Progress of the *Public Bodies Bill [HL] 2010-11*

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The *Public Bodies Bill [HL]* was introduced to the House of Lords on 28 October 2010 as Bill 24 of Session 2010-11. It completed its Lords stages on 9 May 2011. No date has yet been set for the Bill's second reading in the Commons.

The Bill is the main legislative vehicle for taking forward the outcome of the review of public bodies carried out by the Government, the results of which were announced on 14 October 2010. The Bill is largely enabling legislation. It allows ministers, by Order, to abolish, merge or transfer the functions of the public bodies listed in the appropriate schedules to the Act.

The order-making powers in the Bill, as introduced, were subject to critical reports from the House of Lords Constitution Committee, the Delegated Legislation and Regulatory Reform Committee, the Joint Committee on Human Rights, and the House of Commons Public Administration Select Committee. In response, the Government agreed to amend various elements of the Bill. The Government was also defeated four times during the passage of the Bill in the Lords.

Amendments have been made to the order-making powers under the Bill; to require further consultation before orders are passed; and to place some restrictions on the use of ministerial powers under the Bill. The Schedule and relevant section of the Bill of the Bill which listed public bodies which could, by order, have been moved to other sections of the Bill in order for them to be abolished or merged at a future date were removed altogether. The Government also removed the parts of the Bill which dealt with the Forestry Commission and added a "sunset clause" to the powers to make orders under the Bill.

This note briefly sets out the outcome of the review of public bodies before providing information on the progress of the Bill in the Lords so far.

The Library Standard Note SN/PC/5609, *Quangos,* sets out the background to the Bill and general information about the 'quango debate'. The House of Lords Library Note was published before the Bill's Second Reading in the Lords. The House of Commons Library will publish a Research Paper on the Bill once it has completed its passage through the House of Lords, before it has its Second Reading in the House of Commons.

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1 Background

1.1 Review of public bodies

On 14 October 2010 Francis Maude, the Cabinet Office Minister, announced the outcome of the Government's review of public bodies in both Written[1] and Oral[2] statements to the House. 901 non-departmental public bodies, non-ministerial departments and government owned public corporations and trading funds had been reviewed against the following tests:

> Does it perform a technical function?
>
> Do its activities require political impartiality?
>
> Does it need to act independently to establish facts?[3]

The review concluded that, of the public bodies covered by the review:

- 192 would cease to be public bodies;
- 118 would be merged into 57 bodies;
- 171 were proposed for substantial reform whilst maintaining their current status;
- 40 were listed as 'under consideration' with further announcements expected on their future.

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1 HC Deb 14 October 2010 c26WS
2 HC Deb 14 October 2010 c505
3 HC Deb 14 October 2010 c26WS

A number of public bodies are to be abolished and reformed as expert committees within departments, these include:

- the Main Honours Advisory Committee;
- the Advisory Committee on the Government Art Collection;
- 19 public bodies of the Department of Health will become 'committees of experts', including the Advisory Committee on Dangerous Pathogens; the Committee on Medical Aspects of Radiation in the Environment and the Human Genetics Committee.

Other functions are to be transferred to the Charity sector, the private sector, or absorbed into their parent departments. For example:

- NESTA (the National Endowment for Science, Technology and the Arts) will be established as an independent charity;
- the Audit Commission will be disbanded, with the audit practice transferred into private practice;
- the Qualifications and Curriculum Development Agency will be abolished, with some functions transferred to the Department for Education.

Lastly, other functions have been determined as no longer required and will be abolished altogether. These include:

- the abolition of the Standards Board for England along with its functions;
- the Railway Heritage Committee will be abolished along with its functions.

Francis Maude told the House of Commons that he believed:

> …these reforms are the first and necessary step to restoring proper democratic accountability to public life and signal a complete culture change in government, from one that ducks difficult decisions, is opaque and allows profligacy, inflated salaries and waste, to an administration which is open and transparent about what it does, takes responsibility for its actions and is mindful of every penny of taxpayers' money.[4]

Liam Byrne, the Opposition spokesman, questioned the cost of abolishing and merging public bodies, and asked for information on the impact of jobs and employment. Francis Maude replied that the principle objective of the reforms was to increase accountability, but he was sorry to say that "jobs will be lost as a result of this process".[5]

1.2 The review process

In evidence to the Public Administration Select Committee, the Secretary of the Council of Civil Service Unions, Charles Cochrane, stated that the Unions were not consulted about the review process:

> Whilst we initiated some discussions with the Cabinet Office to ask both about the general process of reviews and abolition of public bodies and of the Bill, we certainly weren't subject to any formal consultation. Certainly, on organisations on which we have a close interest, whether that is the Audit Commission, Becta or the Civil Service

4 HC Deb 14 October 2010 c506
5 HC Deb 14 October 2010 cc507-508

> Appeal Board, in all cases the announcements were made before there were any discussions with us…[6]

Also in evidence to the Public Administration Select Committee, Francis Maude stated that:

> …[consultation] would be very varied and, in some cases, will have been quite extensive; in other cases, will have been very little. But there is another stage, obviously, a consultation, which is beginning now, which is about the implementation plans – what actually happens in practice – and there are discussions certainly being had at a broad, cross-cutting level between my officials in the Cabinet Office and our Public Bodies Group with the civil service unions, but obviously much more at departmental level with the unions there.[7]

There has also been some comment about the three tests to which public bodies were put. In their January 2010 report, *Smaller Government: Shrinking the Quango State,* the Public Administration Select Committee concluded that the tests were "hopelessly unclear".[8] They went on to recommend that, "there should be a single set of tests that covers: whether a function needs to be performed (existential), whether it is appropriate for it to be performed independently by a public body (impartiality); and how it can be delivered most cost-effectively (value for money)".[9]

Professor Matthew Flinders of Sheffield University has stated that:

> There are many examples where you can't find any explanation for why one body is going and another one is being kept. Why get rid of the Security Industry Authority and keep the Gangmasters Licensing Authority? Whey keep seven Research Councils? Why get rid of the HFEA [Human Fertilization and Embryology Authority] and keep NICE [National Institute for Clinical Excellence]. This is much too quick; that is the key issue here. The process for assessing the future births, deaths and marriages of public bodies has simply not been transparent; nobody understands. The three tests are ok at a very high level of generality, but in terms of applying them, nobody can really understand how exactly they have been mapped on to the current topography of Departments…[10]

Sir Ian Magee of the Institute for Government also believed that:

> ...we don't think that they [the tests] have necessarily been applied consistently at first blush. It's not immediately clear, for example, why arts and sport funding needs to be independent, but film funding doesn't need to be independent…[11]

In evidence to the Public Administration Select Committee Francis Maude acknowledged that the tests were "not a precise science".[12]

The Public Administration Select Committee itself concluded that:

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6 Oral evidence taken before the Public Administration Select Committee on 9 November 2010, to be published as HC 537-ii 2010-11, *Small Government: Shrinking the quango State*, Q150

7 Oral evidence taken before the Public Administration Select Committee to be printed as HC 537-i 2010-11, *Smaller Government: Shrinking the quango state,* Q44

8 Public Administration Select Committee, *Smaller Government: Shrinking the Quango State,* 7 January 2011, HC 537 2010-11, para 19

9 *Ibid,* para 23

10 Oral evidence taken before the Public Administration Select Committee on 9 November 2010, to be published as HC 537-ii 2010-11, *Small Government: Shrinking the quango State*, Q234

11 *Ibid,* Q229

12 Public Administration Select Committee, *Smaller Government: Shrinking the Quango State,* 7 January 2011, HC 537 2010-11, Ev 62

> This review was poorly managed. There was no meaningful consultation, the tests the review used were not clearly defined and the Cabinet Office failed to establish a proper procedure for departments to follow. It is important that the Government learn lessons from these mistakes… To ensure their effectiveness future reviews should not be conducted in a similar way.[13]

However, Sir Ian explained that he believed that the review of public bodies was overdue, and that it was, "not surprising that Governments of all political colours would want to do something like this when they first come into office".[14]

2 The Public Bodies Bill [HL] 2010-11

2.1 In brief

The *Public Bodies Bill [HL]* was introduced on 28 October 2010 as Bill 25 of Session 2010-11 and completed its Lords stages on 9 May 2011. The Bill is the main legislative vehicle for taking forward the outcome of the Government's review of public bodies. However, not all the bodies that are to be abolished or merged as set out in the 14 October review are included in the Bill. The changes to some, such as the Audit Commission, are to be made in department specific legislation. Others are non-statutory bodies so no legislative provisions are required.

The Bill is largely enabling legislation. It allows ministers, by Order, to abolish, merge or transfer the functions of the public bodies listed in the appropriate schedules to the Act. As introduced, the Bill provided that Orders would have to be made under the affirmative procedure.

The Bill has been subject to criticism from the Constitution Committee and the Delegated Powers and Regulatory Reform Committee in the House of Lords, the Joint Committee on Human Rights, and the Public Administration Select Committee in the House of Commons. The Government was defeated in four divisions on the Bill and accepted other amendments without division. The main amendments made to the Bill include:

- the removal of the controversial Section 11 and Schedule 7 from the Bill (which would have allowed large numbers of public bodies to be moved into schedules allowing them to be abolished or merged or otherwise changed by order);
- the removal of the sections in the Bill relating to the Forestry Commission;
- replacement of requirements to consult with ministers in the devolved administrations to the requirements to consult with the relevant parliament or assembly; and
- amendment of the procedure for making orders under the legislation;
- the addition of a sunset clauses to the entries in the Schedules, so that the entries lapse five years after their commencement.

2.2 Order-making powers under the legislation as introduced

The various schedules to the Bill as introduced listed bodies subject to the order making powers as follows:

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13 Public Administration Select Committee

14 *Ibid,* Q241

- Bodies which the Minister will have the power to abolish under Section 1 were listed in Schedule 1
- Bodies subject to the power to merge under Section 2 were listed in Schedule 2
- Bodies subject to the power to modify constitutional arrangements (that is, to change the structure or governance of these bodies) under Section 3 were listed in Schedule 3
- Bodies subject to the power to modify funding arrangements (for example, allowing public bodies to charge fees) under Section 4 were listed in Schedule 4
- Bodies subject to the power to modify or transfer functions under Section 5 were listed in Schedule 5
- Those bodies where a Minister would have the power to make provision by order to authorise it to delegate some or all of its functions to an eligible person under Section 6 were listed in Schedule 6
- Schedule 7 specified the bodies and offices which were subject to the power to add to the other schedules under Section 11.

As introduced, there were also provisions in the Bill relating to environmental bodies in Wales and powers in relation to the functions of the Forestry Commissioners.

