

**RCN Scotland response to Delegated Powers and Law Reform  
Committee consultation on:**

**Framework legislation and Henry VIII powers**

## **Introduction**

The Royal College of Nursing (RCN) is the world's largest nursing union and professional body. It is the leading national and international authority in representing the nursing profession. We represent over half a million nurses, student nurses, midwives, nursing associates and nursing support workers in the UK and internationally.

The RCN has 49,500 members in Scotland. We campaign on issues of concern to nursing staff and patients, influence health policy development and implementation, and promote excellence in nursing practice.

## **Background**

The Scottish Parliament's Delegated Powers and Law Reform Committee is keen to hear views on current use of framework legislation and Henry VIII powers. Framework legislation sets out principles for a policy but does not provide substantial detail on the face of the bill as to how that policy will be given practical effect. Instead, it provides broad powers to fill in the detail at a later point, most often by Ministers through secondary legislation (also referred to as delegated or subordinate legislation). Henry VIII powers allow Ministers to amend acts of parliament by secondary legislation.

RCN Scotland's response to this consultation will focus on our experience of the National Care Service (Scotland) Bill and the Health and Care (Staffing) (Scotland) Act 2019.

## Consultation questions

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

There is no clear and well understood definition of what framework legislation is. In broad terms, framework legislation seeks to set out principles, or an ambition for change, as well as high-level policy decisions, while leaving the detail to non-primary legislative means (such as secondary legislation, statutory guidance, 'softer' guidance, operational implementation decision and ministerial direction). What is, or is not, included on the face of a Bill will depend on a range of factors, including the relevant policy area and existing powers of stakeholders. Whether legislation is 'framework' or not does not come down to crude measurements such as number of sections (though a framework Bill is more likely to be shorter than if a different approach was taken) and most Bill's will be part 'framework' and part 'substantive' in nature.

The National Care Service (Scotland) Bill is an example of legislation which is 'framework' in nature. It contains high level principles by which an NCS should abide by and sets out the structural reforms needed to create an NCS. But it does not, for example, set out the level of detail about what services will fall within the purview of an NCS nor about things like membership of a National Board.

RCN Scotland also understands that Scottish government favours an increasing use of framework legislation.

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

RCN Scotland can understand the argument that framework legislation provides flexibility and can 'future proof' policy decision making by avoiding the need for new primary legislation to make more minor changes in the law. RCN Scotland also accepts that one advantage of framework legislation could be that detail relating to implementing policy decisions can be designed with a wider range of stakeholders outwith the parliamentary process (referred to as 'co-design' by the Scottish government).

However, and this is primarily informed by our experience of the National Care Service (Scotland) Bill, there are clear disadvantages and risks to taking a framework approach. Most significant is the impact such an approach can have

on the ability of stakeholders (including Parliament) to meaningfully scrutinise proposals.

A very basic example of this is that stakeholders are being asked to provide views on proposals to create a National Care Service and a National Care Service Board, without having even a clear definition of what services will come under an NCS or any detail on the relationship between the NCS Board, Scottish government and other stakeholders. This has, to put it bluntly, made it impossible for RCN Scotland to adequately scrutinise this Bill on behalf of our members.

Putting something on the face of a Bill, by making it more difficult to amend at a future date, also gives that policy decision greater status. Even in the example of the National Care Service (Scotland) Bill, some policy decisions (such as the introduction of a right to breaks for carers) are set out substantively on the face of the Bill, which appears to give that area greater status than decisions to be made via secondary legislation. It is not clear, in the case of the Bill, why some detail is set out in the Bill, while others are not, which can be seen to create a hierarchy of competing priorities.

It would be difficult to establish a set of 'criteria' which make the use of framework legislation appropriate. However, given our experience of engaging with the National Care Service (Scotland) Bill, we would favour greater thought being given to when framework legislation is appropriate and how to ensure that opportunities to scrutinise are made more possible if such an approach is taken.

