Finance Committee

Report on Subordinate Legislation
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1. The remit of the Finance Committee is to consider and report on-
   a. any report or other document laid before the Parliament by members of the Scottish Government containing proposals for, or budgets of, public expenditure or proposals for the making of a tax-varying resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;
   b. any report made by a committee setting out proposals concerning public expenditure;
   c. Budget Bills; and
   d. any other matter relating to or affecting the expenditure of the Scottish Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, “public expenditure” means expenditure of the Scottish Administration, other expenditure payable out of the Scottish Consolidated Fund and any other expenditure met out of taxes, charges and other public revenue.
Committee Membership

**Convener**
Kenneth Gibson  
Scottish National Party

**Deputy Convener**
John Mason  
Scottish National Party

Richard Baker  
Scottish Labour

Gavin Brown  
Scottish Conservative and Unionist Party

Malcolm Chisholm  
Scottish Labour

Mark McDonald  
Scottish National Party

Jean Urquhart  
Independent
Introduction

1. At its meeting on 20 May, the Committee considered the Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft]. The purpose of the Order is to extend the duration of Part 2 of the Public Services Reform (Scotland) Act 2010 (the Act).

2. Part 2 of the Act contains order-making powers allowing Scottish Ministers to make orders to add, remove or change the functions of public bodies to improve efficiency, effectiveness and economy, and to remove burdens.

3. The powers in Part 2 were the subject of much debate when the Act (then Bill) was being considered by the Parliament. As a result of those debates amendments were made to provide sufficient parliamentary safeguards to the use of these powers, including applying a super-affirmative procedure to orders under Part 2.

4. The Bill was also amended at Stage 2 to include a “sunset clause” in relation to Part 2. The effect of this provision was that the order-making powers to expire five years after the legislation came into force unless an order to continue the powers was agreed to by the Parliament. The legislation came into force on 1 August 2010. If this Order is not made before 1 August 2015 Part 2 of the Act would cease to have effect from that date.

Delegated Powers and Law Reform Committee Consideration

5. The Delegated Powers and Law Reform Committee (DPLRC) considered the instrument at its meeting on 12 May and agreed to draw the attention of the Parliament to the instrument as, in its view, the Government had failed to meet expectations in terms of consultation. The relevant extract of the DPLRC Report is attached at annexe B.

6. The annex to the DPLRC Report contains the questions asked of the Government in advance of its meeting on 12 May along with the Government’s responses.

7. The DPLRC wrote to the Finance Committee on 13 May expressing a number of concerns. This letter is attached as annexe A.

8. The letter explains that, during scrutiny of the Bill, “the principle of whether or not such powers should be delegated to subordinate legislation attracted considerable debate.” The “sunset clause” was inserted in order to address these concerns with the apparent rationale being, that it would “provide the Parliament with the
opportunity to review the use of the powers to date and whether the case had been made out for their renewal for a further 5 year period."

**Consultation**

9. The Policy Note states that as “this Order seeks only to extend the duration of Part 2 of the 2010 Act, we do not believe there is a requirement for a formal public consultation. No public consultation has been carried out for this Order.”

10. In its written response to the DPLRC’s invitation to explain why a consultation exercise affording stakeholders the opportunity to reflect and comment on the operation of Part 2 of the 2010 Act was not considered appropriate the Government stated—

   “The Order seeks only to extend the duration of Part 2 of the 2010 Act, and we do not believe that a formal public consultation was needed or would have been of benefit. It is for Parliament to decide whether the Part should remain in force and we do not believe that stakeholders were likely to have any particular views on the issue of continuation. Each individual order taken forward under Part 2 has, however, been subject to public consultation.”

11. The DPLRC letter draws the following points to the attention of the Finance Committee—

   - that neither the policy note nor the subsequent information from the Scottish Government has provided a satisfactory explanation as to why the Scottish Government concluded that a formal consultation on the principle of continuing the effect of the substantial delegated powers in Part 2 of the 2010 Act was not merited;

   - that it is concerned to note that the Government takes the view that it is unlikely that stakeholders would have any particular views on the matter. The Committee considers that the views of stakeholders (or the absence of views) should be established through the consultation process rather than assumptions made in the absence of an opportunity for comment;

   - that it considers that for members to make an informed decision there would have been benefit in having the findings of a consultation exercise to draw upon; and

   - that individual occasions on which the powers are exercised have been the subject of consultation but that such instruments raise an entirely different issue to that posed by the current draft order.

12. The DPLRC suggested that the Finance Committee may wish to pursue these issues with the Deputy First Minister.

**Oral Evidence**
13. In oral evidence to the Committee, the Cabinet Secretary stated that in the five years since it came into force, it was clear that the conferred powers had only been used for the originally envisaged purposes and there was no evidence to support suggestions made during the passage of the Bill that they might be misused. He confirmed that any changes using the powers had been and would continue to be subject to consultation and full parliamentary scrutiny and that in his view “the mere continuation of that responsibility, which has been properly, fully and exhaustively debated in Parliament, did not merit a specific consultation” (Col 4).

14. Asked why it was necessary to retain the powers, the Cabinet Secretary explained that they allowed the Government to make “minor amendments to the landscape of public bodies” without having to wait for primary legislation to do so.

15. With regard to the lack of consultation, given the at the time controversial nature of the legislation, the Cabinet Secretary restated his position that—

“any action that follows on from or arises out of that will be the subject of consultation. There is, therefore, the protection both of consultation and of parliamentary scrutiny and decision making in relation to all such orders. The crucial point is that Parliament itself legislated for the provision five years ago and judged that it is an appropriate power, and the history of our exercising the power has been entirely consistent with what I told Parliament at the time would be the case.”