The Impact Assessment which accompanied the Bill stated the Government had decided to introduce the changes through an enabling bill and secondary legislation:

> …because it only requires one piece of primary legislation thereby saving time on the floor of the House. Once the legislation has passed, departments can affect the changes they need, through the less time-consuming process of secondary legislation, as soon as they are ready to do so. The benefits of rationalisation will therefore be realised far more quickly. Using one enabling bill also sets up a coherent framework for change giving strength to the government's reform agenda.[15]

As introduced, the Bill specified that an Order to abolish or make other specified changes to public bodies as listed in the schedules to the Bill:

> …may not be made unless a draft of the instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament.[16]

2.3 Extent of the Order-making powers in the Bill

There was some concern expressed in the Lords about the extent of the Order making powers in the Bill. The **Constitution Committee in the House of Lords** considers the constitutional implications of all public bills that go before the House. The Committee published a report on the *Public Bodies Bill* on 4 November 2010 which stated that:

> The Government has not made out the case as to why the vast range and number of statutory bodies affected in this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in

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15 *Public Bodies Bill: Impact Assessment*

16 Clause 10 as introduced.

> Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective.[17]

The Committee made more detailed comments about the limitations and safeguards provided in the legislation as introduced. The Committee concluded that:

> The Public Bodies Bill [HL] strikes at the very heart of our constitutional system, being a type of 'framework' or 'enabling' legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising Chamber.
>
> The Public Bodies Bill [HL] is concerned with the design, powers and functions of a vast range of public bodies, the creation of many of which was the product of extensive parliamentary debate and deliberation. **We fail to see why such parliamentary debate and deliberation should be denied to proposals now to abolish or to redesign such bodies.**[18]

The **Second Reading** of the *Public Bodies [HL] Bill* took place in the Lords on 9 November 2010. Many peers echoed the concerns raised by the Constitution Committee in their report on the Bill. A number of peers spoke against provisions relating to particular public bodies. In particular, Lord Woolf, the former Chief Justice, expressed concerns about the inclusion of bodies in Schedule 7 that were concerned with the administration of justice. Lord Woolf stated that he regarded the Bill "as a matter of grave concern to the judiciary".[19] For the Opposition, Baroness Royall of Blaisdon stated that the Bill was:

> ...badly thought out, badly structured, badly executed, bad for the constitution, bad for public bodies and bad for government.[20]

Responding to the points made during the eight hours of debate, Lord Taylor of Holbeach, the Government Minister, stated that he took the Constitution Committee's report "extremely seriously". He continued:

> I take equally seriously the concerns raised by a number of noble Lords about ensuring the independence of bodies charged with delivering important public functions, and those regarding the scope and nature of Schedule 7. Accordingly, I wish to make clear my intention to bring forward amendments in committee to address these issues constructively. I accept the Constitution Committee's concerns and the need to meet them by devising a parliamentary procedure that will ensure proper public consultation and enhanced parliamentary scrutiny before any proposals under the legislation are approved.
>
> We will also seek to amend the Bill to include safeguards to give independence to public bodies against unnecessary ministerial interference when performing technical functions, and when their activities require impartiality and the need to act independently to establish facts. Finally, we will consider whether some of the bodies need to be removed entirely from Schedule 7.[21]

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17 Select Committee on the Constitution, *Public Bodies Bill [HL],* 4 November 2010, HL Paper 51 2010-11
18 *Ibid,* para 13-14
19 HL Deb 9 November 2010 c75
20 HL Deb 9 November 2010 c68
21 *Ibid,* c184

An amendment was tabled to the motion to commit the Bill to a Committee of the Whole House to send it to a Select Committee of the House instead. This was defeated on a division of the House by 188 to 151.[22]

On 12 November 2010 the **Delegated Powers and Regulatory Reform Committee** in the House of Lords published a report on the *Public Bodies Bill.* This also expressed concerns about the extent of the order making powers under the Bill, stating that as introduced these would "grant to Ministers unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process".[23] The report proposed a variety of ways in which the powers in the Bill could be restricted:

> 36. First, if the House considers them to be inappropriate, certain powers could be removed from the Bill altogether. Future primary legislation could be introduced at the appropriate time.
>
> 37. Second, more detail could simply be placed on the face of the Bill about how the powers are to be exercised. For example, amendments might briefly specify, for each body listed in Schedule 1, which functions may be abolished, and which functions may be transferred and to whom. This would allow the broad principles to be settled through primary legislation, leaving all matters of detail to delegated legislation.
>
> 38. Third, as mentioned by the Minister and other speakers during the second reading, further general limitations might be placed on the extent of Ministerial powers under the Bill. For example, as noted above, the Minister suggested that the Bill could include "safeguards to give independence to public bodies against unnecessary ministerial interference" in certain respects.
>
> 39. Fourth, certain bodies could be removed from the Bill altogether or from Schedule 7. For example, during the second reading debate it was suggested that this might be appropriate for bodies exercising functions of a judicial nature; and it might equally apply to other types of body.
>
> 40. Fifth, the procedures for scrutinising orders to be made under the Bill could be enhanced. This covers a wide range of potential procedures.
>
> 41. For example, there could be a requirement for public consultation to be held prior to the laying of a draft order, and for the results of that consultation to be communicated to Parliament alongside the order.
>
> 42. A form of the "super-affirmative" procedure could be created for orders under the key provisions of the Bill. There is no standard form of this procedure, which is rarely used. In essence the procedure usually entails a three stage process: a requirement for a proposed order to be laid before Parliament (possibly following public consultation) for scrutiny by both Houses; an opportunity for the government to amend the order in the light of that scrutiny; the laying of a draft order for approval by both Houses. The super-affirmative procedure therefore offers more opportunity for scrutiny than the affirmative, with the chance for Members of both Houses (and others) to make representations before being invited to approve a draft order. The procedure has been effective for the Legislative and Regulatory Reform Act 2006 in part because each House has appointed a select committee to scrutinise proposals. During the passage of the Legislative and Regulatory Reform Bill the government made a commitment that they would not use the process for highly controversial measures, and would not force

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22 *Ibid,* c187

23 Delegated Powers and Regulatory Reform Committee, *Public Bodies Bill [HL],* 12 November 2010, HL Paper 57, para 1

> through orders in the face of opposition from the parliamentary committees (HL Debates 13 June 2006, col. 125). This Committee has emphasized before that "the insertion of a super-affirmative procedure cannot bring a misconceived delegated power within the bounds of acceptability". A single stage of consultation is clearly no substitute for the detailed scrutiny afforded by the use of a bill (the process by which the functions of many of the bodies listed in this Bill were debated and decided). And the government, not Parliament, would retain the sole ability to make amendments to orders.
>
> 43. It has even been suggested that a procedure should be considered to allow Parliament to amend proposed orders under the Bill. This is virtually unprecedented, and more importantly would require extremely careful consideration and design to have any chance of being workable, not least in addressing the difficulty in reconciling differences of view between the two Houses.
>
> 44. Finally, a sunset clause could be introduced for the Bill as a whole or for Schedule 7, time-limiting the powers made available to Ministers.[24]

