Finance Committee

Public Services Reform (Scotland) Bill

Submission from Professor Chris Himsworth

I wish to confine my comments on this Bill to the order-making powers in Part 2 of the Bill and, in particular, the power in section 13 to “remove or reduce burdens”. In my view, the case for taking these hugely wide-ranging ministerial powers has not been made out. I would make four points:

1. The powers that the Parliament would delegate to the Scottish Ministers to make delegated legislation under sections 10 and 13 are potentially vast. They enable Ministers to modify any enactment, including the primary legislation of both the Scottish and Westminster Parliaments. There are references in the Policy Memorandum and the Delegated Powers Memorandum to the Deregulation and Contracting Out Act 1994 which was described at the time as a giant so-called “Henry VIII” clause giving huge and relatively unconstrained powers to ministers to modify primary legislation. It was recognised as an Act which was exceptional in this respect and which, at the very least, required special constitutional justification. I do not see that such constitutional justifications have been offered in relation to the current Bill. It seems to me wholly insufficient to say that the Bill’s provisions replace those in the 1994 Act or that they “largely mirror the regime” in the Legislative and Regulatory Reform Act 2006.

2. To the extent that the powers (especially those in section 13) intended to be conferred on ministers are designed to remove “burdens” on “persons”, they seem simply to echo the language of an earlier age in which it was fashionable for governments to seek to lift the burdens of red tape from commercial and other organisations. It seems to me that, if the same powers are to be taken by a new form of Scottish Government answerable to the Scottish Parliament, then the powers need new justifying arguments. “Regulation” is no longer a dirty word. Whether we are talking about banking (not the concern of this Bill) or environmental protection or aspects of health and safety, it is normal to assume that it is an appropriate role of parliaments and governments to regulate. It is unacceptable, simply in the name of improving the “landscape”, to identify the obligations imposed by regulation as “burdens” which, having been imposed by the deliberate decision of parliaments, can be removed at the decision of ministers. The case would have to be remade in respect of the Scottish constitutional environment of the 21st century rather than in respect of the UK environment of the closing decade of the 20th. In the meantime the opportunity can readily be taken in this and other Public Services Reform Bills to achieve the deregulatory aims which are sought.

3. The procedural justifications which are offered for the use of delegated (secondary) legislation rather than primary legislation to achieve the purposes which are sought are two-fold. One is the convenience of ministerial orders rather than primary legislation. The delegated powers memorandum refers to “the need to make proper use of valuable Parliamentary time”; the result that, if the powers are not taken, “change [is] not only dependent on the legislative process but also on finding legislative time which may not be possible or may be subject to a wait of years”; and says that “it is preferable to have the capacity to do this [in this instance, the powers under section 11(2)] without the need to await a suitable vehicle in primary legislation”.

But what is the evidence that there are such pressures on the primary legislative capacity of the Scottish Parliament? There has to be a starting assumption that those issues which were thought to be appropriate for regulation by primary legislation should be modified by the same means. What is the evidence that that assumption should be displaced? At the very least, it should not be displaced by arguments thought satisfactory in another parliament and in another period. It was, to the contrary, assumed at the launch of the Scottish Parliament that it would be appropriate here to rebalance the legislative process in favour of the use of primary legislation rather than immediately to adopt the Westminster model of a very substantial reliance on delegated powers.

This is, of course, a matter for parliamentarians to reflect on and decide. It is right that the balance between primary and secondary legislation should be rethought from time to time in the light of the Scottish Parliament’s experience over a decade. But, in my view, and especially at this particular period of a light legislative burden in the Parliament, much thought should be given to considering
whether the case has so far been made for the transfer of substantial legislative powers to the executive branch.

4. The other supporting argument for the use of delegated legislation is that there will be, through the use of the affirmative procedure, the opportunity for the Parliament to consider “whether the power is the appropriate and proportionate process” and whether “each use of the power is proportionate”. There is a constant reference to “meaningful consultation”.

But these reassurances are offered against the backdrop of the presumption already mentioned that the use of primary legislation is strongly to be preferred in the first instance and should be displaced only for good cause shown. Whatever the quality of scrutiny of secondary legislation, it is, by definition, never as good as that potentially available in the primary legislative process itself. And a worry is that the reassurances tendered overstate the real powers of the Scottish Parliament to scrutinise and control delegated legislation. These powers vary according to the political situation in the Parliament. At present, it is not at all unthinkable that under minority government conditions, the Government might indeed be forced to reconsider whether the use of their powers is proportionate - the Government has already lost the occasional vote in committee on a statutory instrument. But the powers in this Bill will, if enacted, endure and be available to future Governments with the capacity to ensure greater political compliance from a parliamentary majority. Under those conditions, independent parliamentary scrutiny would be less probable, once more supporting the argument that the case for conferring substantial additional powers of legislation on the Scottish Ministers has not been made.

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