal duty to consult on the later exercise of powers may be a good model.

Bill Kidd (Glasgow Anniesland) (SNP): I thank all our witnesses for their very wide-ranging answers—I am not left with an awful lot to ask out of what I was going to ask. However, I will just take us back a wee bit. From your experience, could changes be made to the scrutiny of framework legislation to enhance the scrutiny of particular elements, such as possible savings and costs? We should be considering how much we will spend on legislation in the build-up to passing bills. Do you have any ideas on how information on costs and savings could be found?

Kenneth Gibson: The best way to ensure that we have the ability to make savings and get value for money is to have everything on the face of the bill and a financial memorandum that dots every i and crosses every t. That way, not only the Finance and Public Administration Committee but other MSPs can query some of the costs.

That level of scrutiny at the start of a bill process is critical, otherwise we can disappear down a rabbit hole. If a bill already costs several hundred million pounds and then we add all the bits and bobs to it through secondary legislation, we could end up with a kind of hydra, or something that is not what was initially envisaged. When there is stakeholder involvement and co-design to a minimal degree before a bill is passed and then a lot is added to it afterwards, we end up with an act that does not resemble what was proposed in the first place. I do not think that that is appropriate or democratic. It is not only about scrutiny, efficiency and cost; it is about ensuring that the legislation that the Government proposes is the legislation that is delivered. That is really important.

At the moment, we more or less have a "take it or leave it" situation in relation to secondary legislation. Secondary legislation cannot really be amended, so, when it is brought to us, we either vote for it or we do not. That restricts the role of the Parliament. The more opportunities that the Parliament has to scrutinise both the financial memorandum and the overall objectives of a bill, and the outcomes that it hopes to deliver, the better it is for everyone.

There is absolutely no reason at all why co-design and stakeholder involvement cannot happen before a bill reaches stage 1. That would be the best way forward—and that is definitely the view of the Finance and Public Administration Committee.

Finlay Carson: I totally agree with what Kenneth Gibson suggests about having a legislative requirement for proper co-design to be set out prior to stage 1. There should also be a requirement for the Government to respond to the stage 1 report, because that is key to answering some of the questions about the direction of travel that the Government wishes to follow in terms of policy and what the outcomes of the bill will be. The Government's response at stage 1 is critical to our understanding of the scope of a framework bill.

As I said earlier, probably less time should be spent on scrutinising primary legislation, but it would be useful to get a clearer indication of when secondary legislation will be introduced and how it will be delivered.

Plans are made under legislation, but they are not necessarily subject to the approval of the Parliament and there is not much consistency on the requirement for that approval. For example, for the good food nation plan, the draft will be laid for 60 days, with no requirement for parliamentary approval; for the climate change plan, the draft will be laid for 120 days, with no requirement for approval; for the islands plan, it will be laid for 40 days, with no requirement for approval.

For the rural support plan, which is critical and which puts the meat on the bones of the Agriculture and Rural Communities (Scotland) Bill, there is no requirement for the draft to be laid in the Parliament—despite the fact that it sets out how the ministers will deliver agricultural support. The budget for that plan is £660 million and there is no requirement for the Parliament to approve that. There needs to be further investigation of how the Parliament can scrutinise at that level. The plan puts the meat on the bones of the bill, so it needs to have parliamentary oversight.

Bill Kidd: Thank you. Mike Hedges can tell us whether what is happening down in Wales is similar.

Mike Hedges: I assume that the Welsh Government has to respond to stage 1 reports, because I have never known it not to respond to one, either to accept or not accept the recommendations and to give its views on the report. I am surprised that that does not happen in Scotland.

One way forward is to use draft bills to identify the nature of the bill early—but Governments do not like to do that, for reasons of time and because they have already got the bill and they are ready to run with it, although having draft bills may produce more effective legislation. The Welsh Government also says that it consults with a large number of stakeholders. I have no reason to disbelieve that, but it obviously does not meet the requirements for a large number of stakeholders—otherwise the time spent taking evidence at stage 1 would be a lot shorter.

Bill Kidd: It is very helpful to hear another perspective. Jonathan Jones, do you want to add anything?

10:15

Sir Jonathan Jones: I do not have a huge amount to add. I agree with the point that has been made very powerfully that one of the reasons for objecting to framework legislation is the uncertainty about cost that parliamentarians are being asked to sign off. Leaving questions of cost to be decided later under secondary legislation in a significant way might be the kind of thing that you would include in guidelines about when using framework legislation is inappropriate.

