



Orders under the *Public Bodies Act 2011*

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The *Public Bodies Act 2011* received royal assent on 14 December 2011. The Act provides for orders to be brought forward to abolish, merge, modify the constitutional arrangements of; modify the funding arrangements of; and modify or transfer the functions of public bodies.

The Act introduces a new procedure – the enhanced affirmative procedure – under which Parliament considers these orders. A new Standing Order was debated and agreed on 19 January 2012. In general, the orders are considered by the relevant departmental select committee, unless the Liaison Committee decides otherwise. Select committees have begun to examine orders under the Act.

The *Public Bodies Act 2011* procedures deal only with the bodies specified in the various schedules to the Act. Other public bodies have been abolished either in different primary legislation or non-statutory bodies have been wound up using ministerial powers. Remaining Non Departmental Public Bodies are subject to a triennial review. In a written ministerial statement on 15 December 2011, Francis Maude, Minister for the Cabinet Office, set out 31 bodies to be reviewed as part of the non-statutory triennial review process of remaining Non Departmental Public Bodies.

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1 Background

The *Public Bodies Act 2011* received royal assent on 14 December 2011.¹ The Act was introduced to provide powers for ministers to abolish, merge, modify the constitutional arrangements of; modify the funding arrangements of; and modify or transfer the functions of public bodies without introducing fresh primary legislation for each body.

Background information is available in the following Library Papers:

Research Paper: [Public Bodies Bill \[HL\]](#), RP 11/50

Standard Note: [The Public Bodies Bill \[HL\]: Commons and remaining stages](#), SN/PC/6092

Ministers intending to use the powers in sections 1-5 of the Act are required to consult according to the requirements of section 10. The Minister cannot lay the draft order and explanatory document “before the end of the period of twelve weeks beginning with the day on which the consultation began” (section 11(3)).

The Act introduces a new procedure – the enhanced affirmative procedure – under which Parliament considers these orders.

1.1 Parliamentary consideration of an order made under the *Public Bodies Act 2011*

The procedure is set out in section 11 of the *Public Bodies Act 2011*.

1. The Minister lays a draft order and explanatory document before both Houses of Parliament (after the twelve week consultation period) [section 11(1), 11(3)].
2. “draft orders under the Public Bodies Act would be subject to scrutiny by the Joint Committee on Statutory Instruments in the normal way” [Lords Procedure Committee²].
3. Draft orders are referred to the Merits of Statutory Instruments Committee in the Lords³ and usually the relevant departmental select committee in the Commons.

¹ HC Deb 15 December 2011 c807

² Procedure Committee, [Orders laid under clauses 7\(2\) and 9 of the Localism Bill; Orders laid under the Public Bodies Bill](#), 31 October 2011, HL 206, para 12

³ *Ibid*, para 13

4. If, within 30 days of the laying of the draft order, either House resolves or a committee charged with reporting on the draft order recommends then the enhanced affirmative procedure should apply (see below) [section 11(5)].
5. However, if no such resolution or recommendation is made, after 40 days, a motion to approve the draft order can be moved [section 11(4)].
6. The enhanced affirmative procedure [section 11(6)-11(9)]:
 - a. Extends the period before a motion to approve a draft order can be approved to 60 days (from the date on which the draft order was laid);
 - b. Requires the minister to have regard to any representations, any resolution of either House of Parliament and any recommendations of a committee of either House charged with reporting on the draft order made during the 60-day period.
 - c. At the end of the 60-day period the minister can either:
 - i. Move that the original draft order be approved and, if it is, make an order in the terms of the draft order; or
 - ii. Lay a revised draft order and a statement giving a summary of the changes proposed. If the revised draft order is approved by a resolution of each House of Parliament, the minister may make an order in terms of the revised draft order.⁴

The motion to approve the new procedures by way of Standing Orders was originally scheduled for debate in December 2011, but rescheduled when there were indications that there had not been enough time for the Liaison Committee to consider the proposals:

Mr Heath: For the convenience of the House, it may be helpful if I say that it is not my intention later to move motion 7. There are two reasons for that: first, there is a deficiency in the printed version of the motion on the Order Paper; also, not moving it will allow further discussions with the Chair of the Liaison Committee and others on the consequences of the changes that we are proposing.⁵

Sir Alan Beith (Berwick-upon-Tweed) (LD): I welcome my hon. Friend's willingness to use this unexpected interlude to ensure that, at the end of the day, Select Committees can be confident that they will have the opportunity to debate and report on the abolition of public bodies before such matters come to the Floor of the House or a Delegated Legislation Committee.

