

Framework legislation and Henry VIII powers: Delegated Powers and Law Reform Committee Call for Views

October 2024

The Scottish Human Rights Commission (the Commission) is a public body created by the Scottish Commission for Human Rights Act 2006.

We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.

The Commission is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.

The Commission is independent of Government. We are accountable to the people of Scotland via the Scottish Parliament.

Executive Summary

The Scottish Human Rights Commission (the “Commission”) welcomes the opportunity to respond to the Delegated Powers and Law Reform Committee’s call for views on framework legislation and Henry VIII powers.

The Commission does not take a position in favour of or opposed to the use of framework legislation and Henry VIII powers. Instead, in our submission we set out the human rights framework to be taken account of by the Scottish Parliament when considering this topic.

We consider that the Human Rights framework raises some important considerations for the use of framework legislation and Henry VIII powers, though it does not provide a definitive answer as to the appropriateness of their use.

We also look at the process for scrutiny of the use of framework legislation and Henry VIII powers, and whether steps need to be taken to ensure the full consideration of human rights within that process.

This submission begins by setting out the relevant human rights framework – including the ECHR and ICCPR – as it relates to the use of framework legislation and Henry VIII Powers. Then, we answer some of the specific questions asked in the call for views.

Introduction

Framework legislation and Henry VIII powers both concern the use of secondary legislation (often referred to as subordinate legislation). Secondary legislation is legislation made by bodies other than the Scottish Parliament, such as the Scottish Ministers, under a power conferred by an Act of the Scottish Parliament. The use and production of Scottish Statutory Instruments (pieces of subordinate legislation) is governed by the Interpretation and Legislative Reform (Scotland) Act 2010. Chapter 10 of the Standing Orders of the Scottish Parliament sets out the procedure for subordinate legislation.

Unlike primary legislation, which goes through a set process of oversight and scrutiny on its journey through parliament, there is no mechanism to guarantee scrutiny of the substance of policy made by secondary legislation. For many pieces of secondary legislation there is not a vote in parliament, whereas for others, debates are short and there is no possibility of amendment. Consultation with rights holders and civil society is done on an ad-hoc basis, and there is no requirement for formal evidence sessions or consultation.

For these reasons, the Commission has raised concerns on a number of prior occasions during our own evidence to Parliament as to the level of scrutiny and oversight involved in the making of secondary legislation.

In this submission, the Commission does not take a position in favour of or opposed to the use of framework legislation and Henry VIII powers. Instead, we set out the human rights framework to be taken account of by the Committee when considering this topic.

In doing so, particular reference is made to the European Convention on Human Rights (“ECHR”) and the UN International Covenant on Civil and Political Rights (“ICCPR”). It should be noted that a human rights analysis does not provide a definitive answer on the circumstances in which the use of framework legislation or Henry VIII powers is appropriate.

Human Rights Framework

European Convention on Human Rights

Framework legislation and Henry VIII powers do not explicitly engage any ECHR rights. Neither the Convention nor its interpretation specify any particular rules for the legislative processes to be followed by State parties. However, the preamble to the Convention explains that the rule of law is an underpinning value which cuts across the interpretation of the entire Convention:

"Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."¹

The Convention does not define the concept of the rule of law, but the Council of Europe's Commission for Democracy through Law (Venice Commission), provides non-binding advice and observations to Council of Europe member states on the rule of law. While the observations of the Venice Commission are non-binding and do not form part of the ECHR infrastructure, they are formulated to compliment the ECHR. The Venice Commission has produced a rule of law checklist, which makes recommendations as to the use of delegated legislation:

"When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act?"²

The checklist notes that if the answer to this question is no, the supremacy of the legislature – that is the right of the parliament, as opposed to the government, to make laws – would be undermined. Civil society actors such as Justice have drawn attention to the fact that framework legislation is not aligned with this requirement in the Westminster context.³

The Venice Commission has also drawn attention to the importance of the ability of parliamentarians to be able to amend legislation put forward by the government:

"The right of amendment is seen as the parliamentary prerogative par excellence. Since the exercise of legislative initiative is clearly dominated in practice by the government, the right of amendment has become the principal exercise by the Parliament of its right of legislative initiative."⁴

Most procedures for the passing of subordinate legislation do not allow for amendment, which presents challenges for parliamentarians to effectively represent their constituents by shaping law and policy. This issue also raises concerns as regards participation rights, which is considered below.

