

HOUSE OF LORDS

Merits of Statutory Instruments Committee

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50th Report of Session 2010-12

**Special Report**

**Scrutiny of Public Bodies Orders**

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*The Select Committee on the Merits of Statutory Instruments*

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), consider—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
  - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
  - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

*Members*

Rt Hon. Baroness Butler-Sloss GBE	Lord Methuen
Baroness Eaton	Rt Hon. Baroness Morris of Yardley
Lord Eames OM	Lord Norton of Louth
Rt Hon. Lord Goodlad ( <i>Chairman</i> )	Lord Plant of Highfield
Baroness Hamwee	Rt Hon. Lord Scott of Foscote
Lord Hart of Chilton	

*Registered interests*

Information about interests of Committee Members can be found in the Appendix.

*Publications*

The Committee's Reports are published on the internet at [www.parliament.uk/hlmeritpublications](http://www.parliament.uk/hlmeritpublications)

*Information and Contacts*

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Merits of Statutory Instruments Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email [merits@parliament.uk](mailto:merits@parliament.uk).

*Statutory instruments*

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

# Special Report: Scrutiny of Public Bodies Orders

## Introduction

1. The Public Bodies Act 2011 gives Ministers the power by order to abolish, merge or modify a number of public bodies and offices originally established in primary legislation. The use of this power by Ministers is subject to a new scrutiny procedure – the “enhanced affirmative” procedure – which was inserted by amendment during scrutiny of the Bill in the House of Lords.
2. The House has agreed that the Merits of Statutory Instruments Committee should undertake the scrutiny work when these draft orders are laid<sup>1</sup>. This gives us an important new role building on our existing work scrutinising statutory instruments laid before the House.
3. In this Report, we set out the key provisions of the Public Bodies Act 2011, the statutory scrutiny process, and how we intend to approach this new scrutiny role. This Special Report is made for the information of the House.

## Key provisions in the Public Bodies Act 2011

4. The Public Bodies Act 2011 (the 2011 Act) confers order-making powers on Ministers and Welsh Ministers in relation to the reform of a range of public bodies and offices listed in the Act. This Report is concerned only with the scrutiny of orders made under sections 1 to 5 of the Act which are subject to the new scrutiny arrangements. The Act contains a sunset provision putting a 5 year limit on the use of these order-making powers.
5. The powers in sections 1 to 5 allow a Minister of the Crown to do certain things in relation to public bodies and offices:
  - **Abolition:** under section 1 the Minister can by order abolish any body or office listed in Schedule 1 to the Act;
  - **Merger:** under section 2 the Minister can by order merge any group of bodies or offices listed in Schedule 2;
  - **Modifying constitutional arrangements:** under section 3 the Minister can by order modify the constitutional arrangements of any body or office listed in Schedule 3;
  - **Modifying funding arrangements:** under section 4 the Minister can by order modify the funding arrangements of any body or office listed in Schedule 4;
  - **Modifying or transferring functions:** under section 5 the Minister can by order modify the functions of a body or office, or transfer its functions to an eligible person, listed in Schedule 5.

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<sup>1</sup> HL Deb 8 November 2011 col 127

*Conditions and tests in the Act*

6. These powers are subject to other provisions of the 2011 Act. Section 7 states that in certain cases functions must continue to be exercised independently of Ministers after modification or transfer<sup>2</sup>. It also stipulates that provision made by the order must be proportionate. Under section 8 a Minister may make an order only if he considers that the order “serves the purpose of improving the exercise of public functions, having regard to—
- (a) efficiency,
  - (b) effectiveness,
  - (c) economy, and
  - (d) securing appropriate accountability to Ministers”;
- and only if he considers that the order:
- (i) will improve the exercise of public functions; and
  - (ii) does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.
7. Section 9 deals with devolved matters and the requirement for consent from the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales, as appropriate. Section 10 places consultation requirements on the Minister before making an Order.

