

External Affairs and Additional Legislation Committee

UK-wide common policy frameworks: scrutiny of non-legislative framework agreements

This paper proposes a model procedure for the Assembly's scrutiny of draft non-legislative UK-wide common policy framework arrangements, as starting point for discussion on 14 October 2019.

It is expected that non-legislative arrangements, as opposed to legislation, will be sought in the majority of policy areas requiring common frameworks. There may also be accompanying intergovernmental agreements in policy areas that require legislation.

This paper proposes establishing a process through seeking written commitments from the Welsh Government to:

- keep Assembly committees informed of progress in developing frameworks;
- lay draft framework agreements before the Assembly i.e. once their text is stable but before they have been finally agreed;
- include specified explanatory material within or alongside each draft agreement;



- support allowing the Business Committee to coordinate committee scrutiny and agree timescales for its conclusion;
- consider and respond to any committee reports (and allow any associated committee report debate to take place) before finalising a framework agreement.

1. Background

1. Since the Committee's establishment in June 2016, it has considered the question of how devolved policies currently governed by EU frameworks might operate after the UK has left the EU.
2. This included scrutiny of the European Union (Withdrawal) Act 2018 and monitoring the development of the UK-wide common policy frameworks programme of intergovernmental work.
3. The Chair of the Committee has contributed to ongoing discussions at the Interparliamentary Forum on Brexit on the coordination of scrutiny across the Assemblies and Parliaments of the UK.
4. During the summer term of 2019, the Committee decided to take a deeper look at the development of UK-wide common policy frameworks. In August 2019, the Committee published a discussion paper that summarised its current understanding of the frameworks programme and the scrutiny challenge it posed for the Assembly.
5. Continuing with this work, the Committee agreed to develop a model for Assembly scrutiny of the frameworks.
6. This paper provides an initial scrutiny model that the Committee has agreed as the basis for further discussion with a range of constitutional experts on 14 October 2019.
7. The paper does not provide an overview of the frameworks programme or the Committee's wider work in this area. This can be found in the Committee's discussion paper.

Scrutiny

8. It is likely that most of the policy areas subject to a framework will require a non-legislative framework agreement to be agreed between the governments of the UK.

9. Some policy areas subject to a framework will be underpinned by legislation.

Legislative elements

10. Under the Assembly's Standing Orders, it has established procedures for the scrutiny of legislation that can be utilised for the scrutiny of the legislative aspects of any framework. For example:

Type of legislation	Procedure
Assembly Bill	Standing Order 26
Assembly secondary legislation	Standing Order 27
Westminster Bill that seeks to make provision in a devolved area of competence	Standing Order 29
Westminster secondary legislation that seeks to amend primary legislation in a devolved area of competence	Standing Order 30A
UK Ministers SIs to temporarily restrict the Assembly's competence (under the EU (Withdrawal) Act 2018)	Standing Order 30B

11. The list above is not exhaustive, but illustrates the type of legislative approach that might be used to underpin a framework and the associated Assembly scrutiny procedure. The provisions in Standing Orders are, in several cases, augmented by inter-institutional agreements between the Assembly and the Government.

12. The Committee has not considered the question of whether or not these procedures need to be enhanced to ensure they adequately deal with legislation that seeks to establish a framework.

13. For example, should Standing Order 26 be amended to add a requirement for any provisions that relate to a UK-wide common policy framework to be identified in the documentation accompanying a Bill?

Question

- Are the Assembly's legislative scrutiny procedures sufficient to ensure adequate scrutiny of legislation relating to UK-wide common policy frameworks?

Non-legislative framework agreements

14. Currently, the Assembly has no formal procedures in place for the scrutiny of the non-legislative framework agreements that are expected to be developed for most of the policy areas subject to a framework.

15. Notwithstanding the importance of ensuring that the Assembly's procedures are adequate for the task of scrutinising the legislative aspects of frameworks, the focus of this paper – and the discussion on 14 October – will be on the development of an approach to scrutiny of the non-legislative framework agreements.

