

Common policy frameworks: Assembly scrutiny

December 2019

This report proposes an approach to Assembly scrutiny of UK-wide common policy frameworks.

The Brexit process has presented new scrutiny challenges for the Assembly. One such challenge is to hold the Welsh Government to account for its part in the development and eventual agreement of UK-wide common policy frameworks.

Since May 2019, we have been considering how the Assembly can effectively scrutinise these frameworks.

This report, our third publication relating to frameworks, proposes an approach for the Assembly to consider.

It builds on our August 2019 discussion paper and our October 2019 paper on scrutiny of non-legislative framework agreements.

We acknowledge that we are reporting at a time of considerable uncertainty. The outcome of the UK general election could affect this area of work.

We have had to balance the risk of having to subsequently revise this report in the new year with the need to ensure that the Assembly is as prepared as possible to respond to circumstances where the scrutiny of frameworks is required.

Without prejudice to the outcome of the general election, we have agreed to report now to ensure that the Assembly can be as prepared as possible for the scrutiny of frameworks, should it need to respond quickly to circumstances that would require such scrutiny in the new year. If there is a need to revise this report in the future, we will publish an update.



1. Introduction

Frameworks will be a complex weave of legislative and non-legislative outputs that could include Acts, secondary legislation, and written agreements between governments.

The Assembly has scrutiny procedures in place for the scrutiny of legislation associated with frameworks, but gaps exist in terms of scrutinising non-legislative framework agreements and the need for a more holistic approach when considering the various legislative and non-legislative components of a framework in the round.

Background

1. Since the establishment of the External Affairs and Additional Legislation Committee in 2016, we have 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.¹
3. The Chair of the Committee has contributed to ongoing discussions at the Interparliamentary Forum on Brexit on the coordination of scrutiny across the legislatures of the UK.
4. During the summer term of 2019, we decided to take a deeper look at the development of UK-wide common policy frameworks. In August 2019, we published a discussion paper that summarised our current understanding of the frameworks programme and the scrutiny challenge it posed for the Assembly.²

¹ Details of our previous work is available from our website www.assembly.wales/seneddEAAL.

² External Affairs and Additional Legislation Committee, *UK-wide common policy frameworks: discussion paper*, August 2019

5. Continuing with this work, we developed an initial model for Assembly scrutiny of the frameworks.³
6. This was published as a paper, to help inform discussion at a roundtable meeting we held with constitutional and legal experts from across the UK. This was held on 14 October 2019.⁴
7. Following this meeting, one of the participants, Dr Jack Simson Caird from the Bingham Centre for the Rule of Law, provided a written note that has helped inform our work.⁵
8. In parallel, we sought the Counsel General and Brexit Minister's view on our proposal. He responded in a letter dated 23 October 2019.⁶
9. We are grateful to those that participated in the roundtable session, Dr Simson Caird for his written submission, the Counsel General and Brexit Minister for his reply, and the ongoing cooperation of Welsh Government officials.

Terms used in this report

- **framework** – this is used as shorthand for 'UK-wide common policy framework' and refers to all aspects of a particular framework in the round.
- **framework area** – the area of policy to be covered by a framework.
- **summary outline agreement** – the initial outline draft of a framework agreement. This is the first framework product to be provided to committees.
- **provisional outline framework agreement** – a near final draft of a framework agreement. The second iteration of a framework agreement to be shared for scrutiny.
- **[core] frameworks programme** – this refers to the programme of intergovernmental work to develop frameworks, under the political auspices of Joint Ministerial Committee (EU Negotiations) ('JMC EN').
- **framework agreement** – the final written intergovernmental agreement establishing a common policy framework.

³ External Affairs and Additional Legislation Committee, *UK-wide common policy frameworks: scrutiny of non-legislative framework agreements*, October 2019. This was published as a paper for our meeting on 14 October 2019.

⁴ Details of this meeting, including a verbatim transcript and video recording, are available from [our website](#).

