

Finance Committee

Public Services Reform (Scotland) Bill

Submission from Aileen McHarg

Introduction

My remarks are confined to the order-making powers contained in Part 2 of the Bill.

Part 2 confers two order-making powers on the Scottish Ministers which permit them, *inter alia*, to amend primary legislation (so-called 'Henry VIII clauses'). One is a power to remove or reduce regulatory 'burdens' affecting any person (s.13). The Scottish Ministers' existing powers in this area are contained in Part I of the Deregulation and Contracting-Out Act 1994. However, at UK level such regulatory reform powers have been significantly revised and extended since the 1994 Act, first by the Regulatory Reform Act 2001, and most recently by Part I of the Legislative and Regulatory Reform Act 2006. The regulatory reform power conferred on the Scottish Ministers by s.13 of the Bill is almost identical to the power contained in s.1 of the 2006 Act (subject to necessary modifications). There are only two significant differences, as far as I can see. First, the substantive restrictions on the use of the 2006 Act power include the condition that the reform being sought must not be of constitutional significance (s.3(2)(f)). This restriction is omitted from the Scottish Bill. Secondly, the UK Act enables Ministers to choose (subject to Parliamentary veto) between three Parliamentary procedures: negative resolution; affirmative resolution; and super-affirmative resolution (ss.15-18). By contrast, the Scottish Bill specifies that orders under this section must be made by the affirmative resolution procedure.

The second order-making power conferred by the Bill is a power to improve the exercise of public functions (s.10). This power has no direct equivalent at UK level, although s.2 of the Legislative and Regulatory Reform Act 2006 does confer a power to secure that regulatory functions are exercised in accordance with 'regulatory principles', and this enables UK ministers to do some of the same things that the Scottish Ministers would be empowered to do under s.10, such as transferring or modifying functions, and creating and abolishing bodies. However, since s.2 of the 2006 Act applies only to 'regulatory functions', it is somewhat narrower than the power envisaged by s.10 of the Bill. S.10 therefore appears to break new ground as far as the creation of Henry VIII clauses is concerned.

Section 13: Power to Remove or Reduce Burdens

When the Legislative and Regulatory Reform Bill was introduced into the UK Parliament, the powers contained in Part I attracted extensive criticism. As a result of both Parliamentary and media pressure, the power contained in s.1 was considerably reduced in scope and the substantive and procedural constraints on its exercise were increased. S.13 of the Bill reflects the amended version of the 2006 Act power (subject to the differences noted above), rather than its original, more sweeping version. Nevertheless, it remains a very broad power which allows

ministers to alter conditions originally imposed by statute under which businesses, voluntary organisations and also public bodies operate, and it goes well beyond the scope of the delegated legislative powers that are usually conferred upon the executive. Notwithstanding that a precedent for such a power already exists at UK level, the Scottish Parliament should satisfy itself that there are independent justifications for conferring an equivalent power on the Scottish Ministers, both in terms of its necessity and its constitutional desirability.

Necessity

In my opinion, the Scottish Ministers offer no strong justification for the necessity of a wide-ranging regulatory reform power. In the first place, it is worth pointing out that by January 2004 the Scottish Ministers had never actually used their existing powers under the Deregulation and Contracting-Out Act 1994,¹ and as far as I can tell they have not done so since. It is also worth noting that the Scottish Parliament's Subordinate Legislation Committee, in its *Inquiry into the Regulatory Framework in Scotland*,² made no recommendation for extending the government's powers in this area. In addition, the only consultation that has been undertaken in respect of this provision in the Bill has been with representatives of business organisations.³

The justifications offered in the Policy Memorandum accompanying the Bill are twofold. First, it will create a common regime for the removal of regulatory burdens across both reserved and devolved areas (para. 116). Secondly, it will enable regulatory burdens to be removed without having to bring forward primary legislation. This will be quicker, and will allow better use of Parliamentary and Government time (para. 125). As regards the former justification, there is no obvious reason why there needs to be a common regime for the removal of regulatory burdens at both UK and Scottish levels. As regards the latter, it is hard to believe that there are very significant pressures on Parliamentary time when there are currently only eight Bills undergoing Parliamentary consideration. In any case, the desirability of reforming the law as quickly as possible needs to be weighed against the need to ensure that changes are properly scrutinised.