2. The model

A note on the framework agreements

16. The framework document(s) that are being considered for this scrutiny process are intergovernmental agreements.

17. Consequently, whilst these agreements might impact policy development in Wales, they cannot constrain the competence of the Assembly's legislative competence. Any constraint on the Assembly's legislative competence would need to be established through legislative means, and would be subject to procedures that the Assembly has in place for the scrutiny of legislation within its areas of competence.

18. Executive action on the part of the Welsh Government to enter into an agreement that constrains the level of policy flexibility available to it can be the subject of Assembly scrutiny.

19. Given the constitutional and political significance of the framework agreements, and their possible interaction with legislative measures, there is a case for a formalised approach to their scrutiny.

20. However, following any scrutiny process, the final decision to enter into an intergovernmental agreement will be for the Welsh Government to make - an executive decision that the Assembly and its committees will hold Welsh Ministers to account for subsequently.

21. This draft model for scrutiny suggested in the next section of this paper aims to strike a balance between ensuring that the Welsh Government has the freedom to perform its executive role whilst enabling an appropriate level of the Assembly scrutiny. Crucially, it is designed to ensure the Welsh Government has the opportunity to consider the views of Assembly committees before a framework agreement is finalised and signed.

Stages of scrutiny

22. As explained in the Committee's recent discussion paper, the governments of the UK describe the development of the frameworks according to a five phase process.

23. This strand of work focuses on the fourth phase i.e. once a draft framework agreement has been developed.

Early engagement

24. It will be important to start a process of tracking and engagement during the preceding stage. However, as considered in the Committee's discussion paper, this could be a less formal mode of scrutiny – akin to the engagement Assembly committees have with Green and White Paper proposals.

25. Behind the scenes, the staff supporting Assembly scrutiny are developing an approach to tracking the development of frameworks in each of the identified policy areas. This information will allow them to alert Assembly Committees in sufficient time to take decisions on their approach to scrutiny of each framework area.

26. Whilst the Committee acknowledges the importance of timely completion of the frameworks, the Committee would expect to see the published outline drafts of frameworks as they become available. This will be of considerable assistance in prioritising the scrutiny of more contentious or complex areas.

Stage 1: Documents laid

27. As a document-based scrutiny process, there needs to be an entry point into the Assembly that triggers the process.

28. Committing the Welsh Government to laying draft framework agreements (and associated explanatory information) once the agreement text has been provisionally agreed between the governments (i.e. once it enters the fourth phase) would provide a clear starting point for Assembly scrutiny.

29. In seeking the laying of these texts, it is also worth considering the information that these texts should contain, or that should be provided in an accompanying memorandum.

30. The type of information that could be sought includes:

- the policy objectives of the framework;
- the evidence to support the need for a framework in this area;
- a summary of the consultation process and responses received;
- governance arrangements, including the dispute resolution process and review mechanism;
- a devolution impact assessment i.e. the extent to which this framework agreement constrains executive competence and the extent to which the constraints imposed by the framework agreement compare to those that exist under current EU frameworks;
- a legislative impact assessment i.e. what legislation, passed or associated, is associated with this framework (retained EU law, other SIs, primary legislation) and any issues of legislative consent; and
- a financial impact assessment.

Questions

- Should draft framework agreements be laid before the Assembly?
- If it is considered desirable to seek the laying of draft framework agreements before the Assembly, then what is the appropriate route to ensuring this happens? (e.g. Assembly-Welsh Government agreement, Standing Orders etc.)
- Is the suggested list of information that should be required within or alongside each draft agreement sufficient? Should anything be removed or added to this list?