⁵ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

⁶ *Letter from the Counsel General and Brexit Minister to the EAAL Committee, 23 October 2019*.

- **concordat** – a written intergovernmental agreement establishing working arrangements between the governments. Some frameworks will require these. It is anticipated that they will be provided alongside provisional outline framework agreements. Memorandums of Understanding might also be used and are similar in effect to concordats.
- **JMC (EN)** – Joint Ministerial Committee European Negotiations. This is the name for the Ministerial-level intergovernmental committee that oversees the frameworks programme.
- **phase / phases / five phases** – the governments have organised the frameworks programme according to five phases. See the table on page 7 for a description of the phases.:
- **governments** – in the plural, this refers to the Welsh, Scottish and United Kingdom Governments collectively. The Northern Irish Civil Service has been involved in the frameworks programme too, in the absence of a Northern Ireland Executive.

2. Legislation

10. 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.⁷

11. Some frameworks will be underpinned by legislation.

12. Under the Assembly’s Standing Orders, the Assembly 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

⁷ The Counsel General and Brexit Minister’s letter, dated 23 October 2019, suggests that there will be non-legislative aspects to each framework, including several iterations of a framework agreement being made available for scrutiny i.e. summary outline agreements and provisional outline framework agreements.

Westminster secondary legislation that seeks to amend primary legislation in a devolved area of competence	Standing Order 30A
UK SIs to temporarily restrict the Assembly's competence (under the EU (Withdrawal) Act 2018)	Standing Order 30B

13. The list above is not exhaustive, but it 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 interinstitutional agreements between the Assembly and the Welsh Government.

14. One potential difficulty for the Assembly is that legislation already passed may have created (or contributed to the creation of) frameworks without being identified as relating to a framework.

15. Assembly officials have highlighted some examples, including the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019⁸ and the Common Organisation of the Markets in Agricultural Products (Transitional Arrangements etc.) (Amendment) (EU Exit) Regulations 2019.⁹

16. The latter of these two examples is of particular concern as the Welsh Government's consent was not sought in advance of the regulations being made.¹⁰

17. Dr Jack Simson Caird suggested that:

[...] in the context of non-legislative frameworks, it may be important that any explanatory material specifies in detail the extent to which the frameworks will rely on legislation which is already in place and whether they will require legislation to be enacted in order to be effective.¹¹

⁸ [Animals and Animal Products \(Legislative Functions\) and Veterinary Surgeons \(Amendment\) \(EU Exit\) Regulations 2019](#), UK SI 2019 No. 1225

⁹ [Common Organisation of the Markets in Agricultural Products \(Transitional Arrangements etc.\) \(Amendment\) \(EU Exit\) Regulations 2019](#), UK SI 2019 No.1403

¹⁰ See [the Constitutional and Legislative Affairs Committee's commentary](#), published alongside the regulation on the Assembly's website.

¹¹ Dr Jack Simson Caird, [Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales](#), October 2019.

OUR VIEW

18. For frameworks to be effectively scrutinised, it is vital that any legislation relating to a framework policy area is clearly identified as such.

19. As we mention in paragraphs 14 to 16 above, we believe there could be examples of frameworks being established that fall outside the core intergovernmental frameworks programme.

20. Where such frameworks are identified, we believe that they should be incorporated into the frameworks programme. This will add transparency and ensure that the development of these frameworks is subject to the same governance and cross-cutting Ministerial oversight as the core programme.

21. The point was made to us, by Professor Aileen McHarg, that it is not easy to locate information about all the activity that is ongoing in relation to the development of frameworks:

[...] it's actually also difficult to find these agreements. Unless you know roughly when they were decided and where to look, it's actually difficult to find them.¹²

22. We agree that the governments could do more to communicate the work on frameworks transparently.

RECOMMENDATIONS

Recommendation 1. We recommend that, in written response to this report, the Welsh Government commits to notify the Assembly when legislation, whether to be considered by the Assembly or the UK Parliament, relates to a UK-wide common policy framework.