United Nations International Covenant on Civil and Political Rights (“ICCPR”)

The UK is a party to the UN International Covenant on Civil and Political Rights (“ICCPR”). Whilst the ICCPR is not legally enforceable in the same way the ECHR is, its obligations are nonetheless binding and must be reflected in domestic law.

Participation Rights

Article 25 ICCPR generally confers the right of all citizens to vote, participate in elections and hold office on an equal basis. It is not prescriptive in terms of substantive outcomes; it does not mandate a particular style of government or approach to participation.

One aspect of Article 25 ICCPR requires States to provide citizens with the right and opportunity to “take part in the conduct of public affairs, directly or through chosen representatives.”⁵ The Human Rights Committee’s understanding of the right is outlined in General Comment 25. The Committee defines the ‘conduct of public affairs’ widely:

“The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”⁶

Clearly, there is an expectation that the public should have the opportunity to be heard in the legislative process beyond participation in elections and that they should have the opportunity to contribute to policy development and the administration of public services.

The Human Rights Council of the UN also adopted a set of guidelines for the effective implementation of the right to participate in public affairs in October 2018.⁷ While the guidelines are non-binding, they represent agreed best practices as to the fulfilment of the right of participation. The guidelines note that:

"Rights holders should be able to participate in the decision-making process from an early stage, when all options are still open. This entails, for example, that public authorities refrain from taking any formal, irreversible decisions prior to the commencement of the process. It also requires that no steps be taken that would undermine public participation in practice, for example large investments in the direction of one option, or commitments to a certain outcome, including those agreed with another organ of the State, a non-State actor or another State."⁸

The primary legislative process facilitates this by publicising Bills, scheduling sufficient time for consideration, taking evidence from experts and civil society, and providing opportunities for amendment. By contrast, the process for subordinate legislation is not as well publicised, operates on a much shorter timescale, does not undergo the same level of scrutiny in committee where it can be examined by civil society, and in most cases cannot be amended. This suggests that there is not always the opportunity for rights holders to effectively participate in the legislative process. When it comes to framework legislation, where substantive policy decisions are made by regulation, this could undermine participation rights.

The guidelines also note the importance of parliamentarians being able to play an important role in representing the views of their constituents in the legislative process:

"Elected representatives should play a critical role in supporting these processes, including through their participation and their representation of the constituencies to which they are accountable."⁹

The use of framework legislation can inhibit the ability of elected representatives to scrutinise policy decisions and effectively represent the views of their constituents, because depending on the procedure used for the subordinate legislation, they need not vote on it and have no right of amendment.

Response to Questions

The Commission does not have a view on all questions asked in the Committee's call for views. Where we do have a view, the questions are addressed below.

What is your understanding of what framework legislation is?

Framework legislation can generally be understood as Acts of Parliament, in this case Acts of the Scottish Parliament, which set broad policy intentions or outcomes, with the policy detail being filled in by secondary legislation after it has become law.¹⁰ There is, however, not a general consensus as to at which point a piece of legislation becomes framework legislation. Henry VIII powers refer to powers which allow Ministers to amend primary legislation using secondary legislation.¹¹

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

The Commission is concerned about the use of framework legislation to alter human rights entitlements. Human rights are fundamental, and any significant impact to them ought to have the full scrutiny of the legislature. Therefore, framework legislation, if used, must build in enough detail to comprehensively guarantee human rights requirements. This means that international human rights requirements ought to be explicitly articulated in the primary framework legislation and operate as a restriction on the scope of the power to make secondary legislation conferred by the framework, to prevent rights entitlements from being altered by secondary legislation. For example, the Commission suggested that explicit articulation of rights would have improved the then Social Security (Scotland) Bill:

"The Commission believes that a clause entitled 'The right to social security' should feature within the Bill. The clause would clearly establish that everyone has the right to social security, as protected by relevant human rights law. 'Relevant human rights law' would be defined with reference to key regional and international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter."¹²

The Commission has raised similar concerns about the human rights protection in the National Care Service (Scotland) Bill in our recent letter to The Health, Social Care and Sport Committee:

"We welcome the clarification of the meaning of "human rights" by reference to international human rights treaties and reference to the concept of "living independently in the community" at Section 1(c)(ii). However, as discussed in our evidence, we believe that the Bill could be strengthened by clearer articulation of the specific meaning of "living independently", to ensure accountability against specific standards articulated by the UN in relation to Article 19 of the UN Convention on the Rights of Persons with Disabilities."¹³

In the Westminster context, this issue has also been considered. In their 2023 Working Paper, the Hansard Society make suggestions as to the appropriate use of delegated legislation, which framework legislation enables. They suggest that consensus may be found in preventing delegated legislation from changing human rights or equalities protections.¹⁴

Do you consider there to be any challenges associated with scrutinising or engaging with a piece of framework legislation? Any specific or real-life examples would be helpful if you can refer to them.

Part of the Commission's general duty is to provide advice and guidance to promote human rights and to encourage best practice in relation to human rights. One element of this duty is to give evidence to parliament and respond to consultations from government insofar as proposals concern human rights. However, framework legislation does not provide detail to allow us to fully examine the human rights implications of particular proposals because the policy detail is filled in later by regulation.

One example of this issue is the National Care Service (Scotland) Bill. We noted the challenge of commenting on framework legislation in our response to the call for views on the Bill from the Health Social Care and Sport Committee in 2022:

"...given the lack of detail in the Bill and the reliance on regulations, opportunities to give more meaningful and robust specification to human rights duties are limited. In particular, the remedies and sanctions available in respect of complaints (s.15) are a key vehicle for human rights accountability, however their detail is left to regulations."¹⁵

Similarly, the Commission's experience of engaging with the Social Security (Scotland) Act 2018 was hampered by the extent to which the scheme was left to regulation:

"The Commission acknowledges that the Bill is intended to establish a social security framework, and that a balance must be struck between the use of primary and secondary legislation. That said, the Commission notes that Chapter 2 of the Bill is lacking in specific detail. The Commission therefore questions whether the right balance has been struck to allow for appropriate public scrutiny."¹⁶

Clearly, the use of framework legislation can, and at times has, hampered our ability to advise on the human rights framework in a meaningful way.

As noted in our submission to the then Social Security (Scotland) Bill, the difficulty of engaging with framework legislation may also be felt by the public at large, and civil society actors. Where there is not sufficient detail in the primary legislation, there can be difficulties with the realisation of public participation in the conduct of public affairs under Article 25 ICCPR. Issues such as the remedies and sanctions available in respect of complaints necessarily have an impact on the most vulnerable individuals, and Article 25 ICCPR best practice requires these individuals and their representatives to be enabled to participate in the construction of any relevant system.

We acknowledge that secondary legislation may facilitate co-designed systems, such as intended for the complaints and redress mechanism in the National Care Service (Scotland) Bill.¹⁷ This can allow for enhanced and meaningful participation for rights-holders, and of course the Commission encourages and welcomes meaningful participation of rights-holders. However, it is important to ensure an appropriate balance is struck to allow widespread participation and parliamentary oversight, in line with rule of law requirements and Article 25 ICCPR. We considered this issue in our recent letter to the Health, Social Care and Sport Committee in respect of its consideration of the National Care Service Bill:

"We appreciate that the Scottish Government plans to co-design the complaints system. While co-design is to be welcomed, the broad attributes that any complaints mechanism must have should be set out clearly on the face of the Bill and be subject to full parliamentary scrutiny. This would provide clear parameters for the process of co-design, ensuring that the resultant system complies with human rights best practice."¹⁸

As discussed, any use of participation in the making of secondary legislation with a significant human rights impact ought to be guided by agreed attributes and

meaningful commitments to human rights best practice in the empowering legislation.