Desirability

A number of points can be made about the desirability of the proposed s.13 power. Perhaps most fundamentally, it is not obvious to me why the removal of regulatory 'burdens' should be thought to merit different treatment, and less stringent procedures, than other changes in the law. The avoidance of delay in introducing reforms is always a desirable outcome. Providing a simple route for removing unnecessary provisions has a commonsense appeal. However, the question whether 'burdens' really are unnecessary, and the extent of their burdensomeness, are often contestable issues. For example, the National Audit Office's 2008 report on the UK government's simplification programme was cautious about whether it had actually produced the savings that were claimed.⁴ Similarly, during the passage of the Legislative and Regulatory Reform Bill, the UK

¹ SPICe, *Regulatory Frameworks in Scotland and Other Selected Countries*, 04/03, 13 January 2004, p 7.

² 31st Report, 2005.

³ Policy Memorandum, para. 126.

⁴ *The Administrative Burdens Reduction Programme*, HC 994, 2007-08.

government acknowledged that it had not done enough work in terms of retrospectively validating the proposed savings and efficiencies from previous regulatory reform orders.⁵

This approach also treats the Parliamentary process as a set of obstacles to law reform, rather than a necessary condition of democratic legitimacy. Any parallel law-making procedure carries a risk that it will be used to enact measures that would not survive more stringent Parliamentary scrutiny. There might also be a temptation for a minority government to agree to amendments to its Bills in order to secure their enactment, but then use its order-making power to remove amendments as 'unnecessary burdens'.

To ensure that regulatory reform powers are not abused, the solution is usually seen as being to introduce safeguards so that they cannot be used for anything other than minor and non-controversial measures. In this regard, it is questionable whether the safeguards in the Bill are sufficient. The 'preconditions' in s.14 are very subjective and are therefore unlikely to be judicially enforceable except in extreme cases. In addition, no explanation has been given for the omission of the restriction in the 2006 Act as regards constitutionally significant measures. As regards procedural constraints, these are much more robust than for ordinary secondary legislation, and the equivalent procedures at Westminster are generally seen as being effective. Much will depend upon the arrangements that the Scottish Parliament itself makes for scrutinising s.13 orders. However, it is disappointing that the Bill has chosen the simple affirmative procedure rather than the super-affirmative procedure in the 2006 Act, as the latter would give the Parliament something approaching a power of amendment.

Nevertheless, it must be acknowledged that the stronger the restrictions on the use of the order-making power, the less useful it is to government. At UK level, this has produced a ratchet effect, with successive attempts by the government to widen its powers being met by successive attempts by Parliament to assert greater control. There is no ultimate solution to this dilemma, because it results from a philosophical clash as to the nature and purpose of the law reform process. N.B. as it is currently drafted, the consultation requirement in s.21 of the Bill could result in a never-ending process of consultation, as each time the Scottish Ministers amend their proposals in response to consultation, it seems to suggest that another round of consultation must be undertaken. It might be sensible to amend this section to limit the requirement to reconconsult to circumstances where the proposed modification of the original proposals is significant.

Section 10: Power to Improve the Exercise of Public Functions

The power contained in s.10 of the Bill, to make by order any provision which the Scottish Ministers consider will improve the exercise of public functions, is also extremely broad (and it also overlaps to some extent with the power in s.13). The purpose of this power is somewhat unclear. The Policy Memorandum and Explanatory Notes treat this as being a power to facilitate administrative simplification and streamlining. However, as currently drafted, the power would

⁵ House of Commons Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, First Special Report, HC 878, 2005-06, para 24.

appear to be broader than that, as the power is to be exercised 'having regard to' efficiency, effectiveness and economy. This wording suggests that these are considerations that must be taken into account, but that they are not necessarily the only purposes for which reform might be undertaken. The requirement that where functions are modified, or transferred to or conferred on existing or newly-created bodies they must be broadly consistent with the body's existing objectives, or with the objectives of a body which has been abolished, is also rather vague. This applies particularly to the remit of the Scottish Administration, as unlike quangos, its overall objectives are not set out in any single piece of legislation. It is therefore not clear to what extent this power might be used to create new public functions, as distinct from reorganising or abolishing existing functions. Even so, it is clear that it could be used to implement quite significant changes in the administrative landscape.

