



Public Services Reform (Scotland) Act 2010

2010 asp 8

PART 2

ORDER-MAKING POWERS

Improving the exercise of public functions

14 Public functions: efficiency, effectiveness and economy

- (1) The Scottish Ministers may by order make any provision which they consider would improve the exercise of public functions, having regard to—
 - (a) efficiency,
 - (b) effectiveness, and
 - (c) economy.
- (2) In subsection (1), “public functions” are functions of the persons, bodies and office-holders listed in schedule 5, subject to any limitations specified in that schedule.
- (3) The provision that may be made under subsection (1) includes provision—
 - (a) modifying, conferring, abolishing, transferring, or providing for the delegation of, any function,
 - (b) amending the constitution of a person, body or office-holder listed in schedule 5 other than—
 - (i) the Scottish Ministers,
 - (ii) the Scottish Court Service,
 - (iii) a cross-border public authority,
 - (iv) a person listed by virtue of section 15(5)(e), or
 - (v) a company (within the meaning of the Companies Act 2006 (c. 46)),
 - (c) creating—
 - (i) a person, body or office-holder on which functions are conferred,
 - (ii) a person, body or office-holder to which functions (modified or otherwise) are transferred or may be delegated.

- (4) For the purposes of subsection (3)(b)(ii), the constitution of the Scottish Court Service is as set out in schedule 3 to the [Judiciary and Courts \(Scotland\) Act 2008 \(asp 6\)](#).
- (5) The transfer or delegation referred to in subsection (3)(a) must be a transfer or delegation to—
- (a) a person, body or office-holder listed in schedule 5,
 - (b) a person, body or office-holder created in pursuance of subsection (3)(c), or
 - (c) a local authority (meaning a council constituted by section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39)).
- (6) An order under this section containing provision creating a person, body or office-holder in pursuance of subsection (3)(c)—
- (a) must include provision adding that person, body or office-holder to schedule 5,
 - (b) may include provision adding that person, body or office-holder to schedule 6,
 - (c) may specify the extent to which any functions are to be public functions for the purposes of subsection (1).
- (7) An order under this section may—
- (a) modify any enactment, instrument or other document,
 - (b) contain such consequential, incidental, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.
- (8) An order under this section may include provision dissolving any person, body or office-holder listed in schedule 5, other than those listed in subsection (3)(b)(i) to (v), but only if the person, body or office-holder has, or will have by virtue of the order, no exercisable functions.
- (9) An order under this section may bind the Crown.
- (10) An order under this section must be made in accordance with this Part.

15 Public functions: further provision

- (1) Schedule 5, which lists persons, bodies and office-holders for the purposes of section 14, has effect.
- (2) The Scottish Ministers may by order modify schedule 5 by—
- (a) adding an entry for any person, body or office-holder falling within subsection (5),
 - (b) removing any entry.
- (3) An order under subsection (2)(a) containing provision adding an entry to schedule 5 may include provision adding a corresponding entry to schedule 6.
- (4) An order under subsection (2)(b) containing provision removing an entry from schedule 5 must include provision removing any corresponding entry from schedule 6.
- (5) Those persons, bodies and office-holders are—
- (a) an office-holder in the Scottish Administration,
 - (b) a Scottish public authority with mixed functions or no reserved functions,
 - (c) a cross-border public authority,
 - (d) a publicly-owned company,

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- (e) any other person, not being a public body or the holder of a public office, who either—
 - (i) appears to the Scottish Ministers to exercise functions of a public nature, or
 - (ii) is providing, under a contract made with a person, body or office-holder listed in schedule 5, any service the provision of which is the function of that person, body or office-holder.
- (6) A company is publicly-owned for the purposes of subsection (5)(d) if it is wholly owned—
 - (a) by the Scottish Ministers, or
 - (b) by any other person, body or office-holder listed in schedule 5 except a person, body or office-holder listed—
 - (i) by virtue of subsection (5)(e)(i) in relation only to some of its functions, or
 - (ii) by virtue of subsection (5)(e)(ii).
- (7) For the purposes of subsection (6) a company is wholly owned—
 - (a) by the Scottish Ministers if it has no members except—
 - (i) the Scottish Ministers or companies wholly owned by the Scottish Ministers, or
 - (ii) persons acting on behalf of the Scottish Ministers or of such companies,
 - (b) by any other person, body or office-holder if it has no members except—
 - (i) the person, body or office-holder or companies wholly owned by the person, body or office-holder, or
 - (ii) persons acting on behalf of the person, body or office-holder or of such companies.
- (8) An entry added to schedule 5 by an order under subsection (2)(a) made by virtue of subsection (5)(e) must specify the functions of a public nature or, as the case may be, the service being provided; and only those functions or that service are public functions of the person in question for the purposes of section 14(1).
- (9) In this section—
 - “company” includes any body corporate;
 - “local authority” means a council constituted by section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);
 - “Scottish public authority with mixed functions or no reserved functions” is to be construed in accordance with paragraphs 1(4) and 2 of Part 3 of Schedule 5 to the Scotland Act 1998 (c. 46); but does not include a local authority.