Thinking of the scrutiny of secondary legislation resulting from framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles scrutinising and engaging with legislation?

The Delegated Powers and Law Reform Committee has an important role in scrutinising delegated legislation on a formal basis. They consider all delegated legislation and refer it to the lead committee (the committee responsible for the relevant subject matter) for further scrutiny if certain conditions related to the formal criteria are met. We suggest that the grounds of referral could be extended to include changes to human rights entitlements. The Delegated Powers and Law Reform Committee should consider identifying secondary legislation which changes rights entitlements and ensure that proper consideration and scrutiny is given to it.

It is important to recognise that human rights impacts are not limited to legislation that specifically confers protection, such as the recent UNCRC (Incorporation) (Scotland) Act 2024. Rather, many pieces of legislation have significant rights impacts, and the committee ought to consider whether changing these rights settlements via secondary legislation requires further scrutiny. Framework legislation which empowers the creation of new criminal offences, or powers of entry/enforcement, such as in the recent Agriculture and Rural Communities (Scotland) Act 2024 necessarily impact on the right to private life.¹⁹ Likewise, as noted above, the National Care Service (Scotland) Bill intends for the complaints and redress system to be made by regulation. The complaints and redress system will be the main form of redress for people experiencing issues with their care, which may impact their right to health, and an adequate and dignified standard of living. As such, though not formally a human rights Bill, regulations made under the National Care Service (Scotland) Bill will have a significant impact on human rights, and access to justice, and the Committee could consider whether the current level of scrutiny is appropriate when regulations come to be made.

Effective identification of powers likely to impact on human rights, construed beyond specific 'human rights legislation' by the committee would ensure that there is acknowledgement of changes to human rights entitlements and the opportunity for more considered scrutiny based on the substantive policy made by the regulations.

What views do you have on Henry VIII powers? In particular, are there any contexts in which you consider their use to be particularly appropriate or inappropriate?

As noted by the House of Commons Library research brief on delegated powers and framework legislation, some uses of Henry VIII powers are uncontroversial, such as incidental, consequential or transitory provisions. These types of amendments do not affect substantive policy nor change the effect of primary legislation.²⁰ The Commission agrees that such use of Henry VIII powers under those circumstances is not problematic. The research brief also notes that the use of Henry VIII powers to make more substantial changes - as is increasingly common - is more controversial.²¹

The Commission has noted concerns about the use of Henry VIII powers where changes are made to rights protections without the full scrutiny of parliament, especially in the wake of the UK's exit from the European Union:

"This concern of diminution of rights protection over time is further increased by the Withdrawal Act provisions allowing ministers to manage legislative change to retained EU law and any other legislation impacted by Brexit, by statutory instrument. These "Henry VIII" powers allow for changes to rights protections without Parliamentary scrutiny and with no other mechanisms through which to protect retained rights from amendment."²²

As with Framework legislation, the Commission is concerned by any use of Henry VIII powers to alter human rights entitlements. Generally speaking, it would be inappropriate for secondary legislation to amend key pieces of primary legislation which confer specific human rights protections. For example, any future legislation which incorporates international human rights treaties into Scots domestic law would be inappropriate to amend substantively by secondary legislation. In the Westminster context, alteration of the Human Rights Act 1998 or the Equality Act 2010 by subordinate legislation would also be problematic.

Further, as noted above in relation to framework legislation, human rights entitlements perforate through many pieces of legislation, and not simply the incorporating acts. Therefore, the same approach to scrutiny and oversight identification we have suggested in response to secondary legislation made under framework consideration should be taken to the use of Henry VIII powers, a more significant use of secondary legislation, to ensure that there is appropriate scrutiny in place.

