

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

6th Report of Session 2010–11

Government Amendments &
Response:
Public Bodies Bill [HL]

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments”.

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The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews

Lord Blackwell

Rt Hon the Lord Butler of Brockwell

Lord Carlile of Berriew QC

Baroness Gardner of Parkes

Lord Haskel

Rt Hon. the Lord Mayhew of Twysden QC DL

Baroness O’Loan

Lord Soley

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Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee’s email address is dpr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

Sixth Report

PUBLIC BODIES BILL [HL] – GOVERNMENT AMENDMENTS

1. **In our earlier report the Committee raised serious concerns about this Bill as it was introduced. For the reasons set out in this report, the amendments so far brought forward by the Government have not resolved these concerns.**
2. **The procedural changes relating to consultation and a form of the super-affirmative procedure are welcome as a step in the right direction. Subject to further consideration of the important points we raise in paragraphs 24 and 25 below, the amendments do seek to address the Committee's concern in our earlier report on the Bill about inadequate parliamentary scrutiny of orders.**
3. **However, as the Committee has made clear in the past, the insertion of a super-affirmative procedure cannot by itself bring a misconceived delegated power within the bounds of acceptability.¹** 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.
4. **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 to Ministers 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 Government amendments to clause 8 impact upon clauses 1 to 6, but in a restricted way (as explained in paragraphs 11, 12 and 22 below). 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 Schedules 1 to 6, but where there is no current 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.**

¹ 4th Report of Session 2009-10, HL Paper 41, report on proposed amendments to clause 17 of the Digital Economy Bill.

5. **Such a change might also have the effect of making it easier for the powers in clauses 1 to 5 of the Bill to be better calibrated to matters which are appropriate to be left to delegated powers.**

Background

6. At its meeting on 10 November the Committee considered and reported on the Public Bodies Bill (Fifth report, HL Paper 57). The Committee repeats that it takes no view on the proposals to restructure public bodies, which as a policy matter are for the House to consider. The Committee's remit is restricted to the proper use of, and Parliamentary control over, delegated powers.
7. The Committee found that the Bill is almost wholly enabling, granting to Ministers enormous discretion to use delegated powers to abolish or restructure a large number of public bodies and offices, transfer some or all of their functions to other bodies, and to abolish or alter the functions of the bodies, including conferring new functions. The Committee had particularly serious concerns about the powers in clauses 1 to 5 and clause 11 (with similar concerns about similar powers in clauses 13 and 18). These powers, and the Committee's concerns, are explained in our earlier report on the Bill.
8. In this earlier report the Committee concluded "that the powers contained in clauses 1 to 5 and 11 as they are currently drafted are not appropriate delegations of legislative power. They would grant to Ministers unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process" (paragraph 1). The Committee welcomed the Minister's commitment to table amendments to meet the serious concerns expressed about the Bill during the Bill's second reading (which had attracted 54 speakers), noting: "there is general agreement that the Bill requires amendment. The precise nature of these amendments will have an important effect on the view that the Committee takes of the extensive package of powers in the Bill as a whole, and the Committee will examine them carefully when they are available. We express the hope that this will be in good time for the start of the Committee stage given the potential impact on the overall shape and nature of the Bill" (paragraph 34).
9. In the event the amendments were tabled on Thursday 18 November, and published on Friday 19 November. This meant that the Committee could not meet to consider them until Monday 22 November. The Committee has also received a letter from the Minister, dated 19 November, which addresses the Committee's original report on the Bill and explains the Government amendments. This letter is printed in Appendix 2.

The Government amendments

10. In summary, the effect of the Government amendments is:
 - to add to the matters to which a Minister must have regard before making an order under clauses 1 to 6 or 18; and to provide that the independence of the judiciary is a necessary protection for the purposes of what a Minister must consider before making an order under clauses 1 to 6;
 - to introduce consultation requirements before orders under clauses 1 to 6, 11, 17 or 18 may be made; and to introduce revised Parliamentary procedural requirements for orders under clauses 1 to 6, 11 and 18.

