We wish to make a few brief comments in response to the invitation to submit evidence on the above Bill. These comments are made in a wholly personal capacity and do not represent the views of any institution or organisation.

Part 1

1. Sections 7 and 8: There should be an express requirement that any delegations should be in writing and publicly notified.

Part 2

2. Although not unprecedented in view of developments at Westminster, sections 10 and 13 grant very large powers to disestablish, remove, transfer and reduce the powers of bodies listed in Schedule 3 by executive order. While there are certain procedures that must be followed, they fall short of the full public deliberation that would be required for a change by legislative amendment. It must be remembered that the powers granted will be enduring and survive well beyond the intentions of the current government and the current parliamentary arithmetic which seems likely to prevent any single–party dominance. A lot depends on the willingness of the Parliament to assert the control given to it by means of the affirmative order procedure adopted, but this entails a very different level of scrutiny, debate and publicity from that involved in primary legislation. Recent experience has shown that the Scottish Parliament can be more effective in exercising its authority in relation to delegated legislation than has been the case at Westminster, but much depends on the make-up of the Parliament, the vigilance and robustness of MSPs in asserting the role of the Parliament and the effectiveness of the procedures by which any proposed measures are subject to scrutiny and control (including their visibility to and engagement of the wider body politic). The extent to which these provisions mark a surrender of power from Parliament to Executive must be recognised.

3. More specifically, it is not clear that the expedited procedures can be justified in relation to all the bodies listed in Schedule 3. In some instances there are further compelling constitutional reasons why any alteration of their powers should be made by the Parliament itself. This is because the bodies perform regulatory or scrutiny roles in relation to the Executive itself or other functions where independence from the Executive is vital. Such bodies include Audit Scotland, Judicial Appointments Board for Scotland, Scottish Information Commissioner, Scottish Commission for Human Rights and Scottish Public Services Ombudsman, all of whom should have their independence overtly preserved. Indeed some of these, e.g. Commissioner for Children and Young People in Scotland and the Scottish Information Commissioner, have only recently been set up not as standard statutory authorities but under parliamentary auspices, suggesting a very conscious recognition that these should be protected from Executive control. Moreover, the inclusion not only of the Judicial Appointments Board but also of a judicial body...
itself, the Lands Tribunal for Scotland, creates a potential threat not only to the independence of the judiciary in general but also to the degree of independence specifically required under art. 6 of the European Convention on Human Rights.

4. Other limits to the general power need to be considered to take account of the kinds of things that some of the bodies listed in Schedule 3 do, namely make decisions, hear complaints and so on. At the point at which a body is disestablished or its structure or procedures significantly altered there may be issues over the status of its decisions that may vest rights or create legitimate expectations in individuals. Such issues should be addressed in advance and not left to the time of the change itself, when the impact on particular decisions or proceedings may give rise to allegations of bias or unfairness.

5. Sections 12(1) and 13(3): It is most welcome that the poor state of the statute book is recognised as one of the problems which these powers can be used to ease and that that restatement of the law can be included as part of the remedial action. Far too much of our legislation is virtually unusable as a result of frequent “cut-and-paste” amendments and every encouragement should be given to measures that ease consolidation or at least avoid further fragmentation and piecemeal amendment.

6. Schedule 3: This list contains a wide range of bodies and since it may be used, formally or not, as a strong indication of which bodies are “public authorities” not just for this purpose but for others, it demands careful attention. Although they may all be “public authorities”, as noted above the bodies listed are of very different natures and it will not always be appropriate for them all to be treated in the same way.

Part 6

7. It is not clear what is gained by converting the policy objective of an enhanced user focus into a legal obligation (s. 92). How is this legal duty to be enforced and what are the consequences of non-compliance? The sense that this does not really belong as a legal obligation is strengthened by the fact that the means of giving the duty more concrete form comes merely as guidance to which authorities must simply “have regard”(s.93). The imposition of legal duties which have no legal consequences, whether direct sanctions, specific reporting obligations or a clear impact on the status of other activities, tends only to blur what should be a clear distinction between law and policy and to weaken the impact of law as opposed to other manifestations of official guidance and control.

8. The position is different in s.94, where the creation of this duty may have consequences in overriding any limitation in the powers of a body that might have prevented it taking sensible action in furtherance of the co-operation that is sought (although there may be argument over the extent to which such a general duty can be called in aid to override a specific provision in the legislation for an individual body).

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