16. The Cabinet Secretary was invited to give a firm commitment that any significant changes to the public sector landscape would be made through primary legislation. He confirmed that any major public sector reforms would be made through primary legislation and would be “subjected to the extensive and full scrutiny that is appropriate for such major changes”. He further stated—

“I am very happy to confirm that our actions will be entirely consistent with what has happened in the past five years and with the explanation and assurances that I gave Parliament five years ago.” (Col 6)

17. When asked whether he envisaged the powers being held in perpetuity and simply being renewed every five years, the Cabinet Secretary confirmed that he considered it likely that there would be a need for the Government to make “minor alterations to the public sector landscape” in the future.

18. Responding to a question about the frequency with which he expected the powers in Part 2 to be used compared to the last five years (eight times in total), the Cabinet Secretary explained that he was unable to give a definitive view on this, but the key point remained—

“whether they are used once or 20 times, it will be only for minor changes to the landscape of public bodies. However, in all circumstances, changes will be consulted upon individually as a consequence of any order being laid under the powers.” (Col 8)
19. Clarification was sought as to whether a further extension of the powers in five years' time would be subject to consultation, stated that “that judgment would have to be made at that time. Ministers would have to come to a view then.” (Col 8). When asked whether the powers could be subject to abuse by a future government, the Cabinet Secretary set out three reasons why he did not consider there to be an opportunity for abuse—

“First, the power would have to be exercised consistently with what I said to Parliament during the passage of the 2010 Act.

“Secondly, any individual instrument must be the subject of separate, distinctive consultation and parliamentary scrutiny, which provides protection.

“Thirdly, there are now five years of precedent; if a minister were to propose more significant change that one considers would merit primary legislation, that body of precedent would be against their argument.” (Col 9)

20. He concluded by stating that—

“There is now established practice about how the powers can be exercised and ministers would be unable to sustain an argument if their actions were not consistent with the three elements that I have set out.”

Conclusion

21. Following evidence the Cabinet Secretary moved the following motion—

- S4M-13108—That the Finance Committee recommends that the Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [draft] be approved.

22. The motion was agreed to.
Annexe A

Letter from DPLRC Convener – 13 May 2015

At its meeting on Tuesday 12 May the Delegated Powers and Law Reform Committee considered the above draft instrument. In so doing, the Committee expressed concerns about the absence of consultation on the draft instrument and agreed to draw these concerns to your Committee’s attention.

This draft instrument, if approved, will extend the effect of Part 2 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) and its associated schedules for a period of 5 years from the date on which the instrument is made. If the order is not made before 1 August 2015 Part 2 of the 2010 Act will cease to have effect from that date.

Part 2 of the 2010 Act allows the Scottish Ministers to make orders to add, remove or change the functions of public bodies to improve efficiency, effectiveness and economy, and to remove burdens resulting from legislation. When the Bill for the 2010 Act was being scrutinised by the Parliament the principle of whether or not such powers should be delegated to subordinate legislation attracted considerable debate. As a result provisions were inserted into the Bill to address the concerns which had been expressed, including the provision which requires the powers to be renewed by order every five years. The rationale behind this requirement appeared to be to provide the Parliament with the opportunity to review the use of the powers to date and whether the case had been made out for their renewal for a further 5 year period. This is the first occasion on which the question of renewal arises.

The policy note accompanying the draft instrument notes that no consultation has been undertaken on it, but offers no reasoned justification for not having done so. In the absence of a statutory requirement for consultation (as in this case) the decision on whether to consult is for the Scottish Government. The Scottish Government Consultation Good Practice Guidance indicates that this decision will be “informed by the history of the policy area, the issue under consultation, the existence of any Parliamentary/EU obligations to consult and the stage of the policy/legislative process”.

In the absence of a considered justification for the lack of a consultation on the draft instrument and given the policy history behind it, the Committee asked the Scottish Government to explain why no consultation had been undertaken.

The Scottish Government’s response maintains that a public consultation was neither needed nor would it have been beneficial. Furthermore, it contends that it is for the Parliament to decide whether the Part should remain in force and that stakeholders were unlikely to have any particular views on the issue of continuation. Finally, the response notes that individual orders taken forward under Part 2 have been subject to public consultation.

The Committee considers that neither the policy note nor the subsequent information from the Scottish Government has provided a satisfactory explanation as to why the
Scottish Government concluded that a formal consultation on the principle of continuing the effect of the substantial delegated powers in Part 2 of the 2010 Act was not merited.

The Committee is concerned to note that the Government takes the view that it is unlikely that stakeholders would have any particular views on the matter. The Committee considers that the views of stakeholders (or the absence of views) should be established through the consultation process rather than assumptions made in the absence of an opportunity for comment.

Furthermore, the Committee considers that for members to make an informed decision there would have been benefit in having the findings of a consultation exercise to draw upon.

The Committee notes that individual occasions on which the powers are exercised have been the subject of consultation but that such instruments raise an entirely different issue to that posed by the current draft order.

The Committee therefore draws to your attention its concerns about the absence of consultation on this draft Order and suggests that you may wish to pursue these concerns with the Deputy First Minister when he gives evidence to the Finance Committee on the Order so as to inform the Parliament’s consideration when it is asked to approve the extension of Part 2 for a further 5 year period.

Please note that we are also drawing these concerns to the attention of the Deputy First Minister.

Nigel Don MSP
Convener