Finance Committee

Public Services Reform (Scotland) Bill

Submission from the Law Society of Scotland

Introduction

The Law Society of Scotland welcomes the opportunity to comment on the Public Services Reform (Scotland) Bill.

Part 2 of this Bill is an important measure which makes provision for improving public functions and reforming legislation.

Preliminary Comments

Sections 13 to 25 of the Bill are introduced as a further de-regulatory measure to cut the burdens on business building on the De-regulation and Contracting Out Act 1994, the Regulatory Reform Act 2001 and the Legislative and Regulatory Reform Act 2006. It is a matter of concern that these provisions in Part 2 of the Bill were not widely consulted upon before introduction. An open and transparent consultation process would have allowed a broader based debate on the Bill.

The Legislative and Regulatory Reform Act 2006 (on which Part 2 is substantially based) was the subject of considerable criticism for its constitutional propriety when going through the United Kingdom Parliament and was amended in both Houses of Parliament as a result of that criticism.

Sections 10 to 12 confer upon Scottish Ministers a wide ranging power to make “any provision which they consider would improve the exercise of public functions” including “modifying, conferring, abolishing, transferring or providing for the delegation of any function “and” amending the constitution of or abolishing a person, body or office holder listed in Schedule 3 to the Bill”.

The provisions on Sections 21 and 22 provide for consultation on proposals for change and the requirement that an explanatory document should be laid before the Scottish Parliament.

However, the overall thrust of the proposals in Part 2 are so substantial and gives Scottish Ministers far reaching, law making powers. These proposals need to be scrutinised with particular care.

These provisions are constitutionally significant and at the very least the powers proposed to be used under these provisions should not be used as a replacement for primary legislation or full scrutiny by the Parliament. Scottish Ministers should follow the Convention Rights (Compliance) (Scotland) Act 2001 Section 12(2), and only employ the powers in Part 2 if they are of the opinion that there are “compelling reasons” for using these powers rather than promoting primary legislation.
Specific Comments

**Section 10 - Public Functions: Efficiency, Effectiveness and Economy**

Section 10 provides that Scottish Ministers may by order make any provision which they consider would improve the exercise of public functions (being the functions of the organisations listed in Schedule 3) having regard to efficiency, effectiveness and economy.

In terms of Section 10(3) Scottish Ministers can modify, confer, abolish, transfer or provide for the delegation of any function and amend the constitution of or abolish any “person, body or office holder” listed in Schedule 3.

Schedule 3 contains a number of important Scottish public authorities with mixed functions or no reserved functions including (a) the Accounts Commission for Scotland; (b) Audit Scotland; (c) any Children’s Panel; (d) various Commissioners including the Commissioner for Children and Young People in Scotland and the Commission for Public Appointments in Scotland; (e) Her Majesty’s Chief Inspector of Prosecution in Scotland; (f) the Judicial Appointments Board for Scotland; (g) the Mental Welfare Commission for Scotland; (h) the Mental Health Tribunal for Scotland; (i) the Parole Board for Scotland; (j) the Scottish Children’s Reporter Administration; (k) the Scottish Commission for Human Rights; (l) the Scottish Criminal Cases Review Commission; (m) the Scottish Law Commission; (n) the Scottish Legal Aid Board; (o) the Scottish Legal Complaints Commission and (p) the Scottish Parliamentary Standards Commissioner.

Each of these bodies was created by an Act of Parliament or an Act of the Scottish Parliament. Many were designed to monitor the actions of Government or to hold Scottish Ministers to account. Many of these functions involve appointments by Her Majesty the Queen and some of the bodies involve either the Lord President of the Court of Session or other constitutional checks in appointment or removal processes. These functions conferred by primary legislation are set out in order to ensure, in many cases, independence from Government and to ensure that the public can have confidence that these functions can be carried on outwith direct influence or control by Scottish Ministers.

Is it appropriate that the order making power should extend to such bodies? Either the UK Parliament or the Scottish Parliament considered it necessary that each of these bodies should at their constitution be given the full prelegislative consultation and Parliamentary scrutiny which they received. Many of the proposals contained in their constitutive acts were controversial or designed to ensure independence from Government. All order making powers to modify, abolish or transfer their functions may be equally as controversial as the original proposals and require as much Parliamentary scrutiny.