The Policy Memorandum gives as one example the creation of a unified Scottish Tribunal Service (para. 106). In principle, it would also seem to be possible to use it, for example, to abolish the Judicial Appointments Board and transfer its functions back to the Scottish Ministers. It is, however, an important restriction on the scope of the power that it cannot be used to reduce the functions of local authorities (although functions can be transferred to them).

Necessity

Again, no strong reasons have been presented for the necessity of this power. In this case, there appears to have been no prior consultation.⁶ Again, the main justification given is in terms of avoiding delay and freeing up Parliamentary time for other purposes.⁷ It is therefore ironic that this power is contained in a Bill the remaining provisions of which implement the very sort of administrative tidying up exercise that the order making power is supposed to facilitate. Admittedly, relying on primary legislation is less flexible than an order-making power. However, it is questionable whether it is necessary or desirable for Scottish public bodies to be in a state of permanent revolution.

Desirability

Similar objections can be made in relation to the proposed s.10 power as to the s.13 power. In the first place, administrative reorganisation exercises might sometimes have considerable policy significance, the merits of which might be contestable. For instance, the example given by the Scottish Government of the power being used to set up a new Scottish Tribunals Service would be a very important change indeed, with significant implications for the role and governance of tribunals. The equivalent reform at UK level was preceded by extensive consultation and was enacted by primary legislation.⁸ The creation of a Scottish Tribunals Service would raise complex issues as to its relationship with the UK Tribunals Service, as well as with the ordinary courts. It would not, therefore, seem to me to be a measure suitable for implementation by secondary legislation.

A second objection is that there is a risk that this power might be abused, for example, to abolish, merge or modify the functions or constitution of a body which

⁶ Policy Memorandum, para. 114.

⁷ Policy Memorandum, para 113.

⁸ Tribunals, Courts and Enforcement Act 2007.

has for some reason become irksome to government. One of the main reasons for entrusting public functions to specific public bodies is because it is thought desirable that they should operate independently, at least to some degree, of central government control. The statutory framework – in particular its relative certainty and permanence – is an important means by which independence is secured. It therefore seems to be inappropriate in principle for the Scottish Ministers to have power to alter these statutory frameworks through secondary rather than primary legislation.

The Delegated Powers memorandum compares the power being sought with the ability of the government to reorganise functions within the Scottish Administration following an election (para 15). For the reasons just given, this is a wholly inappropriate analogy. Whilst it is true that the allocation of functions between ministers and other agencies can sometimes be haphazard, and it is sometimes a matter of historical accident whether bodies are established by statute or by purely administrative means, it does not follow that ministers should have a unilateral power to reallocate functions as they see fit.

This raises the more general point that economy, efficiency and effectiveness are not the only relevant considerations that should be taken into account when designing public bodies and allocating public functions. As well as (in some cases) independence, principles such as accountability and fairness are equally important.

Again, the key question is whether the safeguards in the Bill are sufficient to prevent the s.10 power being abused. The same points apply here as in relation to the s.13 power. In fact, the omission of any restriction on the power being used for constitutionally significant purposes is even more important in this context. Similarly, there is a strong case for requiring use of the super-affirmative procedure, rather than simple affirmative procedure, and thereby giving the Parliament greater opportunity to amend orders. The Policy Memorandum states that it is envisaged that s.10 will be used for single reform proposals only (para. 95). However, this restriction does not appear on the face of the Bill, so it remains possible that ministers could bundle together controversial and non-controversial proposals to reduce the chance of Parliamentary consent being refused.