23. This notification could be made in accompanying documentation already required under Standing Orders (such as explanatory memorandums, legislative consent memorandums and written statements) or as a separate written statement to the Assembly. This information, howsoever provided, should be published to the same timescales as other accompanying information for the type of legislation it relates to e.g. on introduction for an Assembly Bill, no later

¹² EAAL RoP 14 October 2019 c.47

than two weeks after introduction for a UK Bill requiring legislative consent, when a statutory instrument or draft statutory instrument is laid.

Recommendation 2. We recommend that the Business Committee considers whether Standing Orders should be amended to require a member of the Welsh Government to notify the Assembly in the terms described in our first recommendation.

Recommendation 3. We recommend that the Welsh Government reviews all legislation passed in the Fifth Assembly to assess whether or not it relates to a UK-wide common policy framework area. This review should be conducted by the end of February 2020 to ensure that the Assembly has this information before the majority of frameworks are ready for scrutiny.

Recommendation 4. If the Welsh Government's review identifies legislation that relates to one of the framework areas currently under development, it should:

- notify this Committee and the Constitutional and Legislative Affairs Committee in writing; and
- ensure that the explanatory material accompanying the eventual outline framework that is published identifies the link to this legislation.

Recommendation 5. If the Welsh Government identifies legislation that creates, or provides powers to create, a UK-wide common policy framework that falls outside the list of framework areas identified by the core frameworks programme, it should write to this Committee and the Constitutional and Legislative Affairs Committee to:

- notify them; and
- explain how the framework will be incorporated into the frameworks programme or, in circumstances where this is not the Welsh Government's intention, the reasons for developing this framework area outside the core programme.

Recommendation 6. We recommend that the Welsh Government, working with all the other governments of the UK, creates a single web-based resource that lists all the frameworks, their state of progress, and links to legislation and any non-legislative products associated with them. We recommend that this website is active by the end of February 2020 i.e. before the next cohort of frameworks are released for scrutiny.

3. Non-legislative framework agreements

Introduction

24. 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.

25. 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 the remainder of this report will be on the development of an approach to scrutiny of the non-legislative framework agreements.

How scrutiny matches the governments' 'five phases' of the frameworks programme

26. As explained in our August 2019 discussion paper, the governments of the UK describe the development of the frameworks according to a five phase process.

The governments' five phases approach to framework development

- **Phase 1** - Principles and proof of concept established for programme of joint work
- **Phase 2** - Detailed policy development
- **Phase 3** - Review, stakeholder engagement and further policy development
- **Phase 4** - Preparation and implementation
- **Phase 5** - Post-implementation monitoring and review

OUR VIEW

27. Originally, we had thought to suggest that scrutiny be focused on the fourth phase. However, after considering the Counsel General's response to our draft proposals,¹³ we have revised our approach.

¹³ [Letter from the Counsel General and Brexit Minister to the EAAL Committee, 23 October 2019](#)

28. We now believe that formal scrutiny arrangements should be established at the end of phase 2 and completed by the end of phase 3. Phase 4 will be the point at which the framework agreement is to be confirmed between governments.

Preparing for scrutiny

29. It will be important for Assembly committees to start a process of monitoring and engaging with framework policy areas as soon as possible. However, as considered in our discussion paper, this could be a less formal mode of scrutiny – akin to the engagement Assembly committees have with Green and White Paper proposals.

30. We understand that 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.

31. To facilitate this approach, Assembly Commission staff will need to maintain a regular dialogue with the Welsh Government officials responsible for frameworks.

32. As we have noted above, there has been good communication between Assembly and Welsh Government officials to date and we support the continuation of this approach.

RECOMMENDATION

Recommendation 7. We recommend that the Welsh Government commits to continuing a dialogue between Welsh Government and Assembly officials, with a view to ensuring that committees have the information they need in sufficient time to plan for the scrutiny of frameworks.