I agree with what has been said about the problems of scrutiny. Forgive me—as I keep saying, my experience is really in Westminster, but we have the same issue in that most secondary legislation gets no meaningful scrutiny at all. I and others have suggested ways in which scrutiny might be improved by having specialist subject-matter committees look at the policy of secondary legislation. That hardly happens at all in Westminster.

One has to be realistic about limitations on parliamentary time. It is all about being proportionate and focusing in on the really significant exercises of secondary power and ensuring that they are properly scrutinised.

Bill Kidd: Thank you very much. That is all extremely helpful.

Finlay Carson: Given the pressures on parliamentary time, it may be an idea—it is certainly something that my committee has considered—for there to be a statutory requirement for Scottish ministers to publish a report that evaluates the impact of delegated powers and, ultimately, the impact of laid documents, focusing on areas in which the committee thinks that there was a lack of scrutiny.

Katy Clark: The reason that I have heard ministers give for introducing framework legislation is the resource and cost that go into co-design. They argue that, if they do not know whether the Parliament will approve a piece of legislation, the significant cost and resource that would be required to create the detail are not justified.

How do you respond to that and to suggestions that have been made to the committee that there should be longer periods attached to the scrutiny of secondary legislation? There has been reference to a number of days. In situations in which a bill that does not have all the detail is passed, should there be an enhanced scrutiny process for secondary legislation that is set out in the bill in far greater detail? Finlay Carson, would you like to come in first?

Finlay Carson: Certainly. We believe that there should be a statutory requirement for stakeholder engagement and co-design at the earliest stage. Your first point was that the Government might be frightened to do all that work on a bill if the Parliament could reject it. I do not think that the answer to that is to produce a draft bill at stage 1 that is so bland and empty that the Parliament is concerned about what powers will be delegated to Scottish ministers in the future. Those powers would not come under the scrutiny that they would get as part of stage 1.

When it comes to stakeholder engagement and co-design, the Parliament's expectations of the Government must be clear. As I said in my earlier response, some of that co-design and stakeholder engagement has not been as extensive as it might have been. It seemed to focus on certain groups of stakeholders and not on stakeholders in general, which has led to issues around transparency and the argument that, despite the efforts, there was still a vacuum of information in relation to the Government's direction of travel in the framework bill.

Katy Clark: Kenneth Gibson, would you like to respond?

Kenneth Gibson: Good morning. I think that, in fact, the risks are much greater if you do not design everything before you go to stage 1. It could go in all sorts of directions and there could be all sorts of costs added to it. We are concerned about cumulative risks and affordability. We are also concerned about the inefficiency and potential overspending with that approach. However, what is important with any legislation is that we know that it will do what it says on the tin, and we cannot have that if we have co-design post stage 1.

What is important when it comes to scrutiny is that committees feel empowered to say no. For example, when the Finance and Public Administration Committee was presented with a financial memorandum to the National Care Service (Scotland) Bill that we did not think was appropriate to that legislation, we simply sent it back to the Government for it to think again. It was just not acceptable to the committee. Committees should not just shrug their shoulders or bite their lip and say, "Well, this isn't really what we are looking for, but we'll just nod it through." They have to have the strength to say, "No, I'm sorry, but we do not really think this is doing what it should be doing."

We should also remember that it does not help the Government to pass legislation that, ultimately, is going to come back in its face some years down the line. It certainly does not help the people of

Scotland whom we represent. What is important, therefore, is that we do as much of the work as we can at the earliest possible opportunity in the bill process, and I think that that will lead to better outcomes.

Katy Clark: If Mike Hedges or Jonathan Jones do not want to come in on that, I will move on.

Another issue is the supporting documentation that comes with statutory instruments. As you know, there is often an explanatory note as well as a policy note. In your experience, is the information that is provided accurate? Moreover, is it sufficient, particularly in respect of delegated legislation that is made under a framework bill?

That is a question for the witnesses in the room. I do not know whether Finlay Carson would like to come in on that first.

Finlay Carson: Certainly. Our committee believes that there is a need for more information and time for scrutiny of secondary legislation when powers are planned to be introduced.

My point about having more time for parliamentary scrutiny is based on the current 40-day timescale. It derives from legislation from the 1940s, and one could argue that that has not kept pace with the changes that have been made to primary legislation. As we have discussed already, as primary legislation has changed to reflect the need to be more flexible and adaptable in order to keep up with the social and technological advances and changes that we see in society, there needs to be a change in the secondary legislation, too, and I do not think that that is there at the moment. You could argue that it is probably not fit for purpose.

One of the big issues for our committee is getting information in advance on how secondary legislation will be laid, so that the committee is able to plan and prepare for that. For example, as a result of the Agriculture and Rural Communities (Scotland) Act 2024, we will be dealing with significant amounts of secondary legislation in the autumn, perhaps, but we are not very clear about how that will come forward.

