Finance Committee

Public Services Reform (Scotland) Bill

Submission from The Lord President Of The Court Of Session

I wish to express a view regarding the power proposed to be conferred by section 10 of the Bill.

Subsection (1) of that section enables the Scottish Ministers to make by order any provision which they consider would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. By subsection (2), “public functions” are defined as “functions of the persons, bodies and office-holders listed in schedule 3”. Subsection (3) elaborates on the provision which may be made. This includes provision “modifying, conferring, abolishing, transferring or providing for the delegation of any function” (paragraph (a)) and provision “amending the constitution of, or abolishing” with certain limited exceptions a person, body or office-holder listed in schedule 3.

The list in schedule 3 includes both the Scottish Ministers and any other office-holder in the Scottish Administration. It therefore appears to me that these provisions would be capable of being exercised in relation to the new Scottish Court Service established by section 60 of the Judiciary and Courts (Scotland) Act 2008.

Section 12 sets preconditions for the making of an order. These include that “the provision does not remove any necessary protection” (paragraph (b) of subsection (2) as read with subsection (3)). Section 20 sets out the procedure for the making of an order. This includes considerable consultation (section 21) followed by the laying of an explanatory document before the Parliament. The draft order then requires to be approved by resolution of the Parliament before it is made.

Sections 12 and 20 no doubt hedge the use of the power quite considerably. Nevertheless, it seems to me to remain possible for the power to be exercised so as to abolish the SCS and transfer its functions back to the Scottish Ministers, so as to effect a significant transfer of its functions to others or so as to effect a significant modification of its functions, in each case without its consent.

My preliminary view is that these provisions fail to recognise the constitutional rationale for the creation of the new SCS. It is no ordinary office-holder in the Scottish Administration charged with discharging government functions (in the loose sense). It is instead created so as to enable the support services for the courts and the judiciary, as the third arm of government, to be provided by a body which is institutionally separate from the executive arm of government. It is my view that any abolition of the SCS should be effected only after the sort of careful and in-depth scrutiny to which its creation was subject when the Bill for the 2008 Act was before the Parliament; it should, therefore, not be capable of being abolished by the power which is sought to be created by this Bill. So far as the modification or transfer of its functions in the interests of improvement is concerned, I can well see that there may be circumstances in which it would be
advantageous to the SCS to approach the Scottish Ministers with a proposal in that regard. I would however regard it as incompatible with the constitutional position of the SCS that any modification or transfer could occur without the consent of the SCS.

It may well be that there may be no intention ever to use the proposed power relative to the SCS in the ways which cause me concern. That is not, however, an answer to those concerns. If there is no intention to use the proposed power in that way, there should be an express exclusion of the SCS.

Arthur Hamilton
Lord President of the Court of Session