**Section 11 - Public Functions: Further Provisions**

This provides that Scottish Ministers may modify Schedule 3 by adding or removing any entry.
Section 12 pre-condition provides some check on the discretion of Scottish Ministers to make provision under Section 10 in as much as Scottish Ministers may not make an order under Section 10 unless they consider that the conditions in Section 12 are met. These conditions are that the provision is proportionate to the policy objective, does not remove any necessary protection, that any public function which is to be modified will as modified be broadly consistent with the general objects or purpose of the person, body or office holder concerned, that a function which is conferred on a person, body or office holder listed in Schedule 3 is broadly consistent with the general objects of the person, body or office holder concerned and that any function which is conferred on a person created by Section 10 is broadly consistent with the general objects or purposes of a person listed in Schedule 3 which is abolished or public functions abolished or modified by virtue of Section 10.

Parliament requires to be satisfied that the proposed method of making such substantial changes is appropriate should order making powers be used to amend legislation which has been given such full scrutiny as the Bills which create many of these bodies.

Section 13 - Power to Remove or Reduce Burdens

This provides that Scottish Ministers “may by order make any provision” which will remove or reduce any burden resulting from any “legislation”. “Burden” includes (a) financial cost; (b) an administrative inconvenience; (c) an obstacle to efficiency, productivity or profitability; or (d) a sanction criminal or otherwise which affects the carrying on of any lawful activity. Section 13(5) provides that an order may abolish, confer or transfer or provide for the delegation of functions of any description and create or abolish a body or office.

Section 13 provides Ministers with substantial power to amend legislation which has been passed by the UK Parliament or the Scottish Parliament. It is important that the provisions of Section 13(2)(c) and (d) are fully explained, clarified and defined. In particular the breadth of Section 13(2) which relates to the removal of sanctions which are “criminal or otherwise for doing or not doing anything in the course of any activity”. This reaches wider than the corresponding provision in the Regulatory Reform Act 2001 and simply replicates the provision in the Legislative and Regulatory Reform Act 2006.

Section 13(3) is an attempt to provide some guidance on the interpretation of Section 13(1)(2)(a) and (b) where a burden may result from “the form of legislation”. UK Ministers explained in relation to the Legislative and Regulatory Reform Act 2006 that the intention was to allow the consolidation of provisions which govern an area but which are scattered across a number of different pieces of legislation making it difficult or time consuming to find and harder to understand.

The Society fully commends this objective of consolidation of different pieces of legislation. However, it is difficult to anticipate how changing antiquated legislative drafting into modern phraseology and consolidating that legislation would make the legislation easier to understand without changing its meaning. This is a difficult exercise particularly if the legislation concerned has been subject to
interpretation by the Courts and where settled understandings of the existing provisions have been acted on by those affected by the measures being reformed.

Section 13(4) defines legislation as including “a public, general or local Act of Parliament (whenever passed) or an Act of the Scottish Parliament (whenever passed”).

This includes a substantial number of Acts of Parliament. Care will require to be taken to ensure that issues of competency are properly considered when enacting orders under this provision.

The order making power in Section 13 is envisaged as being used for the purposes of removing or reducing any burden and is subject to the restrictions in Sections 20 to 23 relating to public consultation and Parliamentary scrutiny. However, as indicated the consultation provisions in Section 21 propose substantial discretion on the part of Scottish Ministers as to who should be consulted. Surely any person referred to in the Constitutive Act of a Schedule 3 body affected by any order proposed under Section 10 or 13(1) should be consulted as a matter of course?

Section 22 - explanatory document laid before the Scottish Parliament

The Society is of the view that Scottish Ministers should set out in the explanatory document the compelling reason for proceeding with such an order making power.

Part 6 – Scrutiny

Section 92 – Scrutiny: user focus

This section requires the bodies listed in Schedule 13 to make arrangements which:

a) Secure continuous improvement in user focus and the exercise of their scrutiny functions; and
b) Demonstrate that improvement

The bodies effected include:-

1) The Accounts Commission for Scotland
2) Her Majesty’s Chief Inspector of Constabulary
3) Her Majesty’s Chief Inspector of Prisons for Scotland
4) Her Majesty’s Chief Inspector of Prosecution in Scotland
5) The Mental Welfare Commission for Scotland; and
6) The Office of the Charity Regulator

Scottish Ministers can, in terms of Section 92(5) modify the list in Schedule 13 by adding or removing entries.