Stage 1: Determining the level of scrutiny

33. Towards the end of the second phase of framework development, the Counsel General has indicated that summary outline agreements could be sent to

committees to assist them in assessing the degree of scrutiny each framework might receive.¹⁴

34. The Counsel General wrote:

Our current expectation is that at the end of Phase 2 summary outline agreements will be sent to committees for information. This will help committees assess each framework for the degree of scrutiny that each might receive, and we would wish to make an offer of technical briefing at the same time.¹⁵

OUR VIEW

35. The provision of a summary outline agreement to committees at a comparatively early stage in the development of a framework is welcome, as is the offer of a technical briefing at the same time.

36. In addition to sending a summary outline agreement to the relevant committees,¹⁶ the Welsh Government should lay the summary outline agreement before the Assembly.

37. This will ensure all Assembly Members and any other interested person has sight of this document.

38. The External Affairs and Additional Legislation Committee will, in most cases, wish to accept the offer of a technical briefing and it is our intention to offer a view on the level of scrutiny we wish to apply to each framework.

39. It is a matter for individual committees to decide how they wish to respond to the summary outline frameworks.

RECOMMENDATION

Recommendation 8. We recommend that the Welsh Government provides, in response to this report, a written commitment to provide Assembly committees with summary outline agreements and to lay a copy of each summary outline

¹⁴ [Letter from the Counsel General and Brexit Minister to the EAAL Committee, 23 October 2019](#)

¹⁵ Ibid

¹⁶ Currently, we would expect this to be the Policy and Legislation Committee that covers the framework policy area, the Constitutional and Legislative Affairs Committee, and the External Affairs and Additional Legislation Committee.

agreement before the Assembly at the same time. Under normal circumstances this should be no less than six weeks before the associated provisional outline framework agreement is published.

Stage 2: Scrutiny period

2.1 Laying the provisional outline framework agreement and related products

40. The Counsel General and Brexit Minister, in his letter to us dated 23 October 2019, stated his view that:

I anticipate the formal scrutiny of the Frameworks will take place in Phase 3, when provisional outline framework agreements, together with any related implementation products such as concordats, should be passed to relevant parliamentary committees.¹⁷

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

42. As with the previous stage of scrutiny, committing the Welsh Government to laying the provisional outline framework agreement (and associated explanatory information) would appear to be an appropriate means of achieving this.

43. In seeking the laying of these documents, we have considered the information that they should contain, or that should be provided in an accompanying memorandum.

44. Further to suggestions made during the course of our discussion on 14 October 2019, we have added to the list we had published ahead of that meeting.¹⁸

45. Mr Akash Paun, from the Institute for Government, suggested that we needed to be more specific about the evidence we recommend that the Welsh Government provides to justify the need for a framework.¹⁹ This would include an

¹⁷ [Letter from the Counsel General and Brexit Minister to the EAAL Committee, 23 October 2019](#)

¹⁸ External Affairs and Additional Legislation Committee, *UK-wide common policy frameworks: discussion paper*, August 2019

¹⁹ EAAL RoP [14 October 2019](#), c.55-56

assessment of how the framework conformed with the underpinning framework principles.²⁰

OUR VIEW

46. To confirm the need for a framework, the Welsh Government should be able to demonstrate how the absence of a framework would unduly distort the UK internal market and how, in turn, the establishment of a framework will be advantageous to its smooth functioning. Additionally, we would wish to see what the economic implications are for Wales compared to the rest of the UK.

47. We also agreed with Mr Paun's suggestion that the explanatory material accompanying the provisional outline framework should include details of how the framework will be implemented after it is agreed, including a process for keeping the framework under review and of measuring its success.²¹

RECOMMENDATIONS

Recommendation 9. The Welsh Government should lay before the Assembly all provisional outline framework agreements, together with any related implementation products such as concordats.