The House of Commons **Public Administration Select Committee** published its report *Smaller Government: Shrinking the Quango State* on 7 January 2011. The report was mostly concerned with the conduct of the review of public bodies and issues relating to their accountability and sponsorship. The Committee did, however, conclude that the *Public Bodies Bill* as originally drafted "contains insufficient safeguards to prevent the misuse of powers by ministers". They continued:

> It is essential that the exercise of powers under this Bill is subject to rigorous Parliamentary scrutiny. We will be carefully following the Bill's progress in the House of Lords. We are currently minded that the Bill should contain a general sunset clause; it should only serve the current review and fresh primary legislation should be required for future reviews. We will issue a further Report on this Bill itself after it has completed all its Lords stages, and reserve our judgement as to whether additional safeguards will be needed.[25]

2.4 Initial Government amendments

The Government tabled or indicated support for a number of amendments to the Bill in the Lords in response to criticisms from the two committees and points made during the Second Reading Debate. These amendments would:

- require ministers to consider the extent to which the functions affected by the relevant order need to be exercised independently of ministers (**amendment 108**);
- give protection to the independence of the judiciary (**amendment 111**);
- require consultation with various organisations and individuals when making orders under sections 1 to 6 of the Bill (**amendment 114**);
- change the procedure for making orders under the Bill (**amendments 118 and 130**)

In a letter to the Constitution Committee in the House of Lords in response to their report, the Minister, Lord Taylor of Holbeach, explained:

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[24] Delegated Powers and Regulatory Reform Committee, *Public Bodies Bill [HL],* 12 November 2010, HL Paper 57

[25] Public Administration Select Committee, *Smaller Government: Shrinking the Quango State,* 7 January 2011, HC 537 2010-11, para 135

> …I have tabled a series of Government amendments that build in clear safeguards on the use of all order-making powers specified in the Bill. Specifically, this group of amendments ensures that when bringing forward an order a Minister must consider the extent to which functions affected by that order need to be exercised independently of Ministers. The range of safeguards that a Minister must satisfy before bringing forward an order range from whether a function needs to be independent to protect the provision of specialist of impartial advice to whether a function is vital for proper scrutiny of Minister's actions.
>
> The amendments provide clear reassurance that the Minister must be satisfied that an order does not remove any necessary protection, specifically regarding the independence of the judiciary. We listened carefully to the concerns of a number of Peers during the 2nd Reading debate and this protection is now explicitly listed on the face of the Bill, with reference to the definition of judicial independence in section 3 of the Constitutional Reform Act 2005.
>
> …
>
> …we have considered existing precedents and tabled an amendment to the order making procedure to build in additional parliamentary scrutiny in a way that is practical and proportionate for the diversity of reforms that will be facilitated by this Bill. In practice this revised procedure will stipulate that draft affirmative orders are laid for a period of 30 days during which, if either House of Parliament considers it necessary, the procedure can be escalated to an 'enhanced affirmative procedure…
>
> …
>
> Among the Committee's concerns was the absence of a statutory requirement to consult on the proposed reforms that will be taken forward by the orders. In drafting the Bill without such a requirement we were mindful of the existing code of practice on consultation. However, we acknowledge the Committee's concerns on this matter and have tabled amendments that will set out in statute the requirement that Ministers undertake formal consultation before laying draft orders before Parliament…[26]

2.5 Response to the Government's initial amendments

The **Delegated Powers and Regulatory Reform Committee** published a report in response to the Government's tabled amendments. This stated that:

> The House would have only a single Parliamentary consultation stage before an order was brought forward for approval; and the government, not Parliament, would retain the ability to make amendments to orders. Therefore, while the amendments go some way towards addressing the Committee's procedure/ scrutiny concerns, they do not resolve the fundamental problem that the powers themselves are not currently appropriate delegations of legislative power.
>
> In this report and in our previous report on the Bill the Committee has drawn attention to the exceptionally broad nature of the powers proposed to be delegated under clauses 1 to 5, 11, 13 and 18, and the Bill has not been amended effectively to specify or limit the purposes for which the powers in these clauses may be exercised… The Bill therefore remains a skeleton Bill, despite the enhanced procedural requirements. This is particularly stark in the case of the proposed power in clause 11, where it is proposed that the power should entitle the Minister to add any of the 150 bodies or offices listed in Schedule 7 to any of the Schedules 1 to 6, but were there is no current

[26] Lord Taylor of Holbeach, *Response to Constitution Committee report published Thursday 4 November 2010,* Friday 19 November 2010

intention to make changes to the status of any of those 150 bodies or offices. Despite the Committee's strong criticisms of clause 11 and Schedule 7 in its first report on the Bill, the Minister makes no attempt in his letter to justify those provisions. If the House can find no over-riding reason or exceptional circumstances which justify the inclusion of clause 11 and Schedule 7, the Committee recommends that they should be removed from the Bill.[27]

The **Joint Committee on Human Rights** issued its report on the Bill on 21 January.[28] This concluded that there were three significant human rights issues arising in the Bill:

> **Independence and impartiality of bodies protecting and promoting human rights**
>
> A number of bodies which serve a function as part of the institutional machinery for the protection of individual rights in the UK—either rights secured in international human rights law or the common law—are included in the Bill's Schedules. These include, for example, the Equality and Human Rights Commission (EHRC), the Children's Commissioner, Her Majesty's Inspectorate of Prisons, the Parole Board, the Judicial Appointments Commission, the Administrative Justice and Tribunals Council and the Legal Services Commission. The inclusion of these bodies in the Schedules of this Bill may undermine their functional or perceived independence and their ability to give effect to the UK's international and domestic human rights obligations in practice.
>
> **Bodies with administrative, judicial or quasi-judicial decision making powers: the right to procedural fairness (Articles 5-6 ECHR)**
>
> The abolition or reform of other bodies which serve a particular decision making function may undermine the right to procedural fairness guaranteed by the common law, the right to a fair hearing guaranteed by Article 6 ECHR and specific procedural protections guaranteed by specific articles of the Convention (e.g. the right to liberty in Article 5 ECHR). The inclusion of these bodies in the Schedules to this Bill may undermine their functional or perceived independence (for example, endangering the independence of the Parole Board could lead to a risk of incompatibility with the right to liberty guaranteed by both the common law and Article 5 ECHR).
>
> Despite changes to the Bill proposed by the Government in the Lords, concern remains that inclusion in the Bill continues to create a risk that the bodies listed will be subject to action by the Government to restrict their powers, subject only to subsequent judicial challenge. This in turn could undermine the perception that these bodies are capable of acting with independence from Government. Although the Government has tabled amendments proposing to delete some of these bodies from the Bill, these concerns remain.
>
> **Delegated powers and significant human rights issues**
>
> The key issue in debates so far on the Bill has been the constitutional propriety of the scope of the delegated powers proposed in the Bill, to abolish or rewrite existing statutory frameworks without full opportunity for parliamentary scrutiny. We comment on this issue only to reiterate the extent to which the excessive use of delegated powers may reduce the effectiveness of parliamentary scrutiny for human rights compatibility of proposed legislation. A skeleton bill of this nature makes human rights analysis extremely difficult, particularly where there is limited information on the proposed use of the power, the reason for the creation of the power and evidence to

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27 Delegated Powers and Regulatory Reform Committee, *Government Amendments and Response: Public Bodies Bill,* 23 November 2010, HL Paper 62 2010-11

28 Joint Committee on Human Rights, *Legislative Scrutiny: Public Bodies Bill; Other bills,* HL Paper 86 HC 725, 2010-11

> support its proportionality. Without greater detail on these issues it is difficult to assess whether changes to a proposed body will have a positive or negative impact on the ability of the UK to meet its international and domestic human rights obligations.
>
> The breadth of delegation proposed in this Bill appears wholly inappropriate. We reiterate our view that parliamentary oversight of matters which engage individual rights and liberties is particularly important, and delegated powers which may impact upon individual rights or liberties and affect the ability of the UK to meet its international obligations must be justified by the Government and accompanied by adequate safeguards to ensure that infringements do not arise because secondary legislation has been subject to inadequate parliamentary oversight.
>
> In the light of criticism of the Bill in the House of Lords the Government has proposed changes to the Bill. In our view, these changes to the procedural arrangements in the Bill, and to the bodies listed in the Bill, do not go far enough. We remain concerned that the broad use of delegated powers in the Bill would continue to undermine the ability of Parliament to influence or prevent changes to the operation, functions and existence of bodies which may play an essential part in the machinery for the protection of individual rights and liberties in the UK.[29]

Government amendments were then tabled or the Minister's signature added to others' amendments to remove certain bodies, including the Judicial Appointments Commission (Amendment 154A) and the Parole Board (Amendment 160) from schedule 7 of the Bill.

2.6 Further Government amendments

On the seventh day in Committee (28 February 2011), Lord Taylor of Holbeach announced a further set of Government amendments:

- to remove parts of the Bill relating to the Forestry Commission; and
- to remove section 11 and schedule 7 from the Bill altogether.

The Minister stated that:

> The Government absolutely recognise that some public functions need to be carried out independently of Ministers. Schedule 7 was never intended to hinder or threaten that independence. However, it has become clear during the passage of this Bill to date that this House is uncomfortable with the nature of Schedule 7…
>
> …I can confirm to the House that the Government has accepted the arguments that bodies and offices should be listed in the schedules of this Bill only where Parliament has given its consent in primary legislation. On this basis we intend that Schedule 7 and Clause 11 be removed from the Bill. I am therefore adding my name to the existing amendments opposing the Question that the relevant clauses of the Bill stand part.
>
> In this context, I should also inform the House that it will be necessary as a result of the removal of Schedule 7 to introduce a small number of amendments that move bodies currently listed in Schedule 7 to one or more of the remaining schedules. These changes shall ensure that all reforms announced as part of last year's review of public bodies can be implemented. These amendments will be made at a later stage of the

[29] *Ibid,* pp3-4

> Bill's passage, but I hope that the House will be assured by the fact that these moves, and the reforms to which they relate, will be scrutinised in primary legislation.[30]

The Minister also announced that he was adding his name to the relevant amendments to remove clauses on the Forestry Commission from the Bill.[31]

The House of Lords **Delegated Powers and Regulatory Reform Committee** published a further report on the Government amendments to the Bill on 8 March 2011. Although the Committee welcomed the removal of the power in clause 11, they stated that "exceptionally wide delegated powers" remained in clauses 1 to five and 13 of the Bill. The Committee stated that, "those clauses are not appropriate delegations of legislative power".[32]

The Committee explained that the Government had made changes to their amendments. The Committee summarised the effect of revisions. They would:

- adjust the "enhanced" affirmative procedure for orders under clauses 1 to 6, so that a Committee of either House is able to require an order to undergo the enhanced procedure, rather than a resolution of the entire House being required [not: this "enhanced" procedure was originally to be introduced by an earlier version of Government amendment 118, which the Government have now modified];

- remove one of the safeguards in clause 21 as it relates to functions of the British Waterways Board and the Environment Agency;