Another example might be the instruments relating to deer management. I think that there were 96 recommendations requiring a number of instruments, but unless we see a package of such instruments, it will be very difficult for the committee to decide whether each individual instrument is proportionate and will deliver on the policy outcomes that the Government wishes to see. Therefore, there is an issue with how the Government plans to lay such Scottish statutory instruments, and whether it is as a package.

We also need better support for parliamentary scrutiny. SSIs are the only items of business for a subject committee that are not routinely reviewed by the Scottish Parliament information centre. We get advice from SPICe on and legal support for EU exit-related and UK statutory instruments; however, we get more support for UK subordinate legislation than we do for Scottish legislation, and I believe that that needs to be reviewed, given the additional volume of such instruments that we are likely to see.

The Convener: Kenny Gibson is about to leave the meeting. Kenny, is there anything that you want to put in the record before you go?

Kenneth Gibson: Yes. One of the things that my committee has expressed concern about is consistency in how bill teams address financial memorandums. For example, it was clear when we were taking evidence on the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill that the bill team did not know what was expected of them when it came to the financial memorandum. That is why we had to get the cabinet secretary in.

We then wrote to the Scottish Government to urge it to

"put in place enhanced training and development for Bill Teams to improve the quality and consistency of presentation of future"

financial memoranda. We said that that

"should include promoting the importance of applying each of the steps in the"

Scottish public finance manual.

A consistent approach is needed. I will give an example at random. When figures are presented, some are rounded and some are precise, so we are not comparing like with like. It is vital that, whether figures are presented in one way or the other, there is consistency in the way in which financial memoranda are presented to the committee.

The Convener: Is there anything else that you would like to put on the record before you leave?

Kenneth Gibson: I just want to thank the committee for inviting us along.

Jeremy Balfour: I have a very brief question before you depart.

As you pointed out, secondary legislation cannot be amended—it is either accepted or rejected. It has been put to us that there should be some way in which a committee could seek conversations with the Government about amending secondary legislation or flag up that, for example, it agrees with 80 per cent of an instrument but has concerns about 20 per cent of it. The committee could ask the Government to go away and think about the issue again. Would that work, or is it something that sounds good in theory but, in practice, might not help?

Kenneth Gibson: Although I could give my own view on that, I would have to speak to colleagues on the committee to hear what they think, because I am here to represent the views of the committee, not to give my own views.

Jeremy Balfour: Do you have a view on that, Mr Carson?

Finlay Carson: Recently, we considered an SSI that included provision on the period of time that legislation would stay in place before being reviewed. The only thing that was called into question was the date at which the policy would end, but, to address our concerns, the Government would have had to withdraw the SSI or the committee or the Parliament would have had to vote it down, which would not have been a good use of parliamentary time. If there was a way that the issue could have been addressed, the SSI could still have been passed, without the need for annulling it and for another SSI to be introduced. Therefore, there is a case for having an effective way to amend secondary legislation, particularly given the volume that we are likely to see.

The Convener: Thank you for your time, Mr Gibson.

Kenneth Gibson: Thank you, convener.

Katy Clark: Jonathan Jones, from a Westminster perspective, is there a case for being able to amend secondary legislation? At the moment, we are put in a position in which we have to take it or leave it—parliamentarians are not able to amend SSIs. Do you have a view on that? What would the issues be?

Sir Jonathan Jones: A power to amend has been suggested, and I would not rule it out, but it would be quite complicated to work out what an effective amendment process would be. The idea of a think-again power is worth thinking about as a middle course to address what you said about having to take it or leave it.

In practice, SIs are virtually never rejected in Westminster. Part of the problem is that they are almost always passed. As a middle course, there could be a route whereby the House of Lords or the House of Commons could say that it is not rejecting an SI but that it wants the Government to think again on a particular issue. The Government could go away and think about a possible amendment, rather than having back benchers drafting amendments, and the Government would then have to come back to win a second vote.

I completely understand that such a process might have to be adopted for the Scottish Parliament. It is worth thinking about some version of a middle route—one that is short of rejection but is not acceptance and that involves highlighting a particular point on which the Government is invited to think again.

Katy Clark: Does Mike Hedges have a view on that?

Mike Hedges: Mike Hedges has a view on that, and so does my committee. We are looking at whether amendments to statutory instruments or to the motions that accompany them could be tabled by members. We are pushing on that, but my personal view is that the best that we will get is a process whereby the Government looks at the issue again, as Jonathan Jones suggested. Will we be able to amend statutory instruments? No. Can we ask the Government to look at them again? That is probably where we will end up.