Section 93 – User focus: guidance etc.
Provides that, a body listed in Schedule 13, must have regard to guidance issued by the Scottish Ministers and to what are regarded as proper arrangements for the purposes of Section 92(1). The guidance issued by Scottish Ministers may include how to make and what is to be included in arrangements for the purposes of Section 92(1) and how to demonstrate continuous improvement in user focus. Scottish Ministers under Section 93(6) provides that Scottish Ministers may require a listed authority which does not comply with Scottish Ministers guidance to provide a written explanation of why it has not done so.

Section 94 – Scrutiny: duty of co-operation

This section imposes a duty of co-operation on the bodies listed in Schedule 14 which include the Accounts Commission for Scotland and the Mental Welfare Commission for Scotland a duty to co-operate and co-ordinate activity with each other and, where appropriate, the Scottish Ministers.

In relation to Sections 92 and 93, the application of these provisions may not be appropriate to the bodies mentioned in Schedule 13. In particular, the Accounts Commission for Scotland, the Mental Welfare Commission for Scotland and the Office of the Scottish Charity Regulator. User focus applies where the duty owed by the body is to the user. However, the Accounts Commission for Scotland, the Mental Welfare Commission for Scotland and the Office of the Scottish Charities Regulator, have broad-ranging duties. Independence is key to their operation and compliance with statutory duties laid down in their foundation statutes is an obligation under law. Care should be taken to ensure that Ministerial Guidance will conflict with existing statutory obligations.

Mental Welfare Commission for Scotland

The Society’s Mental Health and Disability Sub-Committee met Scottish Government representatives on a number of occasions earlier this year to express its concerns about the future of the Mental Welfare Commission for Scotland. During these meetings the Committee was assured that the Commission would not be included in the present Bill, as had originally been intended. This assurance was confirmed in a formal announcement on 13 February by the Minister for Public Health and Sport. Instead, there would be a separate consultation, which is now ongoing.

However, the Society notes that the Mental Welfare Commission appears in the lists of affected bodies in Schedules 3, 13 and 14 to the Bill. This means that the Commission, along with the other public bodies listed, is subject to the wide-ranging order-making powers in Part 2. Accordingly, the Scottish Ministers would (for example) still have power by order to abolish the Commission (section 10(3)(a)), or to implement their original stated intention to remove its independent safeguarding role.

The Society believes that the primary role of the Commission is a protective one, its independence is absolutely vital, and it serves an essential function to protect the rights (including human rights), interests and welfare of very vulnerable people. Its current functions are contained in primary legislation (the Adults with Incapacity
(Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003) which is relatively recent and which was addressed with great care by the Scottish Parliament. Serious concerns have already been raised by a number of bodies, including the Society, about the impact of the Scottish Government’s proposals upon the functions and independence of the Commission. In these circumstances, the Society believes that any change affecting the Commission should also be the subject of primary legislation, given due and full consideration, and thereafter approved, by the Scottish Parliament. The Society therefore believes that the Schedule 3 should be amended to remove reference to the Commission, avoiding the risk that changes to the Commission are implemented by way of orders under delegated powers, rather than primary legislation subject to scrutiny.

The Society’s concern in this regard is not any threat to the Commission itself, but the threat which that represents to the interests of vulnerable citizens.

The Society is also of the view that the Commission should be taken out of Schedules 13 and 14, for some if not all purposes. For example, section 95 would permit Scottish Ministers to order the Commission to carry out a joint inspection. At present, the Society’s understanding is that the Commission can be requested to investigate a matter, but not ordered to do so. It is understood that the Commission has never refused such a request, however the Society feels it is particularly important that the Commission’s independence, and clear public confidence in the integrity of that independence, be maintained. That aim is not consistent with permitting Scottish Ministers to order the Commission to carry out an inspection jointly with another body which the Commission may require to feel free to investigate or criticise.