16 Preconditions

- (1) The Scottish Ministers may not make provision under section 14, other than provision which merely restates an enactment, unless they consider that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.
- (2) Those conditions are that—
 - (a) the effect of the provision is proportionate to the policy objective,
 - (b) the provision does not remove any necessary protection,

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- (c) 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,
 - (d) any function which is conferred on a person, body or office-holder listed in schedule 5 (other than a function being transferred without substantial modification from another such person, body or office-holder) is broadly consistent with the general objects or purpose of the person, body or office-holder concerned,
 - (e) any function which is conferred on a person, body or office-holder created by virtue of section 14 is broadly consistent with—
 - (i) the general objects or purpose of a person, body or office-holder listed in schedule 5 which is abolished, or whose functions are modified, by virtue of section 14 or otherwise, or
 - (ii) public functions abolished or modified by virtue of that section or otherwise.
- (3) Examples of protections for the purposes of subsection (2)(b) are (without prejudice to the generality of that provision) protections in relation to—
- (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office,
 - (b) civil liberties,
 - (c) health and safety of persons,
 - (d) the environment,
 - (e) cultural heritage (including access, through display, exhibition or otherwise, to cultural heritage).
- (4) For the purposes of subsection (2)(b), the continued independence of the judiciary as mentioned in section 1 of the [Judiciary and Courts \(Scotland\) Act 2008 \(asp 6\)](#) is a necessary protection.
- (5) For the purposes of subsection (2)(b), the holding, care or preservation of property which is cultural heritage by persons separate from the Scottish Ministers and any statutory restrictions on the disposal of such property are necessary protections where the property is vested in such persons as trustees for the public under statute.
- (6) For the purposes of subsection (2)(b), the provision in paragraph 7(4) of schedule 2 to the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp 13\)](#) as to who the convener shall be in relation to certain proceedings before the Mental Health Tribunal for Scotland is a necessary protection.
- (7) For the purposes of subsection (2)(b), 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.
- (8) For the purposes of the application of subsection (2)(c), (d) and (e) to functions exercised, or to be exercised, by the Scottish Ministers, references to their general objects or purpose are to the broad remit of the part of the Scottish Administration through which the functions are, or are to be, exercised.
- (9) For the purposes of subsection (2)(d), a modification of a function being transferred is not to be treated as substantial if it is necessary to enable the effective exercise of the function by the person, body or office-holder to which it is transferred.

- (10) The Scottish Ministers may not make provision under section 14 which merely restates an enactment unless they consider that the provision made would make the law more accessible or more easily understood.
- (11) In subsection (3)(a) “judicial office” means—
- (a) the office of judge of any court,
 - (b) the office of member of any tribunal,
 - (c) any other office, or appointment, consisting of functions of a judicial nature.

Removing and reducing burdens

17 Power to remove or reduce burdens

- (1) The Scottish Ministers may by order make any provision which they consider would remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.
- (2) In this section “burden” means any of the following—
- (a) a financial cost,
 - (b) an administrative inconvenience,
 - (c) an obstacle to best regulatory practice,
 - (d) an obstacle to efficiency, productivity or profitability, or
 - (e) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.
- (3) For the purposes of subsection (1), a financial cost or administrative inconvenience may result from the form of any legislation (for example, where the legislation is hard to understand).
- (4) For the purposes of subsection (2)(c), “best regulatory practice” means practice under which (in particular) regulatory activities should be—
- (a) carried out in a way that is transparent, accountable, proportionate and consistent,
 - (b) targeted only at such cases as require action.
- (5) In this section “legislation” means any of the following or a provision of any of the following—
- (a) a public general or local Act of Parliament (whenever passed) or an Act of the Scottish Parliament (whenever passed), or
 - (b) any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other subordinate instrument made at any time under an Act referred to in paragraph (a).
- (6) The provision that may be made under subsection (1) includes provision—
- (a) abolishing, conferring or transferring, or providing for the delegation of, functions of any description,
 - (b) creating a body or office.
- (7) An order under this section may not amend the constitution of the Scottish Court Service.