**Parliamentary scrutiny arrangements***An overview*

8. Section 11 sets out the new Parliamentary scrutiny arrangements: this section was inserted by amendment during Committee stage in the Lords and followed considerable criticism of the Bill as introduced, including from the Delegated Powers and Regulatory Reform Committee<sup>3</sup> and the Select Committee on the Constitution<sup>4</sup>. In short, the arrangements allow for an enhanced scrutiny procedure to apply if triggered by the Committee charged with reporting on public bodies orders (the Merits Committee) or by the House itself. This report sets out how the Merits Committee will approach its new role in considering public bodies orders and recommending which orders should be subject to the enhanced procedure.
9. Under the Act, each public bodies order is laid before the House in draft. The draft order must be accompanied by an accompanying Explanatory Document (ED), and cannot be laid unless a minimum period of 12 weeks has elapsed since the day on which the consultation period on the order began<sup>5</sup>. Once laid, the order initially proceeds as a draft affirmative

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<sup>2</sup> These cases are: (a) where the function is judicial, (b) where the function’s exercise involves enforcement activities in relation to obligations imposed by the Minister and (c) where the function’s exercise otherwise constitutes the exercise of oversight or scrutiny of the actions of a Minister

<sup>3</sup> Delegated Powers and Regulatory Reform Committee, 2010-12, 5th Report (HL Paper 57), 6th Report (HL Paper 62) and 11th Report (HL Paper 108)

<sup>4</sup> Constitution Committee 2010-12, 6th Report (HL Paper 51)

<sup>5</sup> Section 11 (2) sets out the information that the ED must contain. For the purposes of the Act it is immaterial whether the consultation was carried out before or after the commencement of the consultation provisions (section 10(3)).

instrument which simply requires it to lay before the House for 40 days before the Government can propose a motion to approve it. But during the first 30 days, the House can decide that the enhanced affirmative procedure should apply<sup>6</sup>. This decision can be triggered in one of two ways: by a recommendation of the Merits Committee or by resolution of the House.

10. Under the 2011 Act, there are two key enhancements to the scrutiny arrangements. First, the time given to the House to complete its scrutiny is extended from 40 days to 60 days. Second, during that extended 60 day period the Merits Committee can make recommendations, or the House can make resolutions, on the draft order; and the Minister has a statutory duty to have regard to these recommendations.
11. The scrutiny arrangements apply across both Houses, and have the effect that if one House triggers the enhanced affirmative procedure, that decision then applies across both Houses. So, for example, if the Merits Committee decides to trigger the enhanced affirmative procedure, that applies also in the Commons regardless of any decision there, and *vice versa*. The statutory requirement for the Minister to have regard to any recommendations or resolutions applies equally to recommendations or resolutions made by the Commons.
12. Once the enhanced scrutiny 60 day period is completed the Minister has a choice. He can either submit the order in its original form for approval by a resolution of each House of Parliament. Or if the Minister wishes to make material changes, he can lay a revised draft order before both Houses with an accompanying statement summarising the changes proposed. In either event, he is under a statutory duty “to have regard to” any recommendations or resolutions made in either House. A revised draft order will be subject to approval by resolution by both Houses but no further scrutiny period applies before a motion to approve the revised draft order can be put before the House. However, the House has agreed that the Merits Committee will have the opportunity to scrutinise any material changes made in the revised draft order<sup>7</sup>.

#### Merits Committee approach to scrutiny

13. We welcome the additional role the House has given us to scrutinise these public bodies orders. The Merits Committee has well-established systems for the scrutiny of statutory instruments and we shall use the experience and expertise developed over 8 years in carrying out scrutiny of these orders. To meet the new statutory procedures set out in the 2011 Act we shall differ in certain respects from our routine approach to the scrutiny of instruments and we have drawn on the experience of the Delegated Powers and Regulatory Reform Committee’s scrutiny of Legislative Reform Orders (LROs) which share some characteristics of public bodies orders, in particular the requirement to satisfy certain tests set out in the Act (set out in paragraph 6).

