Introduction

1. In Part 2 of the Public Services Reform (Scotland) Bill the Government is seeking powers, by order, to improve the exercise of public functions and to remove or reduce burdens resulting from legislation. The latter is the devolved equivalent of power to remove or reduce burdens conferred by section 1 of the Legislative and Regulatory Reform Act 2006, which began life as the much criticised power to reform legislation, and which the UK Government was forced to scale back in the face of almost universal condemnation. It is the first power, however, which is likely to attract the most attention, and which is accordingly the focus of this submission.

Rationale

2. Explaining why the Government is seeking the power to improve public services by order, the policy memorandum argues that ‘it is often a matter of historical accident whether changes to improve the delivery of public functions require legislation. Some functions of the public sector have legislative underpinning, but other similar or more significant functions do not and can be reorganised without legislation’ (paragraph 94). To which one might reply that it all depends on what one means by ‘significant’. The Government is undoubtedly correct that significant changes can sometimes be made without the need for legislation, while other, possibly minor, changes do need legislation. But legislation is less a matter of historical accident than of constitutional and legal necessity. In the context of public services it is about establishing public bodies, imposing duties on them, and equipping them with the powers they require in order to fulfil the tasks entrusted to them, and thereafter adjusting the overall legislative framework as felt to be appropriate – precisely those things the Government is now seeking power to do by order.

3. What is exercising the Government, one suspects, is not so much the reasons why some changes require legislation while others do not, as the lack or absence of a ‘consistent process for the Parliament to consider proposed, relatively small scale changes to the public services landscape and delivery of public sector functions’, which means, it argues, that ‘changes are then delayed and the benefits which would have accrued from a timeous amendment to the legislation may be foregone’ (paragraph 113). It is this lack - one highlighted by the Government’s public services reform programme - which the order making power is designed to address.

The power sought

4. Despite the surrounding talk of ‘relatively small scale changes’, there should be no illusions about the breadth of the power being sought; the power is so broad in
fact as to raise the question whether it is not designed as an opening bid. In the exercise of the power, ministers will be able to modify, confer, abolish, transfer, or provide for the delegation of, any function of the persons, bodies and office-holders listed in Schedule 3 to the Bill. They will also be able to amend the constitution of, or abolish, a person, body, or office-holder listed in the Schedule (other than the Scottish Ministers, the Forestry Commissioners, a person listed by virtue of section 11(3)(e) or a company). And they will be able to create a person, body or office holder on whom functions are conferred, or to whom functions are transferred or may be delegated. Equipped with this power, ministers will have little cause to return to Parliament with further proposals for improving the exercise of public functions.

5. Whether giving ministers the power to improve the exercise of public functions by order is a purpose that will commend itself to the Parliament remains to be seen. There are three aspects of the power sought, however, which deserve especially close scrutiny – the substantive limits to the power sought, the Schedule 3 list of bodies in respect of which it is exercisable, and the procedural safeguards that attend its exercise.

Limits

6. The power sought is a power to make any provision which ministers consider would improve the exercise of public functions (having regard to efficiency, effectiveness and economy) (s 10(1)). Ministers will therefore have to demonstrate, in the explanatory document accompanying proposals, how the provision made by the order will improve the exercise of public functions (s 22(1)(c)).

7. Over and above this basic requirement, which will be policed by the Parliament itself, there are two sets of limits on the power sought. The first takes the form of three ‘preconditions’ which apply ‘where relevant’. As well as explaining how the order will improve the exercise of the relevant public functions, the explanatory document must explain why ministers consider the conditions satisfied (s 22(1)(c)). The second takes the form of a series of general restrictions, which apply both to the power to improve the exercise of public functions and to the power to remove or reduce burdens.

Preconditions

8. The first pre-condition is that the effect of the provision made by the order must be ‘proportionate to the policy objective’ (s12(2)(a)). How much of a safeguard this represents is debatable. As was said in another context, ministers it may be thought are unlikely to consider any provision they put forward disproportionate.

9. The second is that it must not remove any ‘necessary protection’ (s12(2)(b)). ‘Necessary protection’ is not defined but section 12(3) provides that a provision is not to be treated as removing a necessary protection if provision is made that delivers ‘the same or similar protection in an alternative manner.’ Necessary protection may not be removed, it is true, but it can be replaced with similar protection. Much will depend on the meaning of ‘similar’.
10. The third condition is what may be described as the ‘broadly consistent test’. The broadly consistent test applies to the modification of functions and the conferral of functions on existing or new bodies (it is not clear why the Bill talks about the conferral rather than transfer of functions or indeed the difference between conferral and transfer unless the latter denotes the re-allocation of functions without modification).

Modification of functions

11. In terms of the modification of functions, the Bill provides that any function that is modified must be broadly consistent with the general objects or purpose of the person, body or office-holder concerned - in other words it must be modified in line with the general objects and purpose of the person, body or office-holder (s 12(2)(c)). The policy memorandum states that it will not be possible therefore to use the power to alter significantly the overall role or purpose of an individual body (paragraph 99).