Conclusion

In conclusion, framework legislation and Henry VIII powers can raise a number of significant human rights concerns. In terms of the international human rights framework, framework legislation and Henry VIII powers engage Article 25 ICCPR. Article 25 provides a lot of discretion to state as to how to ensure participation in the legislative process, and therefore the use of framework legislation and Henry VIII powers is not incompatible with the rights framework. However, it should be ensured that participation in the legislative process is meaningfully facilitated, and that the full scrutiny of parliament is available where secondary legislation makes changes to human rights entitlements.

The ECHR preamble also identifies the importance of the rule of law in underpinning human rights, and concerns about the breadth and process of the making of delegated legislation are noticeable, when the process is compared with pan-European best practice with reference to the recommendations of the Venice Commission. This is especially the case where secondary legislation is used to make changes to human rights entitlements. The Commission notes that if rights entitlements are included in primary legislation, and powers to make secondary legislation are restricted by them, this could help to ensure that framework legislation is used appropriately.

Finally, the role of parliament, and especially the Delegated Powers and Law Reform Committee is vital in ensuring the appropriate use and scrutiny of framework legislation and Henry VIII powers. There could be scope for the Committee to take a more active role in ensuring the appropriate use of these powers, especially as regards human rights, which would help these processes to align better with international best practice for participation in public life.

Endnotes

- 1 Preamble to the ECHR.
- 2 Venice Commission, Rule of Law Checklist (2016), CDL-AD(2016)007, Question 4(iii).
- 3 Justice, The State We're In, Addressing Threats and Challenges to the Rule of Law (September 2023), para 2.29.
- 4 Venice Commission, Report on Legislative Initiative (2008), CDL-AD (2008)35-e, para 49.
- 5 International Covenant on Civil and Political Rights, Article 25(1).
- 6 UN Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (July 1996), CCPR/C/21/Rev.1/Add.7, Para 5.
- 7 United Nations Guidelines for States on the effective implementations of the right to participate in public affairs (adopted by resolution 39/11 in October 2018).
- 8 United Nations Guidelines for States on the effective implementations of the right to participate in public affairs (adopted by resolution 39/11 in October 2018), para 70.
- 9 United Nations Guidelines for States on the effective implementations of the right to participate in public affairs (adopted by resolution 39/11 in October 2018), para 65.
- 10 See House of Commons Library, Delegated Powers and Framework Legislation: Research Briefing (July 2024), para 2.1.
- 11 See House of Commons Library, Delegated Powers and Framework Legislation: Research Briefing (July 2024), para 1.4.
- 12 Scottish Human Rights Commission, Social Security (Scotland) Bill: Written evidence to the Social Security Committee (August 2017), para 33.
- 13 Scottish Human Rights Commission, Letter of 11th October 2024 to the Health, Social Care and Sport Committee.
- 14 Hansard Society, Proposals for a New System for Delegated Legislation; a Working Paper of the Hansard Society Delegated Legislation Review (February 2023), p11.
- 15 Scottish Human Rights Commission, National Care Service (Scotland) Bill – Response to Detailed Call for Views (September 2022), p7.
- 16 Scottish Human Rights Commission, Social Security (Scotland) Bill: Written evidence to the Social Security Committee (August 2017), para 34.
- 17 See Scottish Government, Co-design and the National Care Service (June 2022).
- 18 Scottish Human Rights Commission, Letter of 11th October 2024 to the Health, Social Care and Sport Committee.
- 19 Agriculture and Rural Communities (Scotland) Act 2024 s.18(2).

20 House of Commons Library, Delegated Powers and Framework Legislation: Research Briefing (July 2024), para 1.4.

21 House of Commons Library, Delegated Powers and Framework Legislation: Research Briefing (July 2024), para 1.4.

22 Scottish Human Rights Commission, Briefing to the EU Justice Sub-Committee Inquiry into Rights After Brexit (May 2019), p3.