Matters for the Minister to consider or have regard to

11. Amendment 108² would require the Minister to consider the extent to which functions affected by the order need to be exercised independently of Ministers because they require impartial judgement etc. or involve establishing facts in relation to, or oversight or scrutiny of, Ministers' actions. But it remains the case that the Minister need only "have regard to" the objective of securing appropriate accountability to Ministers: the Minister remains entitled to consider the need for independence to be outweighed by other factors.
12. Amendment 112 would provide that the "necessary protection" referred to in clause 8(2) includes the independence of the judiciary. In effect, the Minister, as a result of the amendment, would not be able to make an order unless he believed that the order did not remove judicial independence. However, it remains the view of the Minister that is decisive, and the provision is of no relevance to the large number of non-judicial bodies listed in the Bill.

New procedural requirements

13. Amendment 114 would require consultation, before an order under any of clauses 1 to 6, with those specified in the amendment, including the body or holder of the office to which the proposed order relates.
14. Amendment 118 sets out a procedure for orders under clauses 1 to 6, which appears to be based (with some significant differences) on the procedures under the Legislative and Regulatory Reform Act 2006 ("the 2006 Act").³ The procedure is summarised in Figure 1.
15. If the Minister wishes to proceed (under step (f) in Figure 1) with the order unamended, he need not provide any statement about the representations made. This does not follow the 2006 Act.
16. Amendments 127 and 130 would insert two new clauses which would provide for consultation and procedural requirements for orders under clause 11 which are broadly equivalent to those for orders under clauses 1 to 6 proposed by amendments 114 and 118. But it would seem that under the proposed procedure for clause 11 a Minister wishing to amend the draft order in the light of representations, etc. made in the 60-day period must start all over again with a fresh explanatory document, and fresh 30, 40 and 60 day periods, etc. (i.e. there is no equivalent to step (f) in Figure 1). This therefore seems to give less incentive to the Minister to change his order in the light of representations or a committee's recommendations (e.g. if the order relates to a number of bodies and a committee recommends removal of one of them).

² References to amendment numbers are to the numbers used on the marshalled list printed as HL Bill 25-I.

³ Amongst other things the 2006 Act includes powers to remove or reduce burdens and to promote regulatory principles.

Figure 1: Proposed procedure for orders under clauses 1 to 6

- (a) The Minister lays a draft order with an explanatory document, at least 12 weeks after the start of the consultation period. (Since the Minister must consider the responses to the consultation, this does not guarantee a 12-week minimum consultation period.)
- (b) The explanatory document gives reasons for the order; explains why the Minister considers that no necessary protection is removed and that the exercise of the rights/freedoms referred to in clause 8(2)(b) is not prevented; and contains a summary of the results of the consultation.
- (c) The draft order waits for 30 days, during which period either House may require (by a resolution of the House) that subsections (6) to (9) shall apply.
- (d) If neither House requires those subsections to apply, the order waits for another 10 days but then can proceed as an ordinary draft affirmative.
- (e) If either House, within the 30 days, does require those subsections to apply, then the order waits for another 30 days after the initial 30 days. The Minister must have regard to any representations, any resolution of either House, and any recommendations of a committee of either House charged with reporting on the draft order, which are made over the whole 60 day period.
- (f) The draft order may then proceed as an ordinary draft affirmative even if Committee recommendations (or resolutions of either House) have been made but the Minister wishes the Order to proceed unaltered; OR the Minister may change the draft and lay a fresh one (with a statement of the changes) and that draft then proceeds as an ordinary draft affirmative.

17. Subsection (2) of the new clause “Consultation on orders under section 11” makes it clear that consultation on an order to add a body to one of Schedules 1 to 6 can take place concurrently with consultation on the order under clauses 1 to 6 which would relate to the body if added. So a “one bite at the cherry approach” for bodies listed in Schedule 7 is clearly envisaged as a possibility. (This is confirmed in the letter from the Minister.)

Amendments 167, 169 and 174

18. Amendment 167 would make to clause 18 an equivalent change to that which amendment 108 would make in relation to clauses 1 to 6; and amendments 169 and 174 make similar provision for orders under clauses 17 and 18 as is proposed for orders under clauses 1 to 6.