- (8) For the purposes of subsection (7), the constitution of the Scottish Court Service is as set out in schedule 3 to the Judiciary and Courts (Scotland) Act 2008.
- (9) An order under this section may—
 - (a) modify any enactment,
 - (b) contain such consequential, incidental, transitional, transitory or saving provision as the Scottish Ministers consider appropriate.
- (10) An order under this section may include provision dissolving any body or office, other than those listed in section 14(3)(b)(i) to (v), but only if the body or office has, or will have by virtue of the order, no exercisable functions.
- (11) An order under this section may bind the Crown.
- (12) An order under this section must be made in accordance with this Part.

18 Preconditions

- (1) The Scottish Ministers may not make provision under section 17(1), other than provision which merely restates an enactment, unless they consider that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.
- (2) Those conditions are that—
 - (a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means,
 - (b) the effect of the provision is proportionate to the policy objective,
 - (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it,
 - (d) the provision does not remove any necessary protection,
 - (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.
- (3) Examples of protections for the purposes of subsection (2)(d) are (without prejudice to the generality of that provision) protections in relation to—
 - (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office,
 - (b) civil liberties,
 - (c) health and safety of persons,
 - (d) the environment,
 - (e) cultural heritage (including access, through display, exhibition or otherwise, to cultural heritage).
- (4) For the purposes of subsection (2)(d), the continued independence of the judiciary as mentioned in section 1 of the Judiciary and Courts (Scotland) Act 2008 is a necessary protection.
- (5) For the purposes of subsection (2)(d), the holding, care or preservation of property which is cultural heritage by persons separate from the Scottish Ministers and any statutory restrictions on the disposal of such property are necessary protections where the property is vested in such persons as trustees for the public under statute.

- (6) For the purposes of subsection (2)(d), the provision in paragraph 7(4) of schedule 2 to the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp 13\)](#) as to who the convener shall be in relation to certain proceedings before the Mental Health Tribunal for Scotland is a necessary protection.
- (7) For the purposes of subsection (2)(d) a provision is not to be treated as removing a necessary protection if provision is also made that delivers the same or similar protection in an alternative manner.
- (8) The Scottish Ministers may not make provision under section 17(1) which merely restates an enactment unless they consider that the provision made would make the law more accessible or more easily understood.
- (9) In subsection (3)(a) “judicial office” means—
 - (a) the office of judge of any court,
 - (b) the office of member of any tribunal,
 - (c) any other office, or appointment, consisting of functions of a judicial nature.

Specific restrictions

19 Order in relation to certain bodies: requirement for request and consent

- (1) The Scottish Ministers may not propose to make provision under section 14 or 17(1) which relates to any of the persons, bodies or office-holders listed in schedule 6 unless requested to do so in writing by the Scottish Parliamentary Corporate Body.
- (2) The Scottish Ministers may not lay a draft order containing such provision before the Scottish Parliament in accordance with section 25(2)(b)(i) unless the Scottish Parliamentary Corporate Body consents.

General restrictions

20 Subordinate legislation and powers of direction, appointment and consent

- (1) An order under section 14 or 17(1) may confer or transfer a function of legislating only on or to the Scottish Ministers, the First Minister or the Lord Advocate.
- (2) An order under section 14 or 17(1) may not make provision for the delegation of any function of legislating.
- (3) An order under section 14 or 17(1) may not make provision to confer a function of legislating on the Scottish Ministers, the First Minister or the Lord Advocate unless the conditions in subsections (4) and (5) are satisfied.
- (4) The condition in this subsection is that the function is exercisable by statutory instrument.
- (5) The condition in this subsection is that such a statutory instrument—
 - (a) is subject to annulment in pursuance of a resolution of the Scottish Parliament, or
 - (b) is not to be made unless a draft of the statutory instrument has been laid before and approved by a resolution of the Parliament.