Stage 2: Scrutiny period

31. Once a draft framework agreement has been laid, the next task is to consider how they should be scrutinised.

- 32.** Given their likely complexity, committee scrutiny would appear to be the most appropriate approach.
- 33.** If this is accepted, then there is also a need to coordinate committee activity.
- 34.** The obvious locus for this would be the Business Committee.
- 35.** In keeping with how the Business Committee coordinates the scrutiny of Bills and legislative consent memorandums, it could play a role in determining the committee(s) responsible for scrutiny of each draft framework agreement and the timescale for scrutiny.
- 36.** This would also allow a coordinated approach in terms of ensuring any legislation associated with a particular draft framework agreement could be remitted to the same committee.
- 37.** Once a draft framework agreement is remitted to a committee, it would be for the committee to decide on how it wished to scrutinise the agreement, including determining how it links to any legislative aspect of a framework and any interparliamentary element it wished to bring to its work.

Questions

- Is committee scrutiny the most appropriate approach to scrutiny?
- Should the Assembly's Business Committee perform the role described i.e. lead on the coordination and timescales for committee scrutiny?
- Are there alternative ways in which to manage the coordination and timescales for scrutiny?

Stage 3: End of this phase of scrutiny

- 38.** The scrutiny model proposed in this paper aims to establish a mechanism to enable meaningful Assembly committee scrutiny of the draft framework agreements, alongside other framework elements, including legislation.
- 39.** It does not seek to establish a control over the Welsh Government's ability to enter into an intergovernmental framework agreement as this, in of itself, is an executive decision for Welsh Ministers – a decision for which the Assembly can hold Welsh Ministers to account for subsequently.

- 40.** Where a framework includes legislative elements, the Assembly has procedures in place to exercise controls, for example through the legislative consent process.
- 41.** As described above under the proposal for committee scrutiny, and analogous to the LCM scrutiny process, a committee would be provided with a timescale within which to report on a draft framework agreement.
- 42.** It therefore follows that, as a minimum, the Assembly would want to seek a commitment from the Welsh Government to not enter into a framework agreement until a committee had reported or the deadline for reporting (set by the Business Committee) has passed.
- 43.** This could be further strengthened by seeking a commitment from the Welsh Government to respond to any representations made by a committee before proceeding to make an agreement and, in keeping with normal committee reporting arrangements, allow time for a ‘take note’ debate on the committee’s report in Plenary.
- 44.** In summary, it is proposed that the end point for this more formalised stage of scrutiny would be, more or less, the normal committee reporting process unless a committee (or committees) chose not to report or did not report within the timescale set by the Business Committee.

Question

- Do you agree that the end point for scrutiny should be the normal committee reporting process (in circumstances where a committee chooses to report) i.e.
 - committee reports;
 - Welsh Government responds;
 - ‘take note’ debate in Plenary.
- Should the Assembly seek a commitment from the Welsh Government to not enter into a framework agreement until a committee reports or the deadline for reporting has passed?
- Are there alternative ways for committees or the Assembly to scrutinise draft framework agreements?

3. Establishing the procedure

45. A scrutiny procedure can be established in a number of ways, including by:

- specifying it in legislation;
- specifying it in the Assembly's Standing Orders; or
- making an inter-institutional agreement between the Assembly (or one of its committees) and the Welsh Government.

46. A requirement set out in law or in the Assembly's Standing Orders carries more weight than one established through agreement, but we face a question of what might be proportionate and appropriate in the circumstances.

47. There is also a question of the time available to establish a new procedure and the possible need for a degree of flexibility in the application of any new procedure that is established.

48. In these circumstances, seeking a written commitment from the Welsh Government to the scrutiny requirements described in this paper, perhaps underpinned by an inter-institutional agreement that outlines the process, could be considered a proportionate and practical approach to establishing this procedure.

Questions

- Do you agree that this scrutiny procedure should be established through an inter-institutional agreement between the Assembly (or one of its committees) and the Welsh Government?
- Alternatively (or alongside the above suggestion), should scrutiny arrangements be established through the Assembly's Standing Orders?
- Is there a case for seeking a legislative route for formalising the scrutiny of framework agreements?
- How can the establishment of Assembly scrutiny procedures interact with the scrutiny processes established in the other UK legislatures?

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Annex A: Diagram of the proposed scrutiny process for non-legislative draft framework agreements

