

PUBLIC SERVICES REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT

Part 2 – Order-Making Powers

Section 14 - Public functions: efficiency, effectiveness and economy

27. This section enables the Scottish Ministers, by order, to make any provision which they consider would improve the exercise of public functions by the bodies listed in schedule 5 (including the Scottish Ministers) having regard to efficiency, effectiveness and economy.
28. In this context, ‘public functions’ means the functions of the persons, bodies and office-holders listed in schedule 5, subject to any limitations specified in that schedule. The list in schedule 5 includes the Scottish Ministers and any other office-holder in the Scottish Administration, certain Scottish public authorities with mixed or no reserved functions, and a cross-border public authority with mixed functions (the Forestry Commissioners).
29. An order under this section may, for example, reconfigure the way (and means by which) certain functions are delivered. In particular, the order may include, but is not limited to, provision modifying, conferring, abolishing, transferring or providing for the delegation of any function (including, subject to section 16, new functions). The power is not however exercisable in relation to local authorities, except that functions may be transferred or delegated to local authorities (including fire and police authorities).
30. An order made under this section may also amend the constitution of, or dissolve, a body listed in schedule 5 other than the Scottish Ministers, Scottish Court Service, cross-border public authorities, companies and any person listed by virtue of section 15(5) (e); but a body cannot be dissolved unless it has, or will have by virtue of the order, no exercisable functions. The order may also create a new person, body or office-holder on which functions are conferred, or to which functions are transferred or may be delegated.

Section 15 – Public functions: further provisions

31. This section enables certain types of person, body and office-holder to be added to the list in schedule 5 and existing entries removed, and allows corresponding entries to be added to, or removed from, schedule 6. The types that may be added are: office-holders in the Scottish Administration; Scottish public authorities with mixed or no reserved functions (other than local authorities); cross-border public authorities; publicly-owned companies; and any other person who appears to exercise functions of a public nature or otherwise provides a service under contract which is a function of a body listed in schedule 5. In relation to the latter, the functions of a public nature or services being provided must be specified, and only these functions or services are public functions of the body for the purposes of section 14.

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;
 - (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).

Section 17 - Power to reduce or remove burdens

37. This section replicates and updates the power to remove burdens by order in respect of both the public sector and the private sector in terms of section 1 of the Deregulation and Contracting Out Act 1994 (which is repealed). ‘Burden’ means a financial cost; an administrative inconvenience; an obstacle to best regulatory practice; an obstacle to efficiency, productivity, or profitability; or a sanction, criminal or otherwise, which affects the carrying on of any lawful activity. This section mirrors the regime in section 1 of the Legislative and Regulatory Reform Act 2006 and together effectively provides a common regime for the removal or reduction of burdens in devolved and reserved areas in Scotland.

Section 18 - Preconditions

38. This section sets out the preconditions for making an order under section 17(1). These are that the policy objectives could not be secured by non-legislative means; the effect is proportionate to the policy objective; the provision strikes a fair balance between the public interest and the interests of anyone adversely affected; it does not remove any necessary protection (these are the same as those described above in relation to section 16) and does not prevent anyone exercising a right or freedom which they could reasonably expect to exercise.

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

39. This section prevents the Scottish Ministers from proposing any provision by order under section 14 or 17(1) which relates to any of the bodies listed in schedule 6 unless requested to do so in writing by the Scottish Parliamentary Corporate Body. In addition, subsection (2) provides that the Scottish Ministers cannot lay any subsequent draft order containing such provision without the consent of the Scottish Parliamentary Corporate Body.

General restrictions

Section 20 - Subordinate legislation and powers of direction, appointment and consent

40. This section provides that an order under sections 14 or 17(1) can only confer a function of legislating on the Scottish Ministers, the First Minister or Lord Advocate and cannot delegate this function. In addition, an order under section 14 or 17(1) cannot transfer to other persons any function of giving directions, appointing a person to any office or position, or consenting to any thing, which is conferred by legislation on Scottish Ministers, the First Minister or the Lord Advocate.

Section 21 - Local taxation

41. This section provides that an order under section 14 or 17(1) cannot be used to impose, vary or abolish any local tax to fund local authority expenditure.

Section 22 - Criminal penalties

42. This section restricts the extent to which criminal penalties can be imposed by an order under section 14 or 17(1).

Section 23 - Forcible entry etc.

43. This section provides that an order under section 14 or 17(1) cannot authorise forcible entry, search or seizure, or compel the giving of evidence except where it merely extends an existing power for similar purposes or restates an enactment.

Section 24 - Prohibition on modification of this Part

44. This section provides that in general an order under section 14 or 17(1) may not make provision modifying any provision of Part 2 other than schedule 5. Section 14(6)(b) does however specifically provide that an order under section 14 may also include provision adding a person, body or office-holder created in pursuance of section 14(3) (c) to schedule 6.

Procedure

Section 25 to 28 - Procedure, consultation and explanatory document

45. **Sections 25 to 28** set out the procedure for making orders. The order-making powers are subject to a ‘super-affirmative’ procedure which requires that if the Scottish Ministers propose to make an order under section 14 or 17(1) they must lay before the Parliament a copy of the proposed draft order and the proposed explanatory document and send copies of these to any person who is required to be consulted under section 26.
46. Scottish Ministers must have regard to any representations made within a period of 60 days (excluding periods when the Parliament is dissolved or in recess for more than 4 days) before laying a draft order before Parliament for approval by affirmative resolution accompanied by a further explanatory document which gives details of the consultation which has been undertaken, any representations received and any changes made as a result of those representations.
47. These sections also set out the procedure for making orders under section 15 which add or remove an entry in schedule 5 (and, if applicable, schedule 6). Before making an order under section 15 which adds an entry to schedule 5, the Scottish Ministers must consult the body in question and lay a draft order and an explanatory document before Parliament, and the draft order must be approved by a resolution of Parliament.

Section 29 - Order-making powers: modifications of enactments

48. This section gives effect to schedule 7.

Section 30 - Interpretation of Part 2

49. This section defines certain terms that are used in Part 2.