Public Services Reform (Scotland) Act 2010: Extension of Part 2 Order-Making Powers

December 2024

Scottish Government
Riaghaltas na h-Alba

Public Services Reform (Scotland) Act 2010: Extension of Part 2 Order-Making Powers

Overview

Scottish Ministers currently hold powers to propose changes to the law, in ways that are more streamlined and flexible than a new Act of the Scottish Parliament would require, in two specific instances. These situations are to improve the effectiveness, efficiency and economy of public service functions; and to reduce or remove burdens for any person resulting from legislation. These powers have been in place since the Public Services Reform (Scotland) Act 2010 came into force and require to be renewed every 5 years in order to continue. This consultation seeks views on whether Scottish Ministers should continue to hold these powers.

Why Your Views Matter

By taking part in this consultation, you will help shape decisions on whether Scottish Ministers should seek the approval of the Scottish Parliament to renew these powers for a further 5 year period. Your views will also help us understand the potential impacts (both positive and negative) that doing so may have.

What Happens Next

Following the closing date, all responses will be analysed and considered along with any other available evidence to help decide on next steps. If Ministers then decide to seek the approval of the Scottish Parliament to extend these powers, they will take steps to lay the necessary draft Order before Parliament.

Introduction

1. This consultation seeks views on extending the duration of order-making powers under Part 2 of the Public Services Reform (Scotland) Act 2010 ("the 2010 Act"), for a further 5 year period from May 2025.

2. Part 2 of the 2010 Act provides Scottish Ministers with order-making powers to improve the exercise of public functions in relation to efficiency, effectiveness and economy, and to reduce or remove burdens resulting from legislation.

3. These powers require to be renewed every 5 years in order to continue. The current powers are due to lapse in June 2025. Section 134(4) of the 2010 Act allows Scottish Ministers to further extend the 5 year period by order, subject to the approval of the Scottish Parliament.

4. We propose to seek the approval of Parliament to extend these order-making powers for a further 5 year period from June 2025. We would welcome views on this proposal.

Background - What these powers allow

5. The major benefit of these order-making powers is to provide the Scottish Government and Scottish Parliament with the flexibility to make changes quickly, as and when opportunities arise, through secondary legislation (also described as a Scottish Statutory Instrument, SSI or Order) without the need to take forward primary legislation (Bills which can become Acts of the Scottish Parliament).

6. Because these powers allow changes to be made through secondary legislation, in circumstances where primary legislation would otherwise be required, their use is restricted to two situations.

7. The first situation is so public bodies can undertake their functions in more effective, efficient and/or economical ways. Section 14 of the 2010 Act provides this power for one or more of the public bodies listed in schedule 5 to the 2010 Act. Most public bodies are listed in that schedule.

8. Examples of how an order can be made under this section include to reconfigure the way certain functions are delivered, such as by modifying, transferring or providing for the delegation of a function. An order can also be made under this section to amend the constitution of most bodies listed in schedule 5, or dissolve a body in certain circumstances. An order may also create a new person, body or office-holder to undertake particular functions.

9. The second situation in which the powers can be used is to reduce or remove burdens resulting from legislation. Section 17 of the 2010 Act provides this power. It can be applied to burdens on any public sector or private sector organisation.

10. For the purposes of this section, a “burden” can include: 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 bodies or bodies concerned.

Controls on the use of these powers

11. Because these powers allow for statutory reforms through secondary instead of primary legislation, a strict “super-affirmative” procedure applies to any Orders made using them. This includes the following elements as a minimum:

    - Scottish Ministers 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;
    - Scottish Ministers must have regard to any representations made within 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;
    - When laying the draft order, Scottish Ministers should also provide Parliament with 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; and
    - The draft order requires a resolution of Parliament to be approved.

12. Additionally, the 2010 Act provides a recurring sunset clause for the order-making powers. This means that, unless Parliament renews these powers every five years, they are lost forever. As Parliament last renewed these powers in May 2020, they must be renewed by May 2025 if they are to continue.

How these powers have been used in practice

13. Since the introduction of the 2010 Act, the powers have been used to make important, but relatively straightforward, changes to public bodies.

14. Five orders have to date been taken forward using section 14 powers (efficiency, effectiveness and economy); with eight orders made using section 17 powers (removing or reducing burdens), and one order using both powers. The most recent Orders were made in 2020.

15. Examples of orders made using section 14 powers to improve efficiency, effectiveness and economy in public functions include:

    - establishing a new office of Commissioner for Ethical Standards in Public Life in Scotland, to replace the Public Standards Commissioner for Scotland and the Public Appointments Commissioner for Scotland[1];

[1] The Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013 (SSI 2013/197)

- creating the roles of prison monitoring co-ordinator and independent prison monitor; and conferring functions around prison monitoring on HM Chief Inspector of Prisons[2];
- extending the range of poverty and inequality issues that the Poverty and Inequality Commission can consider[3]; and
- creating a new route for whistleblowers in the healthcare sector to bring complaints to the Scottish Public Services Ombudsman[4].