Analysis

19. The breadth of the powers in the Bill, and the introduction by these amendments of a form of super-affirmative procedure, invites further comparison with the 2006 Act.
20. Section 2 of the 2006 Act is especially relevant, as it is a power specifically aimed at the functions of public bodies. (It should be noted that the power in Section 1 of the 2006 Act is a very broad power, but its purpose is the removal or reduction of burdens and so section 2 is considered to provide a more relevant comparison.)
21. The powers in sections 1 and 2 of the 2006 Act are subject to more preconditions than the powers in this Bill (they are that the effect of the Order is proportionate to the policy objective; that it strikes a fair balance; and that it is not constitutionally significant).
22. The Minister explains in his letter that where the Bill differs from the 2006 Act it is because the powers under this Bill are more narrow: “The powers under the 2006 Act apply at large, whereas the powers under the Bill can only be exercised in relation to the bodies specified in it”. It is true that the powers in the Bill can apply only to the 200+ bodies listed in it. But section 2 of the 2006 Act seems to the Committee narrower in at least two respects than the powers in the Bill. First, it limits the extent of Ministerial powers by specifying that the power may only be exercised with a particular purpose in mind: to secure that regulatory functions are exercised so as to comply with the principles of transparency, accountability, proportionality and consistency (section 2(3)). The key powers in this Bill do not specify any purpose for which the powers may be exercised. Certain matters are set out in clause 8 and amendments 108, 111 and 112, but these are simply matters to which the Minister must have regard, or give consideration to, before bringing forward an Order.
23. Secondly, the power in section 2 of the 2006 Act cannot be used to abolish any regulatory function or confer any new regulatory function (though it can be used to create or abolish bodies and to make changes to their constitution and the way in which they exercise their functions). Clauses 1, 2 and 5 of the present Bill contain no such limitation, indeed they expressly provide for the abolition and creation of regulatory, or any other, functions.
24. There are also more effective statutory requirements for Parliamentary scrutiny for orders under the 2006 Act. In particular:
 - (a) the requirement to have regard to representations, resolutions and recommendations during a 60-day period is triggered merely by a recommendation of a committee of either House (unless rejected by the House), and does not require a resolution of the House;
 - (b) 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”);
 - (c) 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.
25. There is also the practical limitation that the procedure under the 2006 Act is not used for highly controversial matters (as noted in paragraph 42 of the

Committee's earlier report) which is given legal teeth by the committee's "veto" ((b) above). Careful consideration would have to be given as to whether and how a super-affirmative procedure can provide effective scrutiny of orders under this Bill, which could be very different in character to orders under the 2006 Act, and to the appropriate place for committee scrutiny of such orders.

26. The matters to be considered in clause 8, and therefore the changes made by amendments 108, 111 and 112, do not affect orders under clause 11. There is no current policy intent by the Government to make any changes to the bodies listed in Schedule 7, so no indication of what if anything will happen to them should Parliament agree to grant the power in Clause 11 to enable the transfer of any of these bodies to any of Schedules 1 to 6 for abolition, merger, restructuring, etc.

APPENDIX 1: ATTENDANCE AND DECLARATION OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

At the meetings on 10 November and 22 November, the following interests were declared in relation to the Public Bodies Bill:

Baroness Andrews, as Chairman of English Heritage and Vice-President of the National Parks Association

Lord Carlile of Berriew, as a chair of the Competition Appeal Tribunal, and as being involved in legal matters which could be affected by changes to some of the bodies listed in Schedule 7 of the Bill

Lord Blackwell, as a Board Member of OFCOM; and as a recent former Board member of the Office of Fair Trading

Attendance:

The meeting on 22 November was attended by Baroness Andrews, Baroness Gardner of Parkes, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley & Baroness Thomas of Winchester.

APPENDIX 2: PUBLIC BODIES BILL [HL] – GOVERNMENT RESPONSE

Letter to the Chairman from Lord Taylor of Holbeach, Government Spokesman, Cabinet Office

RESPONSE TO DELEGATED POWERS AND REGULATORY REFORM COMMITTEE REPORT

1. I am writing as the Peer in charge of the Public Bodies Bill in response to the report of the Delegated Powers and Regulatory Reform Committee on the Bill, as published on 12 November 2010 as HL Paper 57. I would like to begin by thanking Committee members for their work in producing this important report and in acknowledging the points made during Second Reading. I am now in a position to explain in detail the amendments to which I referred in my closing speech.

2. As you will know, the Public Bodies Bill has been introduced as a means of enabling a series of reforms to specific public bodies which were agreed across Government and announced to Parliament by the Minister for the Cabinet Office on 14 October 2010. In addition, it seeks to put in place a framework which would enable future reform of public bodies, specified in Schedule 7 to the Bill, pending the outcome of future reviews.