Recommendation 10. Alongside each provisional framework agreement, the Welsh Government should publish an explanatory memorandum that includes:

- the policy objectives of the framework;
- the evidence to support the need for a framework in this area, including the evidence to demonstrate adherence to each of the framework principles;
- a summary of the consultation process and responses received;
- any unresolved differences in the positions expressed by the other parties to the agreement and how these differences are to be resolved;
- 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

²⁰ See the [Joint Ministerial Committee \(EU Negotiations\) Communiqué from 16 October 2017](#) for details of the framework principles.

²¹ Ibid c.57

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 proposed, is associated with this framework (e.g. retained EU law, other SIs, primary legislation) and any issues of legislative consent;
- a financial impact assessment; and
- a post agreement implementation plan (to include a review process with defined timescales and indicators to demonstrate adherence to the framework principles).

2.2 Committee scrutiny

48. If it is accepted that a provisional outline framework agreement will be laid, the next task is to consider how it should be scrutinised.

49. Given the likely complexity of provisional outline framework agreements, committee scrutiny would appear to be the most appropriate approach, and we note that this is anticipated by the Counsel General.²²

50. If the need for committee scrutiny is also accepted, then there will be a need to coordinate committee activity.

51. The obvious locus for this would be the Business Committee.

52. 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 provisional outline framework agreement and the timescale for scrutiny.

53. This would also allow a coordinated approach in terms of ensuring any legislation associated with a particular provisional outline framework agreement could be remitted to the same committee.

54. Once a provisional outline 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.

²² [Letter from the Counsel General and Brexit Minister to the EAAL Committee, 23 October 2019](#)

2.3 Concluding scrutiny

55. The scrutiny model proposed in this report aims to establish a mechanism to enable meaningful Assembly committee scrutiny of the draft framework agreements, alongside other framework elements, including legislation.

56. 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.

57. Where a framework includes legislative elements, the Assembly has procedures in place to exercise controls, for example through the legislative consent process.

58. As described above under the proposal for committee scrutiny, and analogous to the legislative consent memorandum scrutiny process, a committee would be provided with a timescale within which to report on a draft framework agreement.

59. 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.

60. 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 debate on the committee's report in Plenary.

61. 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.

62. In the evidence received, the case was made for the Assembly to seek a stronger role.

63. Dr Simson Caird, in his evidence to the Committee, made clear that we should be seeking an Assembly veto on framework agreements:

The National Assembly for Wales will need legally binding veto powers in relation to some of the executive's positions on [...] non-legislative framework agreements [...] because otherwise it is unlikely that the informal scrutiny structures described in the committee's briefing documents will be effective.²³

OUR VIEW

64. On balance, we believe that the approach we propose in this report, whilst stopping short of calling for a veto power, will provide the opportunity for effective scrutiny to take place.

65. If accepted, our recommendations will ensure that the Welsh Government does not agree frameworks until the completion of Assembly scrutiny (or a scrutiny period). This, arguably, amounts to a limited scrutiny reserve function.

66. In the short term, this scrutiny approach will be established by a written commitment and interinstitutional agreement and, subject to the will of the Business Committee and the Assembly, enshrined in Standing Orders in the medium term. We return to this under the heading of 'Establishing the procedure' below.

67. In circumstances where our recommendations are not agreed, we will consider alternative approaches to ensuring effective scrutiny can take place.

RECOMMENDATIONS

Recommendation 11. We recommend that the Business Committee considers whether it might wish to perform the role we suggest in terms of coordinating committee scrutiny of provisional outline framework agreements.

Recommendation 12. We recommend that the Welsh Government, in written response to this report, commits to enabling the role for the Business Committee we have described in this report, should the Business Committee wish to undertake such a role.

²³ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

Recommendation 13. We recommend that the Welsh Government, in written response to this report, commits to not enter into a framework agreement until a committee reports on a provisional outline framework agreement or a deadline for reporting set by the Business Committee has passed.