12. Leaving aside the fact that ministers will be able to abolish the body and set up a successor body in its place (below), the question that immediately arises is what is the general objects or purpose of a body. In the case of functions exercised, or to be exercised, by ministers we are told it is the ‘broad remit of the part of the Scottish Administration through which the functions are exercised’ (s 12(4)), but this is hardly more illuminating. If one asks what is the general objects or purpose of Creative Scotland or any of the other bodies for which the Bill makes provision, one will search the legislation in vain. In the case of SEPA, to take an existing public body, it is presumably to protect the environment, but if this is correct then what ministers are seeking is a free hand to modify its functions, so long of course as they do so in a way that is broadly consistent with that purpose - which is as close to a legislative blank cheque as it is possible to imagine.

Conferral of functions

13. In terms of the conferral of functions, the Bill provides that any function that is conferred on an existing person, body or office-holder (other than a function being transferred without substantial modification) must likewise be broadly consistent with the general objects or purpose of the person, body or office holder (s 12(2)(d)). (A modification of a function being transferred is not to be treated as substantial if it is necessary to enable its effective exercise by the body to which it is transferred (s 12(5)).) The policy memorandum states that it will not be possible therefore to use the power to ask (sic) a body to undertake functions inappropriate to its core functions (paragraph 99). Again, however, there is the difficulty of establishing the general objects or purpose of a body and of how much of a restriction this represents. Moreover, it will be open to ministers to abolish the body and set up a successor body in its place.

New bodies

14. If ministers do decide to abolish a body and set up a successor body in its place, the Bill provides that any function which is conferred on the successor body
must be broadly consistent with the general objects or purpose of a body which is abolished or whose functions are modified (or else with public functions that are abolished or modified whether by an order made under section 10 or otherwise) (s 12(2)(e)). According to the policy memorandum this means that the conferral of radically new functions will not, therefore, be allowed for under these provisions (paragraph 99). Nor seemingly is it the intention that any restructuring or reorganisation of activities be used to create a new enterprise with functions unrelated to the functions or activities being carried out by the scheduled bodies. There must be some continuity of identity in the functions performed and the services delivered by any new organisation and that which preceded its establishment. The new functions conferred must be supplemental or ancillary in some way to functions or activities already being performed (paragraph 109). The controlling factor again, however, is the general objects or purposes of the scheduled bodies, or the broad remit of the part of the Scottish Administration concerned.

15. The underlying logic in all three cases therefore is the same: general objects or purposes remain unchanged but functions, ie powers and duties can be re-written in a way that is broadly consistent with those objects or purposes, which as already suggested is tantamount to giving ministers a free hand to rewrite the statute book across much of the public sector. The only part of the public sector that is beyond the reach of the power is local government. While functions may be transferred or delegated to local authorities (s 10(4)), ministers will not have power to transfer functions away from local authorities or to make any structural change in relation to local government.

16. To which criticism the reply will be that all we are talking about are ‘relatively small scale changes’ (paragraph 113). The difficulty is that the legislation as drafted does not say that. What it says is that ministers can re-write the statute book in a way that is broadly consistent with the general objects or purposes of the scheduled bodies, which will often be a matter of inference, so long as they do so in a way which is proportionate and does not involve the removal of any necessary protection.

General restrictions

17. The general restrictions, ie restrictions applicable to both powers, are identical to the general restrictions imposed on the power to remove or reduce burdens under the Legislative and Regulatory Reform Act, save that the restriction on the transfer of ministerial powers of direction, appointment and consent has no UK equivalent. They do not therefore call for special comment.

Schedule 3 bodies

18. The power sought is a power to improve the exercise of the public functions of the bodies listed in Schedule 3. In terms of the bodies listed the power is open to objection on separation of powers grounds. The difficulty is that it treats the bodies listed as all of kind - as bodies simply engaged in the delivery of public services, glossing over the fact that the functions in which they are engaged are in some cases very different. In particular, it ignores the fact that some of them are
designed as a check on government itself - the so called parliamentary commissioners in particular fall into this category, as does the Auditor General for Scotland - or how easily their independence may be compromised by the power sought. It is a precondition of the exercise of the powers conferred by the Legislative and Regulatory Reform Act that the provision made by an order is not ‘constitutionally significant’ (s 3(2)). Consideration might be given to the inclusion of a similar condition here, if not to the removal of some of the bodies from the Schedule.

Procedural safeguards

19. The making of an order will be preceded by consultation, the laying of a draft order and an explanatory document before the Parliament, and the approval of the draft order by resolution of the Parliament. The provision in respect of consultation and the laying of draft orders and explanatory documents before the Parliament mirrors exactly that in relation to the making of regulatory reform orders under the Legislative and Regulatory Reform Act 2006 and does not call for special comment here.

20. What is open to question is the sufficiency of the scope for parliamentary consideration of draft orders. What is proposed is that orders should be subject to the affirmative resolution procedure, but at Westminster the analogous power under the Legislative and Regulatory Reform Act may, depending on the significance of the order, be subject to the negative resolution procedure, the affirmative resolution procedure or the super-affirmative resolution procedure, with each House having a say in the choice of procedure. Committees also have the power to veto the making of an order. Set against that standard the procedure proposed seems insufficient. Nor should it be forgotten that the Parliament is a single chamber legislature. It has only one chance to get it right. There is no House of Lords waiting in the wings.

Alan Page
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