Mr Heath: I am grateful to my right hon. Friend, with whom I have been in correspondence on these matters. I am keen to ensure that we have a system that fits the needs of the House in dealing with such important issues.⁶

⁴ Statutory consultation period is in section 10; enhanced affirmative procedure in section 11; also see Procedure Committee, *Orders laid under clauses 7(2) and 9 of the Localism Bill; Orders laid under the Public Bodies Bill*, 31 October 2011, HL 206

⁵ HC Deb 19 January 2012 c939-950

⁶ HC Deb 14 December 2011 c214

There followed an exchange of correspondence between the Deputy Leader of the House, David Heath, and the Chair of the Liaison Committee, Sir Alan Beith, which was placed in the Vote Office and the Library, Mr Heath made a commitment to reviewing the new arrangements a year or so after they came into effect, to ensure that departmental select committees were not overburdened with new tasks. However he was not prepared to give an assurance that requests from committees for additional time to scrutinise would always be granted. He did agree that no debate on the order would take place before the publication of the select committee report under section 11(6) of the Act which had been made within the appropriate period. Another agreement was that members of the select committee charged with reporting on the draft proposals would be included in the Delegated Legislation Committee convened to consider the order.

The debate took place on 19 January 2012, where the new Standing Order was approved. Explanatory Notes were made available in the Vote Office. Some concern was expressed during the debate that select committees might struggle with the workload, but the possibility of joint working with other committees was highlighted for particular orders.

1.1 Allocation of Orders to Select Committees

Paragraph (1) of the new Standing Order 152K makes general provision to determine the select committee which will report on the proposed order, which will normally be the departmental select committee. Paragraph (2) provides that the Liaison Committee may designate another committee in the place of the departmental select committee.

The full text of the Standing Order is as follows:

‘(1) Subject to paragraph (2), the select committee charged with reporting on a draft order for the purposes of section 11(5) and (6) of the Public Bodies Act 2011 shall be—

(a) the select committee appointed under Standing Order No. 152 (Select Committees related to Government departments) appointed to examine the expenditure, administration and policy of the Department of the Minister who has laid the draft order, or

(b) in respect of a draft order laid by a Minister in the Cabinet Office, the Select Committee on Public Administration.

(2) The Liaison Committee may report that it has designated a select committee appointed under Standing Order No. 152 (Select committees related to government departments) or the Select Committee on Public Administration as the select committee charged with reporting on a specified draft order for the purposes of section 11(5) and (6) of the Public Bodies Act 2011 in place of the select committee to which paragraph (1) applies.

A few draft orders have already been published and have begun review in the Commons and the Lords. See for example the draft *Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Act Order 2012* and the *Public Bodies,-Draft Public Bodies (Abolition of Courts Boards) Order 2012*.

A legal commentator on the Public Bodies Act procedure has questioned whether Parliament controls over the enhanced affirmative resolution procedure should have been strengthened:

..unlike Legislative Reform Orders, there is no power of veto during the process (something which the Government very firmly resisted);

as with statutory instruments generally, Parliament has been given no power to amend;

there are huge time constraints - the 30, 40 and 60 day periods for affirmative and enhanced affirmative procedure include non-working days (other than when the Houses are not sitting for more than 4 days) and allow almost no time for reflection;

Parliamentary Committees, particularly the departmental select committees, already have very significant workloads and it may be wondered whether those with a lot of orders to consider (eg the Efra and Justice Committees) will be able to cope;

in the Commons, the problem of overlapping committee remits means that some committees will have to play second fiddle to others, unless the Liaison Committee in some way intervenes;

stakeholder interests may have to choose between Lords and Commons scrutiny committees in making their submissions or be in both places at once;

there is in some respects a lack of complete transparency in the process eg in so far as informal dialogue will take place in advance of the laying of orders and appears to be encouraged between departments and committees which will be out of the public view (this is likely to include the submission of draft orders in advance of laying); also, transfer schemes don't have to be lodged with draft orders, though one was informally with the NESTA Order (see [here](#)).