Recommendation 14. In circumstances where a committee has reported within a deadline set by the Business Committee, we recommend that, in written response to this report, the Welsh Government commits to:

- respond in writing to any representations made by an Assembly committee; and,
- in keeping with normal committee reporting arrangements,²⁴ allow time for a debate on the committee's report in Plenary before proceeding to make a framework agreement.

Stage 3: the framework is confirmed

68. Following the completion of the scrutiny process, the framework will be finally agreed and signed by the governments.

RECOMMENDATION

Recommendation 15. We recommend that the final framework agreement and any associated implementing products are laid before the Assembly once signed.

Stage 4: Future developments and monitoring

OUR VIEW

69. Once agreed, the Assembly has an important role to play in terms of the ongoing monitoring of the frameworks, in terms of their continued adherence to the framework principles and delivery of the objectives set for them by the governments.

²⁴ Under normal committee reporting arrangements, a committee can request a plenary debate, during non-government time, on any report it makes. This recommendation seeks a commitment from the Welsh Government to not enter into an agreement until such a debate has taken place, in circumstances where a committee requests one.

70. Additionally, the Assembly will need to monitor any changes that are sought to a framework and any disputes that might arise between the signatories over the implementation of a framework.

RECOMMENDATIONS

Recommendation 16. We recommend that the Welsh Government lays a report before the Assembly, at least annually, that provides an assessment of the functioning of each framework according to the post agreement implementation plan we have called for in recommendation 10 to this report.

Recommendation 17. We recommend that the Welsh Government lays a written statement before the Assembly whenever:

- a change to a framework is proposed by any party to the framework agreement;
- a change is made to any framework agreement;
- a dispute arises in relation to the implementation of a framework; or
- when formal dispute resolution mechanisms are triggered.

4. Establishing the procedure

71. 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 interinstitutional agreement between the Assembly (or one of its committees) and the Welsh Government.

72. A requirement set out in law or in the Assembly's Standing Orders carries more weight than one established through agreement.

73. During our roundtable discussion on 14 October 2019, Professor Alison Young summarised the benefit of establishing scrutiny arrangements in Standing Orders:

[...] if you have it in an element of a Standing Order that's very clear, it's very clear what its provisions are, it's open and transparent, and it's also clear who is bound by it.

74. Dr Simson Caird, as mentioned previously in this report, suggested that the Assembly needs a “legally-binding veto power” to ensure the effectiveness of Assembly scrutiny.²⁵

OUR VIEW

75. In the short term, through the recommendations made in this report, we are seeking a written commitment from the Welsh Government to the scrutiny requirements described in this paper.

76. This written commitment, should it be forthcoming, could be underpinned by an interinstitutional agreement that outlines the process in further detail.

77. This offers a proportionate and practical approach to establishing this procedure in the short term.

78. In the longer term, for the reasons outlined by Professor Young and others, we believe there is merit in the Assembly considering a revision to its Standing Orders.

Interinstitutional agreement

OUR VIEW

79. As a Committee, we would be content for our Chair to seek to establish an interinstitutional agreement with the Counsel General and Brexit Minister, to underpin any written commitments made in response to this report. The Chair could seek the Assembly’s support for this agreement. A precedent for this was set by the Chair of the Constitutional and Legislative Affairs Committee.²⁶

80. Without dismissing this as an option, we believe a more appropriate route might be for the Llywydd to make this agreement, with the support of the Chairs’ Forum.

²⁵ Dr Jack Simson Caird, *Written evidence to the External Affairs and Additional Legislation Committee of the National Assembly for Wales*, October 2019.

²⁶ See the *Constitutional and Legislative Affairs Committee’s Inter-institutional Relations Agreement* for further information. This is an agreement between the National Assembly for Wales and the Welsh Government.

RECOMMENDATION

Recommendation 18. We recommend that the Llywydd considers discussing this report with the Chairs' Forum in the first instance, and the question of whether to establish an interinstitutional agreement to underpin the scrutiny proposal made in this report..

