



Public Services Reform (Scotland) Act 2010

2010 asp 8

PART 2

ORDER-MAKING POWERS

Improving the exercise of public functions

16 Preconditions

[^{F1}(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,
- (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.

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- (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.]

Textual Amendments

- F1** Ss. 14-30 cease to have effect (2.8.2015) by virtue of [Public Services Reform \(Scotland\) Act 2010 \(asp 8\)](#), [s. 134\(2\)\(3\)](#) (with [s. 134\(4\)\(5\)](#)); however, ss. 14-30 continue to have effect until 4.6.2020 by virtue of [The Public Services Reform \(Scotland\) Act 2010 \(Part 2 Extension\) Order 2015 \(S.S.I. 2015/234\)](#), [arts. 1, 2](#); which continuation is further extended until 5.5.2025 by [The Public Services Reform \(Scotland\) Act 2010 \(Part 2 Further Extension\) Order 2020 \(S.S.I. 2020/140\)](#), [arts. 1, 2](#)

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Commencement Information

II S. 16 in force at 1.8.2010 by [S.S.I. 2010/221](#), art. 3(2), [Sch.](#)

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

- Blanket amendment words substituted by [S.I. 2011/1043 art. 34](#)

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Pt. 5 Ch. 3A amendment to earlier affecting provision 2019 asp 6, s. 12(2) by [S.S.I. 2023/127 reg. 3\(4\)](#)
- Pt. 5 Ch. 3A inserted by [2019 asp 6 s. 12\(2\)](#)