16. Examples of orders made using section 17 powers to reduce or remove burdens resulting from legislation include:

- amending requirements relating to agricultural tenancies, to provide a greater level of confidence in the working relationship between landlords and tenant farmers[5];
- helping to streamline and simplify the planning system in two specific areas[6];
- allowing NHS National Services Scotland to provide shared services across the public sector with a view to improving efficiency and productivity[7]; and
- enabling Ministers to recover the costs of Education Scotland carrying out inspection of independent Further Education colleges and English Language schools[8].

17. More significant changes to the public bodies landscape have been delivered through primary legislation (e.g. the creation of Consumer Scotland through the Consumer Scotland Act 2020).

Proposal to Extend the Part 2 Order-Making Powers

18. We consider there are several reasons why these order-making powers should be extended.

19. Flexibility. The order-making powers in Part 2 of the 2010 Act provide flexibility to make changes quickly, as and when opportunities arise, without the requirement for the lengthy process required for developing and scrutinising primary legislation.

20. Value in supporting Public Service Reform. At this time of tight public sector resources and increasing demands on public services, public sector bodies need

---

[2] The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2015 (SSI 2015/39)
[3] The Public Services Reform (Poverty and Inequality Commission) (Scotland) Order 2018 (SSI 2018/316)
[4] The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020 SSI 2020/5)
[5] The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 (SSI 2011/232)
[6] The Public Services Reform (Planning) (Local Review Procedure) (Scotland) Order 2013 (SSI 2013/24); The Public Services Reform (Planning) (Pre-Application Consultation) (Scotland) Order 2013 (SSI 2013/25)
[7] The Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013 SSI 2013/220)
[8] The Public Services Reform (Recovery of Expenses in respect of Inspection of Independent Further Education Colleges and English Language Schools) (Scotland) Order 2012 (SSI 2012/102)

to ensure that the services they provide remain affordable in the near future, sustainable longer-term and continue to support better outcomes for people across Scotland. In many cases, that requires reform to how public sector bodies operate, to release resources from back-office functions to front-line delivery; and reform to how they work alone and collectively to best serve people's needs now and in future.

21. While the powers in Part 2 of the 2010 Act were last used in 2020, order-making was not a priority for much of the intervening period, as Scotland dealt with the pandemic. Looking ahead, the powers offer important tools to drive public service reform. They can be used to adjust the configuration of the public bodies landscape in order to release funds for front-line services and better meet future needs. They can also be used to unlock barriers to reform in some cases.

22. The powers can support the work of the Scottish Parliament. For instance, Scottish Ministers took forward an order referred to above, which created the new office of Commissioner for Ethical Standards in Public Life in Scotland, on behalf of Parliament.

23. The powers can benefit businesses and charities, as well as public services. The section 17 power has already been used to reduce burdens on businesses. For example, orders referred to above have amended requirements relating to agricultural tenancies, and streamlined and simplified the planning system.

24. The powers will be used responsibly. The order-making powers are subject to tight safeguards in the 2010 Act, including a strict super-affirmative procedure for approval. These safeguards mean that any proposed changes to primary legislation through the order-making powers are subject to rigorous examination and scrutiny. Scottish Ministers have only deployed the powers in appropriate cases, and most recently in 2020.

Responding to This Consultation

25. We are inviting responses to this consultation by 10 February 2025.

26. Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (http://consult.gov.scot). Access and respond to this consultation online at https://consult.gov.scot/public-bodies-unit/public-service-reform-part-2-order-making-powers. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 10 February 2025.

27. If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

    Public Services Reform (Scotland) Act 2010 Order-Making Powers Review
    Public Bodies Support Unit
    Scottish Government
    Area 3-F North
    Victoria Quay

Leith
Edinburgh
EH6 6QQ

Handling your response

28. If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly

29. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

30. If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

31. To find out how we handle your personal data, please see our privacy policy: https://www.gov.scot/privacy/.

Next steps in the process

32. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.gov.scot. If you use the consultation hub to respond, you will receive a copy of your response via email.

33. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published, where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

34. If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or publicbodiesunitmailbox@gov.scot.

Scottish Government consultation process

35. Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

36. You can find all our consultations online: http://consult.gov.scot. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

37. Responses will be analysed and used as part of the decision-making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

    - indicate the need for policy development or review;
    - inform the development of a particular policy;
    - help decisions to be made between alternative policy proposals; and
    - be used to finalise legislation before it is implemented.

38. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Consultation questions

- Question 1: Do you agree that the Scottish Ministers should seek the Parliament's approval to extend the order-making powers in section 14 of the Public Service Reform (Scotland) Act 2010 (powers to improve efficiency, effectiveness and economy in public functions) for a further 5 years from May 2025?
    - Yes
    - No

    Please give reasons for your answer.

- Question 2: Do you agree that the Scottish Ministers should seek the Parliament's approval to extend the order-making powers in section 17 of the Public Service Reform (Scotland) Act 2010 (powers to reduce or remove burdens resulting from legislation) for a further 5 years from May 2025?
    - Yes
    - No

    Please give reasons for your answer.

This publication is available at **www.gov.scot**

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-83691-143-2 (web only)

Published by The Scottish Government, December 2024

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1541014 (12/24)

w w w . g o v . s c o t