OUR VIEW

- 81.** In the longer term, we believe there is merit in the Assembly considering a revision to its Standing Orders to ensure that a future Welsh Government is bound by these scrutiny arrangements.
- 82.** The Business Committee is responsible for considering questions of procedural change, and we invite it to consider this further.
- 83.** Should the Business Committee consider it to be of assistance, we would be content to look at developing detailed proposals for changes to Standing Orders to provide for framework scrutiny and to report in turn to the Assembly with our recommendations.

RECOMMENDATION

Recommendation 19. We recommend that the Business Committee considers our suggested approach to scrutiny (as described in this report) with a view to determining whether or not it would consider it appropriate to seek changes to Standing Orders to strengthen the scrutiny process in the future.

5. A broader view

Interparliamentary cooperation

- 84.** The Interparliamentary Forum on Brexit has been discussing how interparliamentary mechanisms for the scrutiny of frameworks could be developed.
- 85.** These discussions are ongoing and encompass options that vary from the creation of a formal interparliamentary body for the scrutiny of frameworks to the status quo i.e. an informal sharing of information between legislatures.

86. At our meeting on 14 October 2019, Professor Alan Page highlighted the importance of the devolved legislatures co-operating:

I think there's an acknowledgement of reality that no devolved legislature, on its own, can get the full picture. Effective scrutiny in this context does require co-operation. Whether that co-operation is forthcoming or not is another matter, but I would have said that that is the starting point.²⁷

OUR VIEW

87. We agree that the scrutiny of frameworks can be improved through the sharing of information between legislatures.

88. The Chair of the Committee will continue to participate in interparliamentary dialogue to investigate whether this sharing of information can take place within the timescales available for the scrutiny of frameworks.

Considering each framework in the round

89. The majority of this report is focused on two aspects of scrutinising the frameworks: scrutiny of any legislation and scrutiny of the non-legislative framework agreements.

90. Whilst we have described these scrutiny tasks separately, it will be essential for all aspects of a framework to be considered in the round.

91. Our recommendation that the Business Committee coordinates the scrutiny of frameworks will, if accepted, help ensure that this holistic approach is taken.

The cumulative implications arising from frameworks and the UK internal market

92. Looking at each framework in isolation risks missing the cumulative effect of the frameworks programme.

93. In its totality, the web of intergovernmental agreements and legislative constraints established by the frameworks can be seen to amount to a new tier of UK governance.

²⁷ EAAL RoP 14 October 2019 c.32

94. Furthermore, consideration of the frameworks cannot be detached from the emerging concept of the UK internal market.

95. Professor Alan Page and Professor Michael Keating, in contributions they made at our meeting on 14 October 2019, pointed to this risk both in terms of the link to the UK internal market and post-Brexit governance of the UK. Professor Page also raised the suggestion of a committee to monitor this.²⁸

96. Professor Jo Hunt, at the same meeting, highlighted the lack of an agreed definition of a UK internal market in the context of frameworks:

We know that one of the reasons, or the primary justification for a common framework, is still given as 'for the interests of the internal market', but we're still not clear what that means.²⁹

OUR VIEW

97. Whilst we understand that the frameworks programme has been driven by the necessity to replace existing EU policy frameworks ahead of Brexit, the frameworks can be seen as defining some of the parameters of the UK internal market.

98. We note that intergovernmental work is underway to better define a shared understanding of the UK internal market concept and that the link between this strand of work and the frameworks programme is acknowledged by the governments.³⁰

99. Without detracting from the importance of ensuring individual frameworks are subject to the type of scrutiny we recommend in this report, there is a need to ensure that the Assembly is prepared for the scrutiny challenge posed by the emergence of a UK internal market concept, of which the framework are an important component.