10:30

Roz McCall: Hello again, everyone. I will come first to Mr Hedges with my first question about Henry VIII powers. Your committee's submission made reference—which I am sure that you remember—to a suggestion to strengthen scrutiny on that,

"to require the Minister making them to consult with relevant stakeholders before making, or laying a draft of, a statutory instrument."

That highlights to me the possibility that there could be other forms of scrutiny and that there should be a better way of scrutinising that Henry VIII power. What might be a required or appropriate scrutiny method for that form of legislation?

Mike Hedges: The Legislation, Justice and Constitution Committee wants to strengthen the scrutiny of statutory instruments that are made under Henry VIII powers by requiring them to be subject to consultation with relevant stakeholders. The committee is concerned that we dealt with a piece of legislation yesterday that had 20 Henry VIII powers in it, and that is not abnormal. More and more Henry VIII powers are being brought in. For example, there were concerns that the Agriculture (Wales) Bill contained a delegated power to amend the definition of agriculture. It was an agricultural bill, but it included the ability to amend what agriculture is.

Governments like Henry VIII powers, but Parliaments do not. There needs to be some means of rationing them, so that they come in only with good reason.

Governments—or, at least, the Welsh Government—do not seem to like indexing anything. Instead of saying, "We are going to charge £100 a year for this", and use Henry VIII powers to change the charge in the future, they could say that they will index it over the next five years against inflation or a different index. They

like to have that power, but its use takes a lot of power from those of us who are scrutinising the legislation.

The committee is concerned about the great use of Henry VIII powers, including their use in UK bills in devolved areas. They could be used to amend the Government of Wales Act 2006 and could therefore modify the Senedd's legislative competence. We certainly have concerns all the way across the use of Henry VIII powers.

Roz McCall: We are trying to drill down into what would be an effective form of scrutinising those powers. Are we saying, "We just don't like them, so let's not do it"? In your opinion, can we find a sensible, suitable way of scrutinising those powers and halting their use when need be?

Mike Hedges: Governments and civil servants like Henry VIII powers because they make life easier for them. First, with every use of a Henry VIII power, we need an explanation of why that is the most appropriate way forward. Secondly, if the power is being implemented, we need future post-legislation investigations and scrutiny of how it is being used.

The idea of "Let us get on with it" and that Parliament is only a rubber stamp destroys the importance of Parliament.

Roz McCall: That is very interesting.

Mr Jones, what is your opinion on what Mr Hedges has just said about Henry VIII powers and on the concern that Westminster could encroach on devolved legislation?

Sir Jonathan Jones: I agree with what Mr Hedges has said on the concerns about excessive use of Henry VIII powers.

We have been discussing a particular and extreme example of the problem of powers being taken and exercised with no proper scrutiny or democratic input. Obviously, in that case, we are talking about the amendment of previous primary legislation.

However, I do not think that we can say that all Henry VIII powers are bad. There will be times when it is more efficient to use them to update old law in a relatively minor way.

I am with Mr Hedges with regard to how to constrain the use of those powers, which is by trying to ensure that the powers are as narrow as possible, and that it is clear what type of legislation they are targeting and what types of amendments are to be permitted. I also agree on the point about requiring Governments to explain why they have taken powers of that sort and to justify that.

When the powers are exercised, the question then is about how they are scrutinised. As you know, there are different levels of scrutiny, so you might require a debate or additional supporting material to justify the approach and to explain how the power will be exercised and why.

One possibility that we have not really discussed so far, but which has been tried, is a sifting process. That approach was taken with the EU exit instruments. A particular committee would be charged with looking at particular categories of instruments and deciding on them. Some may be anodyne and perfectly harmless and minor, but that committee would identify the ones that were not and which were really significant. Those would then be required to be looked at in more detail, whether by a specialist committee, through further consultation or by debate. You could apply that process more generally, and you could certainly apply it to Henry VIII powers.

Roz McCall: Mr Carson, in your submission, you refer to some bills in relation to Henry VIII powers, but not many. Do you have anything to add?

Finlay Carson: I can answer the question very simply. We have had only one Henry VIII power to consider in session 6, so we have not taken a view on the issue generally. However, I absolutely agree with Jonathan Jones. One thing that we discussed was about the Government explaining its approach to identifying how instruments are to be treated by the Parliament—whether the affirmative or the negative procedure should be used and how it came to that conclusion. Ideally, that would be done early, to give the committee an opportunity to comment on the appropriateness of that approach.