3. When considering how we could most effectively legislate for these proposals, the Government had to address two issues: the extent of the legislative changes needed; and how they could be delivered within a reasonable timeframe. There are a wide range of changes needed to a diverse range of public bodies. However, many of the changes are, in policy terms, relatively straightforward and seek to rationalise or re-structure in a way that improves efficiency and accountability of these bodies.

4. To seek to enact them all through primary legislation would involve a bill or bills the size of which would be undeliverable, or waiting, over a number of sessions, for suitable legislative vehicles. Indeed, owing to other pressures on Parliament and that fact that some Departments often do not have a legislative vehicle in a particular session, the use of primary legislation would cause severe delays to the proposed reform package. Given that these reforms stem from a commitment of the Coalition Government, and given that many of them enjoy wide public support, we remain of the opinion that such delays could not reasonably be justified.

5. In its' report, the Committee acknowledged the Government's plans to table amendments before Committee stage. The Committee undertook to examine these amendments and reflect on their overall impact on the shape and nature of the Bill. I am pleased to now be in the position to outline in detail the amendments that have been tabled. I believe they will be welcomed by the Houses and will allay the various concerns raised by the Committee regarding the order-making powers contained in the Bill. The Government amendments cover three key areas and I will examine each in turn.

Matters to be considered

6. The Government's amendments seek to meet concerns about ensuring appropriate independence in the exercise of public functions. Government amendment 1 ensures that when bringing forward a draft order a Minister must

consider the extent to which there is a need for the functions to be exercised independently of Ministers when having regard to the objective of securing appropriate accountability to Ministers because (i) the function requires the expertise or advice to be given by a person who is impartial in relation to the Government of the day's policies or (ii) because the function is one of oversight of scrutiny of the actions of Ministers.

7. Further to the changes to Parliamentary procedure the Government proposes (see below) the Minister must also give reasons relating to their consideration of the matters in clause 8(1) when they lay a draft order under the Bill before Parliament.

8. In their report the Committee acknowledge the provisions set out in clause 8(2) of the Bill and the fact that these provisions mirror similar provision in the Legislative and Regulatory Reform Act 2006; but queried how they would be expected to work in the context of the Public Bodies Bill.

9. In a number of respects the considerations will have a degree of resonance with those matters that could arise in the regulatory reform context. For example, clause 8(2) ensures that legal and constitutional requirements for independence in the performance of public functions cannot be removed by an order under the Bill and Government amendment 3 provides reassurance that the independence of the judiciary is a necessary protection under clause 8(2)(a). It is also considered that if the order-making powers were to be used to make changes to, for example, the licensing functions of some public bodies, similar issues may arise as those which have arisen in the context of regulatory reform orders in relation to the provision and use of personal data or other information⁴.

10. Those rights conferred or protected by the Convention for the Protection of Human Rights and Fundamental Freedoms are rights which a person might reasonably expect to keep further to clause 8(2)(b), for example, the right to a fair hearing before an independent tribunal in the determination of their civil rights.

11. Clause 8(2)(b) may also extend to rights or freedoms that individuals consider they have in relation to changes to the functions of public bodies where these are not protected by the Convention but individuals have a reasonable expectation to continue to exercise the right or freedom.

12. Further to the changes to Parliamentary procedure the Government proposes (see below) the Minister must also explain why they consider that the conditions in clauses 8(2)(a) and (b) are satisfied when they lay a draft order under the Bill before Parliament.

13. The Bill differs from the Legislative and Regulatory Reform Act 2006 in a number of respects but this is because of the different subject matter and narrower scope of the powers under the Bill. The powers under the 2006 Act apply at large whereas the powers under the Bill can only be exercised in relation to the bodies specified in it.

14. Considerations of proportionality are clearly an aspect of the Minister's considerations when having regard to the objective of securing increased efficiency, effectiveness and economy in the exercise of public functions. Nor was there any need to replicate provisions as to the constitutional significance of orders given

⁴ In this regard see the comments of the House of Commons Regulatory Reform Committee, Proposal for the Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004 Second Reports Session 2004-2005, HC 118

that all bodies to which the order-making powers can apply are specified in the Bill.