- amend consent provisions relating to Northern Ireland, Scotland and Wales.[33]

However, the Committee was not satisfied with these proposals. They called for the "general purposes for which Parliament expects the powers [under clauses 1 to 5] to be used should be set out on the face of the Bill".[34] On the "enhanced affirmative" procedure, the Committee compared the Government's amended procedure to that available under the *Legislative and Regulatory Reform Act 2006:*

> (a) under the 2006 Act, if a committee of either House recommends that no further proceedings be taken on a draft order, then any further proceedings are automatically stopped unless and until the recommendation is rejected by that House itself (commonly called the "veto");
>
> (b) under the 2006 Act, a Minister wishing to proceed with an order unaltered after having been required to have regard to representations must lay a statement before Parliament giving details of any representations received. Such a statement is not required under this Bill
>
> There is also the practical limitation that the LRO procedure is not used for highly controversial matters (Ministerial commitment, HL Debates 13 June 2006, col 125). Orders under this Bill may be different in character to those under the 2006 Act – not least because the 2006 Act specified the purposes for which its powers could be exercised, while this Bill does not. Because of this difference, the House should give careful consideration to the extent to which an enhanced or super-affirmative

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30 HL Deb 28 February 2011 c799

31 For more information about the Forestry Commission see the Library Standard Note, SN/SE/5734, *The Forestry Commission and the Sale of Public Forests in England*

32 House of Lords Delegated Powers and Regulatory Reform Committee, *Government amendments: Public Bodies Bill [HL],* 8 March 2011, HL Paper 108 2010-11

33 *Ibid,* para 5

34 *Ibid,* para 12

procedure can provide effective scrutiny of orders under the Bill, and the role that committee scrutiny can play.[35]

2.7 Amendments made during the Committee Stage in the Lords

The Bill was debated in Committee on 9 days: 23 November; 29 November; 1 December; 14 December; 21 December 2010; 11 January, 28 February, 7 March and 9 March 2011.

A large number of amendments were tabled, both by the Government, the Official Opposition, and other peers. These include amendments to remove individual public bodies from each schedule to the Bill as well as amendments to the order making powers and requirements for consultation.

The Government suffered two defeats on the Bill during the Committee stage in the House of Lords:

- The first defeat took place on the first day in Committee (23 November 2010) on the first amendment debated (Amendment 1). Lord Lester of Herne Hill had put down a paving amendment to allow for a **new clause to place restrictions on ministerial powers** to abolish or modify public bodies by delegated legislation, including requirements to protect judicial independence and human rights. After listening to the Minister's response to the points raised in debate, Lord Lester explained that he wanted to "leave breathing space" between the debate and the Report stage, to allow the Government to bring forward its own amendments. He therefore begged leave to withdraw his amendment. However, peers did not allow him to do so, and a division followed. The amendment was passed by 235 to 201.[36]

- The second defeat took place on the fourth day in Committee (14 December 2010). The House passed an amendment to **remove the "Chief Coroner, Deputy Chief Coroners, Medical Advisers to the Chief Coroner and Deputy Medical Advisors to the Chief Coroner" from Schedule 1 of the Bill**. The Amendment was moved by Baroness Finlay of Llandaff, a Crossbench peer. The Government suffered its largest defeat in the House of Lords this Session with 266 voting in favour of the amendment and 165 against.[37]

A number of other amendments were made to the Bill without division. These included:

- **Amendments 64, 68, 76, 84, 100** followed on from the paving amendment tabled by Lord Lester on **restrictions on ministerial powers**. These amendments inserted "Subject to section (restriction on ministerial powers) to the beginning of clauses 1-6. A new section was inserted by Lord Lester's **amendment 175ZA**, "Restrictions on Ministerial powers":

  > (1) The modification or transfer of a function by an order under the preceding provisions of this Act must not prevent it (to the extent that it continues to be exercisable) from being exercised independently of Ministers in any of the following cases.
  >
  > (2) Those cases are-
  >
  > (a) where the function is a judicial function (whether or not exercised by a court or tribunal);

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35 *Ibid,* paras 17-18
36 HL Deb 23 November 2010 c1039
37 HL Deb 14 December 2010 c549

(b) where the function's exercise involves enforcement activities in relation to obligations imposed on a Minister;

(c) where the function's exercise otherwise constitutes the exercise of oversight or scrutiny of the actions of a Minister.

(3) Provision made by an order under the preceding provisions of this Act must be proportionate to the reasons for the order.

(4) In this section "enforcement activities" means-

(a) the bringing of legal proceedings or the provision of assistance with the bringing of legal proceedings;

(b) the carrying out of an investigation with a view to bringing legal proceedings or to providing such assistance; or

(c) the taking of steps preparatory to any of those things."[38]

- **Amendment 89** removed the **Competition Commission** from Schedule 5. The Government indicated that further amendments would be made to allow the merger of the Competition Commission and the Office of Fair Trading by placing them both in Schedule 2 at a later stage in the Bill's progress.[39]

- **Amendment 98** removed **Passenger Focus** from Schedule 5 of the Bill. The Minister explained that:

> The Government had originally listed Passenger Focus in Schedule 5 to enable possible changes to its functions. Further work and our discussions with Passenger Focus have clarified that we can significantly reduce the cost to the taxpayer without recourse to legislative change through Schedule 5. For example, efficiencies can be derived by reducing the scope of Passenger Focus's research and survey work. My noble friend Lord Taylor has added his name to Amendment 98 on that basis to support the removal of Passenger Focus from Schedule 5, which we hope will be welcomed by the Committee. However, the governance changes that we intend require its inclusion in Schedule 3...[40]

- Amendments were passed to required **the consent of the devolved parliaments and assemblies rather than with in the devolved administrations** before making orders within those bodies' competencies. The Minister explained:

> My Lords, government Amendments 113ZA to 113E would change the circumstance in which consent is required from the devolved Administrations for orders brought forward under Clauses 1 to 6. Clause 9 stipulates the circumstances in which the consent of the devolved Administrations should be sought. At present, consent is required from the Scottish or Welsh Ministers or the appropriate Northern Ireland department. The Constitution Committee's report recommended that consent should more appropriately be obtained from the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly.
>
> Following that report, and in consultation with the devolved Administrations, the Government have tabled amendments to change the current reference to Ministers to reference to the legislatures, in order to reflect the views of the Constitution Committee

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38 HL Deb 9 March 2010 cc1742-3
39 *Ibid,* c1671
40 *Ibid,* c1711

and the devolved Administrations, which are content with these proposals and have agreed to legislative consent Motions based on this provision.