We certainly discussed that, particularly in relation to the Good Food Nation (Scotland) Bill and the Agriculture and Rural Communities (Scotland) Bill, which will have significant numbers of instruments under them. The committee felt that it was important for us to understand why the Government was taking the approach that it was taking. Some instruments will need a very light touch—they will be technical in nature and will not need much scrutiny—but others will be different. The Government's and the Parliament's views on that approach might differ, and we would like to be able to explore why that is the case.

Roz McCall: That is excellent—thank you.

The Convener: I have one final question, which is on other Parliaments. We have reached out to contact other Parliaments, and we have a meeting tomorrow morning with one of the state Parliaments in Australia. This is probably a question for Jonathan Jones in the first instance, although I am happy for other colleagues to come in if they have comments.

Are there any examples that the Scottish Parliament and, potentially, other Parliaments in

the UK could examine with regards to the use of framework legislation and Henry VIII powers? Clearly, they will not be called Henry VIII powers, but are there any positive models of scrutiny to consider?

Sir Jonathan Jones: I mentioned the sifting process that was, I think, tried for the first time, at least in a major way, for the Brexit SIs. Whatever you think about that whole process, some kind of prioritisation and sifting process was definitely needed, because of the volume of instruments that were being made and pushed through Parliament. Many of them were very minor and technical and did not merit detailed debate or use of parliamentary time. It may be worth looking at how that model worked and how successful it was in identifying the instruments that were more significant and which therefore needed more scrutiny and debate.

That is the example that I have in mind. There may be others, but I am afraid that I cannot pluck out examples. I come back to the idea that not all SIs are bad, and not even all Henry VIII powers are bad, so you need some kind of process for identifying the ones that are not necessarily bad but which need more scrutiny. The sifting model may be worth looking at from that point of view.

Mike Hedges: I agree that a sifting model or process is necessary. Jonathan Jones is absolutely right that not all SIs are bad and neither are all Henry VIII powers. Government tends to say, “This is only a technical amendment,” when, in fact, there will be wide-ranging repercussions. I also think that there needs to be an explanation of why something is considered to be technical.

Finlay Carson: I agree 100 per cent with what we have just heard. The Rural Affairs and Islands Committee dealt with a large volume of Brexit legislation. It is our job to make sure that nothing slips through but, ultimately, there are time pressures on the committee. The UK and Scottish Government often agreed, but that did not mean to say that the technical changes that we were discussing did not have an impact that the Parliament needed to be aware of. A sifting process and an independent overview of whether amendments or SIs are technical or otherwise, as Mike Hedges suggests, is important. I agree with the previous two witnesses and would repeat what they have said.

The Convener: If colleagues have no further questions, I will go to the witnesses for any final points that they would like to put on record.

Mike Hedges: I have found it very informative to see what is happening in Scotland and to provide some information on what is happening in Wales.

Sir Jonathan Jones: I have nothing further to add. Thank you for asking me to the committee.

Finlay Carson: We need to be aware that parliamentary procedures need to keep pace with the changing way that primary legislation is introduced. Right now, I do not think that the situation is ideal, so I welcome the committee’s oversight and I hope that we can get to a better approach.

The Convener: I thank all the witnesses for their evidence. After the meeting, if there are any further points that you feel that it would be useful for the committee to be made aware of, it would be extremely helpful if you could write to us.

I suspend the meeting briefly to allow our witnesses to leave.

10:42

Meeting suspended.

10:44

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 4, we are considering three instruments, on which no points have been raised.

Disclosure (Scotland) Act 2020 (List A and B Offences) Amendment Regulations 2025 [Draft]

Regulated Roles with Children and Adults (Scotland) Amendment Regulations 2025 [Draft]

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No 2) Order 2025 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

10:45

The Convener: Under agenda item 5, we are considering two instruments, on which no points have been raised.

Protection of Vulnerable Groups (Prescribed Services and Activities) (Protected Adult) (Scotland) Regulations 2025 [Draft]

Disclosure Information (Accredited Bodies) (Scotland) Regulations 2025 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

10:45

The Convener: Under agenda item 6, we are considering two instruments, on which no points have been raised.

Ardersier Port Limited (Pilotage Powers) Order 2024 (SSI 2024/382)

Disclosure (Scotland) Act 2020 (Commencement No 4) Regulations 2025 (SSI 2025/2 (C 1))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: In relation to SSI 2024/382, does the committee wish to welcome that the Scottish Government has undertaken to reflect on whether the statutory pay conditions should be narrated in the preamble of the order in the event that future orders are required under that enabling power?

Members *indicated agreement.*

10:46

Meeting continued in private until 11:21.

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