Whilst I may be in a minority, it seems to me that Parliament really ought to have been given an opportunity to amend Public Bodies Orders presented to it, even if (as happens eg with special procedure orders), government retains a right to override the result then reached. It may well be that, with good work from the scrutiny committees, Ministers will exercise judgement in all appropriate cases to withdraw drafts and submit replacements with material modifications where these are truly merited (as the enhanced affirmative procedure allows) but, then again, this may be wishful thinking. Either House has of course the ultimate remedy of failing to approve the necessary affirmative resolution at the end of the process. As the Companion to the House of Lords Standing Orders makes clear, and this reflects the position taken in the Conventions Committee Report of 2005 and an exchange of letters with Lord Strathclyde in 2010, the Lords does retain "an unfettered freedom to vote on any subordinate legislation submitted for its consideration" (see [here](#)). Maybe we will see it doing so more frequently in the future.⁷

2 Progress of the review into public bodies

2.1 The Public Bodies Act 2011 Review

[Research Paper 11/50 *The Public Bodies \[HL\] Bill 2010-12*](#) sets out the background to the review of public bodies announced in June 2010 by Francis Maude, Minister for the Cabinet Office, with the initial conclusions announced on 14 October 2010. Among the documentation was a table giving a summary of the outcome by sponsoring department entitled [Public Bodies Reform: Proposals for Change](#)⁸.

The Cabinet Office provided some supplementary written evidence to the Public Administration Select Committee in May 2011 on the *Public Bodies Bill*. This included a [breakdown](#) of total estimated spending reductions by department.⁹ The Public Administration

⁷ Paul Thompson *Public Bodies Act Orders- the Bonfire is lit* 28 February 2012 Bircham Dyson Bell <http://www.mondaq.com/x/166462/Public+Finance/Public+Bodies+Act+Orders+the+bonfire+is+lit>

⁸ <http://www.number10.gov.uk/wp-content/uploads/2010-10-14-Public-bodies-list-FINAL.pdf>

⁹ [Public Administration Select Committee Public Bodies Bill Additional Evidence 19 May 2011 HC 909](#)

Select Committee report on the Bill in January 2011 was critical of the public bodies review in a number of aspects, concluding that the Bill would not deliver significant cost savings or improved accountability. [Standard Note 6092 The Public Bodies Bill \[HL\] Commons and remaining stages](#) summarises the continuing debate during the passage of the Bill.

The [Public Bodies Reform webpage](#) on the Cabinet Office offers a general overview of the progress of the review into public bodies.¹⁰ Some bodies have or will be abolished or merged using primary legislative powers; other non-statutory bodies can be abolished or merged using ministerial powers, without further reference to Parliament.

The Cabinet Office publishes [quarterly updates](#) about the progress of the review. The most recent was in January 2012.

A press notice issued on 14 December 2011 listed progress so far as follows:

In October 2010 the Government announced the results of its review of more than 900 public bodies. The reforms will lead to the total number of public bodies reducing by more than 250. This includes 199 ceasing to be public bodies. Where their functions are needed they will either be brought back into Government, devolved to local Government, or moved out of Government. Where they are not needed, they will be abolished altogether. Additionally 120 bodies will be merged into 56 and a further 176 bodies will be substantially reformed.

The reforms in the new Public Bodies Act will begin immediately and include:

abolishing the Regional Development Agencies, and delivering a new approach to growth and regeneration including Local Enterprise Partnerships which will shift power to local businesses and communities;

transferring British Waterways functions to a new charitable body. This will give waterways' users and the communities that live alongside them, greater involvement in how they're managed and contribute to their sustainability in the long-term;

abolishing The Child Maintenance and Enforcement Commission as a non-departmental public body and transferring functions back to the Department for Work and Pensions ensuring that accountability and decision making responsibility for child maintenance sits with Ministers;

legally abolishing Food from Britain as the body has been defunct since 2009 but was never formally abolished. There are other bodies which provide export promotion services and are well placed to serve UK exporters; and

abolishing the Aircraft Industries Arbitration Tribunal and transferring responsibility to HM Court and Tribunals Service. The tribunal was created in the 1980s and has not met for at least the past 25 years so transferring the functions will reduce duplication and waste.¹¹