The remaining government amendments are in response to further consultation with the devolved Administrations. They widen the circumstances in which consent from the Scottish Parliament and the Northern Ireland Assembly would be required in order properly to reflect the relevant devolution settlements, and have been reached in agreement with those Administrations and, again, the devolved Administrations have agreed to legislative consent Motions based on this provision.

Amendment 113AA extends the need for consent from the Scottish Parliament to take into account situations that may arise where functions of Scottish Ministers are altered by changes made by the Bill, but where those changes are not already covered by Clause 9(1) as it stands. The amendment excludes the need for consent to some changes under Clauses 1 and 2, because it would not be appropriate to require consent from devolved Ministers where a body's functions are in a reserved area and the body is being abolished, or abolished by way of merger. Without this exception, consent of devolved Ministers would be required in areas that are primarily reserved under the Scotland Act 1998.

The drafting reflects agreement reached with the Scottish Government, and we believe that it is a sensible and pragmatic solution that will allow us to implement orders under this Bill effectively. The amendments also ensure that the Bill is consistent with the legislative consent motion currently lodged in the Scottish Parliament, following discussions between my department and the Scottish Government.[41]

- **Amendment 114** inserted a new clause requiring **consultation** by Ministers wishing to make an order under sections 1-6 [42]
- **Amendment 118** inserted a new procedure for making orders under sections 1-6 as described above. **Clause 10** was then removed from the Bill.
- **Clause 11** was removed from the Bill[43] as was **schedule 7** and **clause 12**[44]
- The clauses relating to the **Forestry Commission** (clauses 17, 18 and 19) along with references to the Forestry Commission contained in other parts of the Bill were removed.[45]

The Minister stated that the Government would consider whether to accept a sunset clause later on during the progress of the Bill.[46]

2.8 Amendments made during report stage

The House of Lords had three Report stage days: 23 March and 28 March and 4 April 2011.

The Government suffered a total of two defeats during Report stage:

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41 *Ibid,* c1728
42 *Ibid,* c1730
43 *Ibid,* c1738
44 *Ibid,* c1739
45 *Ibid,* c1742
46 *Ibid,* c1726

- The House divided on an amendment to **remove** the **Youth Justice Board for England and Wales** from Schedule 1. The amendment was made, with 225 voting in favour and 162 against (**amendment 20A**).[47]

- The House divided on **amendment 26** which would place the **Administrative Justice and Tribunals Council and the Civil Justice Council** in Schedule 2. The purpose of the amendment was, as Lord Newton of Braintree explained, to "give the Government other options". The Administrative Justice and Tribunal Council already appears in Schedule 1 of the Bill which would allow it to be abolished by order. The House agreed the amendment by 198 to 191.[48] The Administrative Justice and Tribunals Council and the Civil Justice Council were also added to Schedules 3 and 5 of the Bill without division (**amendments 30, 32, 37 and 45**).[49]

In addition, the amendments passed without division included:

- a group of amendments concerning **Welsh environmental bodies**. Introducing the group of amendments, Lord Henley explained that:

> Amendments 6, 8, 11 and 15 will remove from Ministers of the Crown the power to abolish certain environmental bodies separately constituted for areas in Wales: the Welsh Agricultural Dwelling House Advisory Committee; the Agricultural Wages Committee, the Environmental Protection Advisory Committee, established under Section 12 of the Environment Act 1995; and the regional and local fisheries advisory committees established under Section 13 of the Environment Act 1995.
>
> The Government has tabled a separate amendment, Amendment 80, which we will come to later, to give the Welsh Ministers the powers to abolish the equivalent Welsh committees. Amendment 80 is part of a package of amendments following in-depth discussions with the Welsh Assembly Government to provide specific order-making powers to the Welsh Ministers. Further details of the order-making powers being afforded to the Welsh Ministers to abolish these named bodies will be outlined in the context of this package.
>
> These amendments are consistent with the policy intention to give the Welsh Ministers the power to make decisions in relation to public bodies and offices in Wales where they fall within the policy areas which the Welsh Ministers and the National Assembly for Wales are responsible. This is also consistent with the aim of the Bill to provide the Welsh Ministers with relevant powers to ensure that they can put in place the most appropriate arrangements to deliver their environmental duties and policy objectives in Wales.[50]

- The Government supported **amendment 19** tabled by Lord Kennedy of Southwark to remove the **Security Industry Authority from Schedule 1**. The Minister explained that the Government still intended to abolish the SIA in its present form, but had decided to do so through a different piece of primary legislation.[51]

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47 HL Deb 28 March 2011 c977
48 *Ibid,* c1001
49 *Ibid,* c1026 and c1045
50 HC Deb 23 March 2011 c747
51 *Ibid,* c832

- the **Competition Commission and the Office of Fair Trading** were added to Schedule 2 of the Bill, to allow them to be merged by order under the provisions of the Bill (**amendment 25**).[52]

- **S4C** was added to Schedule 3 of the Bill (**amendment 34B**);[53]

- the **Advisory Council on Public Records** was added to Schedule 5 of the Bill (**amendment 44**);[54]