However we believe that a fundamental principle should be that Scottish government should carry out the necessary consultation and co-design work before introducing the legislation. Scottish government must do the detailed policy development work before writing the Bill and any framework bill should be preceded by a detailed policy document setting out how the proposals will look and work in practice.

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

RCN Scotland is of the view that framework legislation should never be used to avoid scrutiny or as a way to get legislation 'over the line'.

We are of the view that the experience of the National Care Service (Scotland) Bill, where significant and broad policy decisions and changes to the legislation are still to be made at Stage 2 is far from ideal in terms of parliamentary scrutiny.

As the Scottish government is using stage 2 to make sweeping changes to the NCS Bill as introduced, this effectively makes it impossible for stakeholders and opposition MSPs to suggest their own amendments at stage 2. In part, because there is still a lack of clarity about whether the government's amendments will change again before formal lodging in response to continued discussions. And also because MSPs are unable to lodge an amendment to an amendment and so cannot put forward suggested improvements until stage 3. In essence, the Scottish government is using stage 2 to rewrite the Bill and removing the ability of other MSPs and stakeholders to participate meaningfully in stage 2 proceedings, a key stage in the parliamentary process.

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

See above in response to questions 2 and 3.

RCN Scotland's experience of the co-design process accompanying the National Care Service Bill has not been positive. While we understand the rationale behind co-design, in terms of developing proposals in conjunction with people with lived experience of using and delivering a system, the implementation of co-design has not worked well in practice. We called for and welcomed the creation of an Expert Legislative Advisory Group, however, this fell far short of our expectations and failed to make any meaningful impact on the Bill or draft amendments.

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

The Scottish government intends to set out the membership of the NCS Board via secondary legislation following co-design. During the passage of the Public Bodies (Joint Working) Act 2014, some of the regulations were published during the Bill's progression, ahead of Stage 2. In the absence of detail on this being included on the face of the Bill, a similar approach would have aided scrutiny and could be adopted more widely to assist parliamentarians and stakeholders.

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

The Committee will understand that the decision on whether to use affirmative, negative or some other procedure for subsequent delegated legislation is important when considering scrutiny. However, whatever procedure used, engaging with secondary legislation is significantly more difficult for ‘professional’ stakeholders and nearly impossible for members of the public.

In February 2024, [RCN Scotland wrote to the Health, Social Care and Sport Committee about](#) The National Health Service (Common Staffing Method) (Scotland) Regulations 2024, which were laid under order making powers established by the Health and Care (Staffing) Act 2019. Our concerns over these draft regulations were complex, but relevant to this consultation was the fact that despite being aware that RCN Scotland had concerns around the subject matter of these regulations, the Scottish government introduced them with no prior consultation with stakeholders. The result was that the regulations did not introduce flexibility and are likely to be required to be updated relatively soon. In that letter, RCN Scotland pointed out that “This is frustrating as this issue could have easily been avoided if the Scottish government had laid the draft SSI with some time to spare, instead of at the last moment ahead of 1 April 2024 [implementation of the Act].” RCN Scotland believes that this highlights a wider issue – namely the need to ensure adequate consultation with stakeholders, in a timely manner, ahead of parliamentary scrutiny of subordinate legislation.

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

As the Committee will be aware, the use of Henry VIII powers is intended to allow Ministers to make more minor changes to primary legislation without the full need for involvement of Parliament required for primary legislation. As with the use of secondary legislation more widely, this raises challenges in terms of scrutiny, as outlined above in response to questions 5 and 6 above.

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

The points raised in response to question 6 are relevant to this question too.

**9. Do you have any general comments or views on framework legislation or Henry VIII powers? The Committee would be particularly interested in any evidence you have on the prevalence of framework legislation (in any jurisdictions you are familiar with), whether this has changed over time, and any views you have on the definition of framework legislation.**

RCN Scotland has no further comments to make.