Dear John

Public Services Reform (Scotland) Bill – section 10

As you are aware, the Finance Committee has now concluded its Stage 1 evidence-taking sessions on the Public Services Reform (Scotland) Bill and is currently considering its draft report.

The Committee has requested that I write to seek clarification from you on one specific point that was raised during your evidence session on 27 October. In response to a question from David Whitton MSP you stated, in relation to the power in section 10, that—

“At heart, they give the ability to change primary legislation through affirmative order. Such powers were included in section 57 of the Local Government (Scotland) Act 2003, which provides powers for ministers to modify any enactment that prevents or hinders local authorities from complying with their duties under that act or from exercising the powers that it gave to them. That particular power was tempered by the requirement to lay an order—which is exactly what we have in this bill—that had to be consulted upon, and the Subordinate Legislation Committee of the day regarded those powers for ministers as being entirely appropriate.”

The Official Report of the session can be found on the Parliament’s website, at: http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-2401.htm
The Committee notes that this Act has not been mentioned as a precedent for the power in section 10 in the Bill, the accompanying documents or during the bill team’s evidence session. In addition, there would appear to be some potentially significant differences between the example cited and the provisions in the Bill. These differences include—

- The power in the 2003 Act applies primarily only to local authorities (other public service providers are engaged only in relation to co-ordinating community planning of public services), whereas the power in the Bill applies to all public bodies listed in schedule 3. The list of bodies in schedule 3 can also be amended, meaning the boundaries of the power could be expanded.

- The 2003 Act is also limited to taking away or modifying provisions in legislation which hinder the performance of specific best value, publication and community planning objectives set out in that Act. The Bill, however, allows Ministers to make any provision (not just to amend existing legislation) which they consider would improve the exercise of public functions, having regard to efficiency, effectiveness and economy (which are not defined).

The Committee seeks clarification on this issue.

Given the Committee’s timescale for considering its report, a response would be appreciated by close on Friday 27 November.

Yours sincerely

Andrew Welsh MSP
Convener

Copies of this letter have been sent to the Members of the Finance Committee and to the Scottish Government Bill Team.
Thank you for your letter of 24 November, seeking clarification on one of my responses during my evidence session on 27 October.

The main point I was making in evidence was that each power - the power in section 57 of the Local Government (Scotland) Act 2003 and the power proposed in section 10 of the Public Services Reform Bill - is a power in secondary legislation to make potentially wide changes to primary legislation, in both cases subject to safeguards and in both cases having regard to economy, efficiency and effectiveness. It seems to me that it is therefore a very close analogy.

Section 57 of the 2003 Act, has a tightly focussed purpose; to amend legislation that prevents local authorities from discharging best value duties, having regard to economy, efficiency and effectiveness. This is analogous to the section 10 power; to promote improvement in public services having regard to 'economy, efficiency and effectiveness'. Both powers depend on being able to amend primary legislation through secondary legislation subject to appropriate safeguards. I made clear my willingness to consider further safeguards in the Bill on this point.

Section 10 is also broadly similar to section 57 of the 2003 Act in the legal effect it can deliver. So, for example, the Provision of School Lunches (Disapplication of the requirement to Charge) (Scotland) Order 2008 was made under section 57 of the Act to deliver the provision of free school meals across a range of age groups. Prior to the section 57 power, this required primary legislation (see the Education (School Meals) (Scotland) Act 2003).

Of course the bodies subject to the powers are not the same. They each operate to a large extent in respect of a tier of government - section 57 in respect of local government and, in
respect of some functions, other public and private providers at the local level; and section 10 in respect of central government and other public bodies.

You commented that the power in section 57 of the 2003 Act had not been mentioned in the documents which accompanied the Bill. However it was clear, from both the written and oral evidence submitted to you, that Section 10 is widely believed to be without precedent, which is not the case. I therefore took the opportunity, when giving evidence, to respond to that point, giving the Act as an example of a power which was already on the statute book and which could be used to make potentially wide changes to primary legislation by secondary legislation.

Finally, you pointed out that the list of bodies in Schedule 3 can be amended, thus expanding the coverage of the Order-making power in section 10. However, Section 11(2) and (3) make it clear that only the same categories of bodies as are already in Schedule 3 can be added. I did of course make clear that I was prepared to consider whether the list of bodies included in Schedule 3 is appropriate.

I hope this clarifies matters for the Committee.

Yours sincerely,

JOHN SWINNE