- the **Broads Authority** was removed from Schedule 5 of the Bill (**amendment 46**);[55]

- the **Keeper of the Public Record** was added to Schedule 5 of the Bill (**amendment 51**);[56]

- the **National Parks authorities in England** were removed from Schedule 5 (**amendment 53**);[57]

- the **Public Records Office** was added to Schedule 5 of the Bill (**amendment 55**);[58]

- **Clause 6** (Power to authorise delegation) and **Schedule 6** (which listed the Broads Authority and National Park authorities in England) were **removed** from the Bill (**amendments 57 and 58**);[59]

- **Clause 8** was amended so that Ministers can only make orders if they consider that it "serves the purpose of improving the exercise of public functions" (**amendment 60A**);[60]

- a number of amendments were agreed which conferred powers on Welsh Ministers as requested by the Welsh Assembly Government to enable them to give effect to possible institutional changes which could follow their ongoing review of how environmental policies are delivered in Wales;[61]

- amendments to ensure that the consent of charities to receive functions as a result of activities under the Bill will have to be sought under the legislation.[62]

Three amendments to remove certain public bodies from Schedule 1 were lost on division:

- The House divided on an amendment to remove the **Agricultural Wages Board** for England and Wales from Schedule 1 of the Bill. The amendment was lost with 194 in favour and 249 against (**amendment 7**).[63]

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52 HC Deb 28 March 2011 c991
53 *Ibid,* c1048
54 *Ibid,* c1054
55 *Ibid,* c1056
56 *Ibid,* c1072
57 *Ibid,* c1072
58 *Ibid,* c1073
59 *Ibid,* c1073
60 HL Deb 4 April 2011 c1542
61 See HL Deb 4 April 2011 c1543 for a full explanation.
62 See HL Deb 4 April 2011 c1590 for a full explanation
63 HL Deb 23 March 2011 c760

- The House divided on an amendment to remove the **National Consumer Council (Consumer Focus)** from the Schedule 1 of the Bill. The amendment was lost by 170 to 182 (**amendment 13)**.

- The House divided on an amendment to remove the **Regional Development Agencies** from Schedule 1 of the Bill. The amendment was lost with 87 in favour and 151 against (**amendment 16A**).[64]

The Government also introduced a number of further amendments which were agreed. Lord Taylor of Holbeach explained:

> …it gives me great pleasure to introduce this group of amendments, each of which introduces important changes to the schedules. I hope that they will be welcomed on all sides of the House.
>
> Amendment 60 would create a power for a Minister, when making an order under Clauses 1 to 5, to include a provision to remove the body or office subject to the order from the schedule or schedules in which the body was listed. The amendment ensures that, where a Minister has been able to implement the proposed reforms by virtue of an order under the Bill, that body can be removed from the relevant schedule and therefore be assured of its ongoing status.
>
> Amendment 69C represents a solution-which, I am happy to state, has the support of the noble Lord, Lord Hunt of Kings Heath-to the question of so-called omnibus orders relating to more than one body and whether they should be permissible under the Bill. I made a commitment in Committee to consider the matter further and have done so. During our debates in Committee, I expressed my concern that any restriction on omnibus orders should not prevent Ministers from the sensible and reasonable combination of related changes in a single order. For example, I am sure that the House will understand that there is little to be gained from a separate consideration of 160 orders making identical changes to internal drainage boards.
>
> On that basis, the Government propose instead to amend Clause 11 to require that, should Ministers consider it appropriate to bring forward an omnibus order under Clauses 1 to 5, they must explain in the Explanatory Memorandum their justification for the decision. It will therefore be for Parliament to judge whether the Minister's decision was appropriate. I consider that to be a sensible and proper solution.
>
> I am delighted to have added my name to Amendment 72, in the name of the noble Lord, Lord Hunt of Kings Heath, the noble Baroness, Lady Royall of Blaisdon, and my noble friend Lord Norton of Louth. That amendment, much like the amendment in Committee which now forms Clause 16, represents the outcome of genuine engagement and compromise on all sides of the House. I pay tribute to noble Lords who have assisted in presenting it to the House this evening. Amendment 72 effectively sunsets the entries in the schedules by ensuring that an entry in the schedule automatically lapses five years after its commencement. The amendment therefore clarifies that the listing of a body in one of the schedules will not involve endless changes to that body's status but will be a vehicle for specific reforms which the Government expect to be carried out in a timely fashion. As I described the Government's thinking in Committee, the amendment will ensure that the powers in the Bill will remain on the statute book. That ensures that, following future reviews of public bodies, the Government will have the option of using primary legislation to repopulate the schedules as a means of making further reforms, subject to Parliament's consent.

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64 *Ibid,* c829

> For that reason, I am unable to support Amendment 72A in the name of my noble friend Lord Goodhart. That amendment would sunset the entire Bill, as well as the entries in the corresponding schedules, following the dissolution of this Parliament. To do so would be a mistake. It would leave the Government without a mechanism to take forward the outcomes of what I believe all sides of the House hope will be regular, systematic reviews of public bodies. Particularly given the work that this House has undertaken to craft a mechanism in the Bill which can command the confidence of Parliament and the public, it would be a retrograde step to ask future Parliaments to begin that process from scratch.[65]

2.9 Amendments made during third reading

The Bill received its third reading in the House of Lords on 9 May.

The House of Lords agreed an Opposition amendment without division to put a sunset clause into the Bill.[66] As discussed above, the Government had indicated that they would support this amendment. The amendment provided that:

> Any entry in Schedules 1 to 5 ceases to have effect at the end of the period of five years beginning with the day on which it came into force (without affecting any order already made by virtue of that entry (without effecting any order already made by virtue of that entry).[67]

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65 *Ibid,* cc 1073-1075
66 HL Deb 9 May 2011 c672
67 *Ibid,* c671