Consultation

15. Government amendment 4 introduces a requirement for consultation on proposals to make orders under clauses 1 to 6. This will require Ministers to consult the body or office holder to which the proposals relate, other stakeholders substantially affected by the proposals, the devolved administrations (where relevant) the Lord Chief Justice (where appropriate) and other persons the Minister considers appropriate. Where changes are made as a result of the consultation process, the Minister will also be required to undertake further consultations on these changes.

16. Government amendment 5 replicates the requirement to consult on proposals to make an order under clause 11 requiring the Minister to consult the body or office holder to which the proposal relates and such other persons he considers appropriate.

17. In order to ensure this requirement does not unnecessarily delay the Government's reforms consultation undertaken before the commencement of the provisions will count towards this requirement.

18. The provision is mirrored in relation to orders under clauses 17 and 18 (amendment 17) and the Government is in discussions with the Welsh Assembly Government about apply equivalent provision to orders under clause 13 by Government amendment at Committee stage.

Parliamentary Scrutiny

19. In paragraph 42 of its report the Committee suggest that a form of 'super-affirmative' procedure should be included in the Bill to allow for additional Parliamentary scrutiny of orders.

20. Government amendment 5 builds in additional Parliamentary scrutiny in a way that is practical and proportionate for the diversity of reforms that will be facilitated by this Bill.

21. Indeed the Committee noted there is no standard form for a "super-affirmative" procedure but that it 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 Government to amend the order in light of that scrutiny and the laying of a draft order for approval by both Houses. Each of these key elements is reflected in Government amendment 5, and the equivalent provision made in Government amendments 9 in relation to orders under clause 11⁵, and Government amendment 15 in relation to orders under clause 18.

Other issues

22. I would also like to take this opportunity to respond to some of the more specific queries that the Committee raised in its report.

⁵ In relation to the enhanced procedure that may apply to orders under clause 11 this does not of course make provision for a revised draft to be laid as that would in effect be a proposal to make an order under a different clause.

23. The Committee stated that clause 12(2) does not prevent “one bite at the cherry”. To be clear, the Bill ensures there is a two stage process to the consideration given to orders made under the Bill. If the Government wishes to exercise any of the powers under clauses 1 to 6 in relation to a body in Schedule 7 it must first ask Parliament to approve a draft order inserting the body into the relevant Schedule, and it must then ask Parliament to approve the draft order that will exercise the relevant power. The first order asks the in principle question and the second order asks for approval on the detail of the changes. It may well be appropriate, and assist Parliament, if the two draft orders were debated together. Whether this is appropriate will be dependent on the circumstances.

24. I should also point out that it is clear that transferring the functions of the Judicial Appointments Commission in relation to judicial appointments to a Minister would be removing a necessary protection (as referred to above).

25. The Committee also called to the attention of the House what it called the ‘unexplained aspect’ of clause 13 giving Welsh Ministers extensive powers to make subordinate legislation by amending Acts of Parliament in relation to matters about which the National Assembly for Wales could not enact a measure. In this regard, we would draw to the attention of the Committee the powers of the Welsh Ministers to make Designation Orders under the European Communities Act 1972⁶. These powers extend to areas where there is no corresponding legislative competence for the National Assembly for Wales, for example in relation to services in the internal European Union market (SI 2009/221) or road tunnel safety (SI 2005/1971). A further example would be Planning Act 2008 which gives Welsh Ministers the power to apply England only provisions to Wales where there is no legislative competence⁷.

Conclusion

26. I have taken the comments set out in the Committee’s report very seriously and have considered at length the breadth and depth of views expressed during Second Reading. The constructive approach taken by Peers, exemplified by the Committee’s report bodes well for the successful passage of this Bill and I am left heartened by the capacity of the House to help the Government improve this Bill. The Bill as introduced was a sincere attempt by Government to put in place a framework for reforming public bodies that would deliver what the Coalition has pledged and what the public can rightfully expect. We have also listened, and will continue to listen, to the highly valued opinions of Peers and of committees, such as the Delegated Powers and Regulatory Reform Committee. I look forward to working further with this Committee and thank them in advance for their further contributions.

Cabinet Office

November 2010

⁶By virtue of section 2(4) of the 1972 Act all such powers are powers to amend Acts of Parliament.

⁷ See section 203 and, in particular, section 203(6) of the 2008 Act.