

PUBLIC SERVICES REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT

Part 2 – Order-Making Powers

Section 16 - Preconditions

32. This section sets out the preconditions for making an order under section 14. In particular, the Scottish Ministers may not make provision (other than provision that merely restates an enactment) unless they consider that the effect of the provision is proportionate to the policy objective (subsection 2(a)) and that the provision does not remove any necessary ‘protection’ (subsection 2(b)). In addition, subsections (2) (c) and (d) provide that ‘public functions’ that are modified, and functions (including new functions) conferred on bodies listed in schedule 5 (unless transferred without substantial modification), must be broadly consistent with the general objects or purpose of the body concerned.
33. If an existing ‘public function’ is transferred without substantial modification to another listed body, a new body created under section 14(3)(c), or a local authority (for example where the function is only modified to the extent necessary to enable its effective exercise), then the function does not need to be broadly consistent with the general objects or purpose of the receiving body. However, for new bodies created under section 14, subsection (2)(e) still requires that any function conferred on that body must be broadly consistent with either (i) the general objects or purpose of a body listed in schedule 5 which is abolished or whose functions are modified, or (ii) ‘public functions’ that are abolished or modified.
34. For the purposes of subsection 2(b), ‘protection’ includes (without prejudice to the generality of the meaning of the provision) protections in relation to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office; civil liberties; health and safety of persons; the environment; and cultural heritage. Section 30 gives a very wide definition of cultural heritage such as would include all the types of material whether in material form or otherwise which could be found in museums, art galleries and libraries embracing both the sciences and the humanities. The words in brackets referring to cultural heritage make it clear that the protection extends to the public’s rights of access to the cultural heritage and rights to see it displayed and exhibited.
35. If a ‘protection’ is not necessary it can be removed; and if it is necessary, it can be replaced by provision that delivers the same or similar protection (subsection (7)). In this context, subsections (4) to (6) prescribe that the following are protections that are necessary:
 - (i) the continued independence of the judiciary as mentioned in section 1 of the Judiciary and Courts (Scotland) Act 2008;

*These notes relate to the Public Services Reform (Scotland) Act
2010 (asp 8) which received Royal Assent on 28 April 2010*

- (ii) institutional arrangements in terms of which persons separate from Scottish Ministers are charged under statute as trustees for the public with holding, caring for and preserving property which is cultural property, and any statutory restrictions on the trustees on disposal of such property vested in them; and
 - (iii) provision in paragraph 7(4) of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 as to who the convener shall be in relation to certain proceedings i.e. the requirement that certain cases involving restricted patients are to be chaired by the President of the Tribunal or a sheriff.
36. In particular, subsection (5) and the provision relating to cultural heritage in section 16(3)(e) recognise the particular role and importance to the Scottish nation of those functions carried out by the national collections institutions which hold collections as trustees for the public. The national heritage functions of these institutions are more fully stated in the founding legislation of each of the three main collecting bodies - that is, Part 1 of the National Heritage (Scotland) Act 1985 (establishing the National Museums of Scotland), the National Galleries of Scotland Act 1905 (establishing the National Galleries of Scotland) and the National Library of Scotland Act 1925 (establishing the National Library of Scotland).