- (6) Subsections (1) to (3) do not apply to provision which merely restates an enactment.
- (7) An order under section 14 or 17(1) may not make provision which has the effect of transferring to a person other than the Scottish Ministers, the First Minister or the Lord Advocate any function to which subsection (8) applies.
- (8) This subsection applies to any function of—
 - (a) giving directions,
 - (b) appointing a person to any office or position, or
 - (c) consenting to any thing,
 conferred by any enactment on the Scottish Ministers, the First Minister or the Lord Advocate.

21 Local taxation

An order under section 14 or 17(1) may not make provision to impose, abolish or vary any local tax to fund local authority expenditure.

22 Criminal penalties

- (1) An order under section 14 or 17(1) may not make provision to create a new offence that is punishable, or increase the penalty for an existing offence so that it is punishable—
 - (a) on indictment, with imprisonment for a term exceeding two years, or
 - (b) on summary conviction, with—
 - (i) imprisonment for a term exceeding 12 months, or
 - (ii) a fine exceeding level 5 on the standard scale.
- (2) In the case of an offence which is triable either on indictment or summarily and is not an offence triable on indictment only by virtue of section 292(6) and (7) of the Criminal Procedure (Scotland) Act 1995 (c. 46), the reference in subsection (1)(b)(ii) to a fine exceeding level 5 on the standard scale is to be construed as a reference to the statutory maximum.
- (3) Subsection (1) does not apply to provision which merely restates an enactment.

23 Forcible entry etc.

- (1) An order under section 14 or 17(1) may not make provision to—
 - (a) authorise any forcible entry, search or seizure, or
 - (b) compel the giving of evidence.
- (2) Subsection (1) does not prevent an order from extending any power for purposes similar to those to which the power applied before the order was made.
- (3) Subsection (1) does not apply to provision which merely restates an enactment.

24 Prohibition on modification of this Part

An order under section 14 or 17(1) may not make provision modifying any provision of this Part other than schedule 5.

Procedure

25 Procedure

- (1) An order under this Part must be made by statutory instrument.
- (2) The Scottish Ministers may not make an order under section 14 or 17(1) unless—
 - (a) they have consulted in accordance with section 26,
 - (b) following that consultation, they have laid before the Scottish Parliament—
 - (i) a draft order, and
 - (ii) an explanatory document prepared in accordance with section 27, and
 - (c) the draft order has been approved by resolution of the Parliament.
- (3) Except as mentioned in subsection (7), the Scottish Ministers may not make an order under section 15 unless—
 - (a) they have consulted in accordance with subsection (4),
 - (b) following that consultation, they have laid before the Parliament—
 - (i) a draft order, and
 - (ii) an explanatory document prepared in accordance with subsection (5), and
 - (c) the draft order has been approved by resolution of the Parliament.
- (4) The Scottish Ministers must consult any person, body or office-holder in respect of which they propose to add an entry to schedule 5.
- (5) The explanatory document must give details of—
 - (a) any consultation undertaken under subsection (4),
 - (b) any representations received as a result of the consultation,
 - (c) the changes (if any) made to the proposals mentioned in subsection (4) as a result of those representations.
- (6) Subsections (2) to (4) of section 27 apply to consultation under subsection (4) of this section as those subsections of section 27 apply to consultation under section 26; and references to subsection (1)(f)(ii) in section 27(2) and (3) are to be read as references to subsection (5)(b) of this section.
- (7) Where an order under section 15 contains only a provision mentioned in subsection (2)(b) of that section and, if applicable, a provision mentioned in subsection (4) of that section, the order is subject to annulment in pursuance of a resolution of the Parliament.