The press notice went on to give examples of other bodies being abolished, separately from the Public Bodies Act process. There is a [Cabinet Office spreadsheet of progress to December 2011 by department](#).¹²

¹⁰ <http://www.cabinetoffice.gov.uk/resource-library/public-bodies-reform-proposals-change>

¹¹ "Quango reforms take leap forward" 15 December 2011 Cabinet Office

¹² Public Bodies Reform Proposals for Change 15 December 2011 Cabinet Office

http://www.cabinetoffice.gov.uk/sites/default/files/resources/Public_Bodies_Reform_proposals_for_change.pdf

2.2 Updated list of public bodies subject to triennial review

The *Public Bodies Act 2011* procedures deal only with the bodies specified in the various schedules to the Act. Other public bodies have been abolished either in different primary legislation or non-statutory bodies have been wound up using ministerial powers.

On 15 December 2011 Francis Maude issued a written ministerial statement.¹³ The statement gave details of progress of the 2010 review.

The Minister for the Cabinet Office and Paymaster General (Mr Francis Maude):

The coalition Government made a commitment to review public bodies, with the aim of increasing accountability for actions carried out on behalf of the state. Royal Assent of the Public Bodies Act 2011 marks an important milestone in this process which will allow Departments to get on with the important task of delivering the reforms I announced on 14 October 2010. Today, I am placing in the Library of the House an updated list of proposals for the reform of public bodies and guidance to support the programme of orders that will follow Royal Assent of the Public Bodies Act 2011. Copies will also be available in the Vote Office.

This Government made a presumption that state activity, if needed at all, should be undertaken by bodies that are democratically accountable at either national or local level. A body should only exist as a quango if it meets one of three tests, to which all existing public bodies have been subjected. These tests are:

Does it perform a technical function?

Do its activities require political impartiality?

Does it need to act independently to establish facts?

Some 14 months on from my original announcement, we have made strong progress. We now have a legislative mechanism in place to implement current and future proposals for reform. We have announced that cumulative reductions in administrative spending of £2.6 billion will flow from public bodies over the spending review period. Where legislation was not required we have already completed more than half of the abolitions proposed by the 2010 review, and we have already started the process of conducting regular, triennial reviews of all non-departmental public bodies. These triennial reviews will ensure that never again will the quango state be allowed to spiral out of control.

Today I am able to confirm the 31 non-departmental public bodies that Departments have identified for reviews in the first year of the three-year review cycle.

He went on to set out the methodology to be used:

Triennial reviews will be based on the success of the methodology applied during the 2010 review of public bodies which looked at whether a function was required and, if it was, whether it should exist at arm's length from Government. Quangos will be required to meet one or more of the three tests listed above.

Triennial reviews will build on this methodology by including a further stage to examine whether the body's control and governance arrangements continue to meet the recognised principles of good corporate governance. As well as an opportunity for continuous improvement the reviews will help departments consider new and more innovative models for delivering services through public bodies.

¹³ HC Deb 15 December 2011 cWMS, also available from the [Cabinet Office website](#)

Once the first tranche of reforms have been delivered, and the process of ongoing triennial reviews is firmly established, the UK public bodies landscape will look radically different and be substantially smaller. We will ultimately have reformed more than half of the 904 public bodies in scope of the 2010 review and the landscape will contain more than 250 fewer public bodies. The landscape will be more accountable, with Ministers taking strategic policy decisions and controlling core costs and releasing the front line to deliver services. Public bodies will no longer be seen as confusing, distant and impenetrable to the public, and Ministers will be clearly and transparently accountable for decisions that should be taken by elected representatives.

The landscape will be smaller, more efficient and will cost less, offering better value for money to the public. Our reforms will also help to realise a power shift away from Whitehall, placing control of the delivery of public services in the hands of people who use them, and contributing to important reforms in health, education and economic growth. Unlike previous attempts to reform the public bodies landscape, our reforms will ensure that public bodies will no longer operate long after their job is complete or continue in a form that is outdated or inefficient. I believe that these reforms will lead to a permanent, and long overdue, shift in the role of public bodies and much clearer lines of accountability.¹⁴

¹⁴ HC Deb 15 December 2011 c110WS