100. However, returning to the point we make in paragraph 14, the core framework programme does not appear to have captured the full spectrum of intergovernmental agreements and legislation that could be considered as establishing UK-wide common policy frameworks. To put this another way, there

²⁸ EAAL RoP [14 October 2019](#)

²⁹ Ibid c.11

³⁰ For example, this link is acknowledged through the frameworks principle to “*enable the functioning of the UK internal market, while acknowledging policy divergence*”.

is a serious risk that there is intergovernmental action occurring that is defining aspects of a UK internal market without being identified as such and falling outside the intergovernmental governance arrangements established for the frameworks programme.

101. Moreover, having a shared understanding across the nations of the UK of what a UK internal market constitutes, i.e. its foundation principles, objectives, parameters and constraints, is essential if future issues such as the agreement and implementation of future trade agreements are to be navigated successfully.

102. We believe that bringing the frameworks programme into a broader overarching programme of intergovernmental work on a UK internal market would make the process more transparent and understandable.

103. In stating this, we also acknowledge the political difficulty this poses.

104. Given the comparatively developed state of the intergovernmental arrangements relating to the frameworks programme, and the fact that JMC EN remains the political locus for both the UK internal market work stream and the frameworks programme, broadening the scope of the frameworks programme might offer a more pragmatic means of reorienting this work in terms of defining the UK internal market.

105. From the perspective of Assembly scrutiny, we believe that there is a need for a committee, or committees, to maintain oversight of the emergence of the UK single market, of which the frameworks programme is an important part.

RECOMMENDATION

Recommendation 20. We recommend that the Welsh Government considers the case for reconfiguring the intergovernmental approach to the frameworks programme to ensure:

- it is considered in the overarching context of work to agree a shared definition of the UK internal market; and
- that legislative and non-legislative action that could be considered as creating a UK-wide framework is incorporated into this programme of work.

Annex A: Outline process for scrutiny of framework agreements

Step of the process	Government phase	How it's to be established
Preparing for scrutiny 		
Committee preparatory work to plan for the scrutiny of a framework area e.g. consider the existing EU framework, open a dialogue with stakeholders, anticipate the key issues	Phase 2	Committee initiative
Assembly committee clerks start discussions with Welsh Government officials	Phase 2	Official to official contact (Recommendation 7)
Monitor the framework area	Phase 2	Committee initiative
Stage 1: Determine the level of scrutiny 		
Outline framework sent to committees and laid before the Assembly	End of phase 2	Welsh Government written commitment (Recommendation 8)
Technical briefing offered by the Welsh Government	End of phase 2	Welsh Government written commitment
Committee determines the level of scrutiny it might wish to apply to the framework	End of phase 2	Committee initiative
Stage 2: Scrutiny period 		
Provisional outline framework agreements, together with any related implementation products such as concordats, laid and provided to the Business Committee	Towards the end of phase 3	Welsh Government written commitment (Recommendations 9 and 10)
Business Committee remits framework agreement to relevant committees and sets a scrutiny deadline	Towards the end of phase 3	Welsh Government written commitment (Recommendations 11 and 12)
Committee scrutiny of the framework	Before the end of phase 3	Committee initiative
Interparliamentary discussion / information sharing	Before the end of phase 3	Committee initiative
Committee report(s)	Before the end of phase 3	Committee initiative and Welsh Government written commitment (Recommendations 13)
Welsh Government written response to committee report(s)	Before the end of phase 3	Welsh Government written commitment (Recommendations 13 and 14)
Optional plenary debate on committee report(s)	Before the end of phase 3	Committee initiative and Welsh Government commitment (Recommendations 13 and 14)
Stage 3: The framework is confirmed 		
The framework is confirmed and laid before the Assembly	Stage 4	Executive action (Recommendation 15)
Stage 4: Future development and monitoring 		
Welsh Government to report on the functioning of frameworks at least annually	Stage 5	Welsh Government written commitment (Recommendation 16)
Welsh Government to notify the Assembly and relevant committees when a change to a framework is proposed, dispute resolution procedures are triggered etc.	Stage 5	Welsh Government written commitment (Recommendation 17)
Ad hoc committee scrutiny	Stage 5	Committee initiative