26 Consultation

- (1) If the Scottish Ministers propose to make an order under section 14 or 17(1) they must—
 - (a) consult such organisations as appear to them to be representative of interests substantially affected by the proposals,
 - (b) where the proposals relate to the functions of one or more persons, bodies or office-holders, consult those persons, bodies or office-holders, or persons appearing to them to be representative of those persons, bodies or office-holders,

- (c) in such cases as they consider appropriate, consult the Scottish Law Commission, and
 - (d) consult such other persons as they consider appropriate.
- (2) For the purposes of any consultation required by subsection (1), the Scottish Ministers must—
- (a) lay before the Parliament—
 - (i) a copy of the proposed draft order, and
 - (ii) a copy of the proposed explanatory document referred to in section 25(2)(b)(ii) (excepting the details required by section 27(1)(f)),
 - (b) send a copy of the proposed draft order and proposed explanatory document to any person to be consulted under subsection (1), and
 - (c) have regard to any representations about the proposed draft order that are made to them within 60 days of the date on which the copy of the proposed draft order is laid before the Parliament under paragraph (a).
- (3) In calculating any period of 60 days for the purposes of subsection (2)(c), no account is to be taken of any time during which the Parliament is dissolved or is in recess for more than 4 days.
- (4) If, as a result of any consultation required by subsection (1), it appears to the Scottish Ministers that it is appropriate to change the whole or any part of their proposals, they must undertake such further consultation with respect to the changes as they consider appropriate.
- (5) If, before the day on which this section comes into force, any consultation was undertaken which, had it been undertaken after that day, would to any extent have satisfied the requirements of this section, those requirements are to that extent to be taken to have been satisfied.

27 Explanatory document laid before the Scottish Parliament

- (1) The explanatory document referred to in section 25(2)(b)(ii) must—
- (a) explain under which power (or powers) in this Part the provision contained in the draft order is made,
 - (b) introduce and give reasons for the provision,
 - (c) in the case of an order under section 14—
 - (i) explain why the Scottish Ministers consider that the conditions in section 16(2) (where relevant) are satisfied or the condition in section 16(10) is satisfied,
 - (ii) explain how the provision made by the order would improve the exercise of public functions, and
 - (iii) if the order relates to the functions of the Scottish Ministers, or confers functions on or transfers or delegates functions to, the Scottish Ministers, describe the functions and identify the part of the Scottish Administration through which the functions are, or are to be, exercised,
 - (d) in the case of an order under section 17(1)—

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- (i) explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied or the condition in section 18(8) is satisfied, and
 - (ii) include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens (within the meaning of that section),
 - (e) identify and give reasons for—
 - (i) any functions of legislating conferred by the order, and
 - (ii) the procedural requirements attaching to the exercise of those functions, and
 - (f) give details of—
 - (i) any consultation undertaken under section 26,
 - (ii) any representations received as a result of the consultation,
 - (iii) the changes (if any) made to the proposed draft order as a result of those representations.
- (2) Where a person making representations in response to consultation under section 26 has requested the Scottish Ministers not to disclose them, the Scottish Ministers must not disclose them under subsection (1)(f)(ii) if or to the extent that to do so would (disregarding any connection with proceedings in the Scottish Parliament) constitute a breach of confidence actionable by any person.
- (3) If information in representations made by a person in response to consultation under section 26 relates to another person, the Scottish Ministers need not disclose the information under subsection (1)(f)(ii) if or to the extent that—
 - (a) it appears to the Scottish Ministers that the disclosure of that information could adversely affect the interests of that other person, and
 - (b) the Scottish Ministers have been unable to obtain the consent of that other person to the disclosure.
- (4) Subsections (2) and (3) do not affect any disclosure that is requested by, and made to, a committee of the Parliament charged with reporting on the draft order.

28 Combination with powers under European Communities Act 1972

- (1) The power to make an order under section 14 or 17(1) may be exercised together with, and by the same instrument as, the power to make an order under section 2(2) of the European Communities Act 1972 (c. 68).
- (2) Where the powers referred to in subsection (1) are so exercised—
 - (a) sections 25 to 27 apply to the order under section 2(2) of the European Communities Act 1972 as they apply to the order under section 14 or 17(1) of this Act, and
 - (b) paragraph 2(2) of Schedule 2 to the European Communities Act 1972 does not apply.

*General***29 Order-making powers: modifications of enactments**

Schedule 7 (which contains minor amendments and amendments consequential on this Part) has effect.

30 Interpretation of Part 2

In this Part—

“cultural heritage” includes objects, structures and other things (in whatever form) resulting from human activity of all periods, traditions, ways of life and the historic, scientific, artistic and literary associations of people, places and landscapes;

“restate an enactment” means to replace it with alterations only of form or arrangement (and for these purposes to remove an ambiguity is to make an alteration other than one of form or arrangement);

“function of legislating” is a function of legislating by order, rules, regulations or other subordinate instrument.