Introduction

I am grateful to the Finance Committee for giving me the opportunity to submit my comments. My comments relate mainly to Part 2 of the Bill.

I should declare that I have an interest in the matters included in Part 2 because I was a former advisor to the Subordinate Legislation Committee upon their Inquiry into the Regulatory Framework in Scotland from 2004 until 2007.

General

Part 2 confers upon Scottish Ministers powers, by order, to

- improve the exercise of public functions by certain specified bodies (section 10); and

- remove or reduce burdens imposed upon any person by legislation (section 13).

Both powers are extremely wide-ranging and would delegate to Scottish Ministers the power to make, by order, considerable amendments to legislation which would otherwise require to be effected by an Executive Bill without having to promote of primary legislation.

These powers raise two major concerns -

- whether it appropriate for the Parliament to delegate such wide ranging powers to Scottish Ministers; and, if so,

- what part should the Parliament continue to play in their exercise.

Better Regulation Agenda

Although this is not mentioned in the Policy Memorandum, both of these powers may arise out of the Better Regulation Agenda which was considered by the Subordinate Legislation Committee (“SLC”) in Stage 1 of its inquiry into the Regulatory Framework in Scotland.¹

Within the UK, legislative provisions relating to better regulation have mainly been concerned with conferring order making powers upon Ministers to remove or reduce burdens imposed upon business by other legislation. These provisions were originally in the Deregulation and Contracted Out Act 1984 but they were replaced, so far as the rest of the UK was concerned by Parts 1 and 2 of the Legislative and Regulatory Reform Act 2006 c.51 (“the 2006 Act”).

The power which is proposed in section 13 of the Bill to be conferred upon Scottish Ministers to remove or reduce burdens, and the provisions relating to it in sections 14-25, are based upon and largely replicate the provisions relating to the similar power in sections 1, 3-8,12-14 and 20 of the Westminster Act.

However, as the SLC pointed out in their 2005 Report, regulatory reform is not just about removing burdens but has a more positive aspect in improving better regulation. This is reflected in the provisions of

- Section 2 of the 2006 Act which empower a Minister of the Crown to make an order promoting regulatory principles so as to ensure that regulatory functions are exercised in accordance with certain regulatory principles; and

- Part 2 of that Act which requires any person exercising certain regulatory functions to have regard to those regulatory principles and to any code of practice issued by that Minister.

There is nothing similar to those provisions in the Bill. No explanation is given in the Policy Memorandum as to why they are not included. It is suggested that the Committee may wish to seek such an explanation and to consider whether the Bill should not contain something similar which would improve the way in which regulatory functions are exercised.

**Section 10: Power to improve exercise of public functions**

As far as I am aware, the power in section 10 is unprecedented in either Scottish or UK legislation.

The power is extremely wide-ranging. It would enable Scottish Ministers to make any provision which they consider would improve the exercise of public functions of any of the bodies or persons listed in Schedule 3 having regard to efficiency, effectiveness and economy. The amendments which could be made include provision modifying, conferring, abolishing, transferring, or providing for the delegation of, any function or abolishing any of the bodies or persons listed in Schedule (subject to certain exceptions) and creating any other body or office.

Some of the difficulties about this power are

- that it is not clear what is meant by improving the exercise of public functions, having regard to the three “Es”. It would cover anything which Scottish Ministers consider would achieve that purpose;
that there is no limitation upon the nature of the public functions which would be affected by this power. In this, it is totally unlike, in nature and degree, the power conferred upon a Minister of the Crown by section 2 of the 2006 Act to promote regulatory principles which is limited to ensuring that regulatory functions are exercised in accordance with certain regulatory principles. The power proposed to be conferred upon Scottish Ministers is not limited to regulatory functions;

that the only restraints upon this power are that Scottish Ministers can only make such an order if they consider that the conditions listed in section 12(2) are satisfied. The restrictions in sections 15-19 and the procedural provisions in sections 20-24 also apply; but

that these restrictions do not effectively restrict the kind of provision which Scottish Ministers could make under this power.

This would confer upon Scottish Ministers the power to make the kind of substantial and substantive amendments which, up until now, have been reserved to the Parliament. It would seem that they could make, by order, the kind of provisions which are proposed in the other Parts of the Bill. Any such order requires to be consulted upon, laid before Parliament in draft together with an Explanatory Memorandum, and approved by the Parliament.\(^2\) However, the Parliament is limited to approving or rejecting the draft as a whole. The Parliament would be denied the opportunity of examining the detail of any such order line by line and making amendments to it similar to the procedure for dealing with Executive Bills. *Prima facie*, this seems to be an exorbitant power which would have the effect of making Parliament largely redundant.

It may be thought

that it is necessary for there to be some mechanism for constantly scrutinising the exercise of public functions to ensure the “3 Es” are achieved and that this should cover not only of the bodies or persons listed in Schedule 3 but also others which are not mentioned, such as local authorities or health boards;

that it is necessary for Scottish Ministers to be involved in this task; and even

that there should be some expedited way of making any necessary amendments without the necessity of having an Executive Bill.

However, I seriously question whether it is appropriate for this function to handed over to Scottish Ministers in the manner proposed by this Bill.

Scottish Ministers may have in mind that, in order to ward off such criticism, they might concede that any such order might be subject to super affirmative procedure similar to that contained in section 18 of the 2006 Act and Parliament given an

\(^2\) Sections 20-22 of the Bill.
opportunity of requiring that procedure to apply.\(^3\) Under that procedure, the Parliament would be given 60 days within which to make representations and Scottish Ministers would have to consider any representations made. Scottish Ministers would be able to lay a revised draft order to take account of those representations. Any draft order or revised draft order would be subject to approval by the Parliament.

Although such super-affirmative procedure would be an improvement, I question whether it really goes far enough. In my view, it should be the function of the Parliament, who conferred public functions upon any body or person, to determine whether the exercise of those functions in any case needs to be improved having regard to the 3 Es and what improvements need to be made. Accordingly, I suggest that the super affirmative procedure in the 2006 Act should be modified to provide that, after the draft order has been laid before the Parliament, the relevant subject Committee should be required to consider it in a similar manner to Stage 1 of an Executive Bill, take their own evidence upon it and upon what is proposed (such as from Audit, Scotland) and should be able to recommend amendments to it. This should not be subject to any time limit. If the Parliament approve the Committee’s report, then Scottish Ministers should be obliged to make an order in terms of the draft with any amendments approved by the Parliament.

In this way, Parliament would be given a substantial role in determining what amendments are made to their own legislation.

**Section 13: Power to remove or reduce burdens**

The power conferred by section 13 is certainly wide but, as its purpose is more limited in scope than the power under section 10, I do not think that it is open to the same kind of objections as mentioned above.

However, I would point out that there appears to be no equivalent to the provision in, section 1 (4) of the 2006 Act which provides that

\[
(4) \text{ Provision may not be made under subsection (1) in relation to any burden which affects only a Minister of the Crown or government department, unless it affects the Minister or department in the exercise of a regulatory function.}
\]

It is suggested that there should be a similar limitation relating to Scottish Ministers and the Scottish Administration provided in the Bill.

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\(^3\) See section 15 of the 2006 Act.