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<sup>6</sup> For the purposes of calculating 30 day, 40 day and 60 day periods under the Act, no account is taken of any time when Parliament is dissolved or prorogued or when either House is adjourned for more than 4 days

<sup>7</sup> Procedure Committee 2010-12, 7th Report (HL Paper 206) paragraph 19

*What we will consider*

14. We intend to report to the House on each public bodies order, whether or not we recommend triggering the enhanced scrutiny procedure. For each order, we shall report on the statutory tests for the draft order set out in section 8 of the 2011 Act. We will also report on whether the statutory consultation requirements in sections 10 and 11(3) have been met. And we shall consider a number of other factors including:

- the effectiveness of the consultation;
- the nature and outcome of debates during the passage of the Bill; and how the instrument takes account of any Ministerial commitments made during debate;
- Member, public or media interest in the draft order; and
- the broad content of any submissions received at the initial stage.

We shall then recommend whether or not to trigger the enhanced procedure.

*Why trigger the enhanced procedure?*

15. While it is not possible in advance to set out the precise circumstances under which we shall recommend the enhanced scrutiny procedure, the following factors will be influential:

- if consideration of those factors outlined in paragraph 15 above results in the Committee wishing to make recommendations about all or part of the instrument, we shall need to trigger the enhanced procedure so that the statutory requirement in the 2011 Act for the Minister to “have regard to” recommendations has effect,
- If the Committee wants to seek further information or to take evidence, either written or oral (or both) including from the Minister proposing the draft order, we may need to trigger the enhanced procedure to allow sufficient time for this whether or not we subsequently make recommendations about the instrument.

*Timing*

16. In line with our approach to consideration of all other statutory instruments, we shall aim to consider each draft order within 15 days of it being laid before Parliament; and to produce an initial report to the House shortly thereafter. There may be occasions where we wish to consider a draft order further before our initial report – for example, to seek further information from the relevant Government department – in which case we may hold it over for an additional week. In any event, we shall make our initial report to the House on a draft order as early as possible within the 30 day initial scrutiny period leaving time for the House (if necessary) to consider any resolution tabled before the initial 30 day scrutiny period expires.

*Further report*

17. Having recommended the enhanced procedure and considered the matters set out in paragraph 15 together with any evidence received, we would envisage making a second report to the House within the 60 day period.

This second report is also the Committee's opportunity to take account of further information and evidence from the relevant Department and to make recommendations on the draft order. This is a significant role for the Committee, not least because it allows the Committee to recommend that amendments be made to a draft order. We hope our reports will inform the eventual debate on the order in the House.

*Other aspects of the scrutiny process*

18. While the key scrutiny role in the House of Lords has been given to the Merits Committee, it may be helpful to set out the full picture of the other parts of the scrutiny process. The Joint Committee on Statutory Instruments (JCSI) will undertake scrutiny of draft public bodies orders (and any revised draft orders) as part of its normal process of considering whether the legal drafting of instruments is correct. Where available and relevant, we shall take reports of the JCSI into consideration when considering draft orders.
19. The Act also gives the House as a whole a role in the scrutiny process which mirrors the Committee's role: the House as a whole can trigger the enhanced scrutiny procedure by passing a resolution; and the House as a whole can pass resolutions on a particular order which the Minister must take into account under the enhanced procedure. We would expect to make either our initial report or any second report as early as possible within the 30 day or 60 day scrutiny period respectively to allow any Member of the House either to come to a different view and override a Merits Committee recommendation on the appropriate procedure, or to allow the House to make additional resolutions on the draft order.
20. Finally, the arrangements apply across both Houses and the Commons will carry out a similar scrutiny role. In the Commons, the scrutiny role for each draft public bodies order will be given either to the relevant departmental select committees or to the Public Administration Select Committee<sup>8</sup>, with whom we expect to collaborate.

**What happens once the scrutiny period has expired**

21. Once the 40 day or 60 day scrutiny period has expired, the Minister can proceed with the draft order as originally laid and seek the approval of both Houses. At this stage the Minister would be expected, where necessary, to explain how regard has been had to any representations, resolutions of either House or recommendations of the committee charged with reporting on the draft order. That explanation would either be given at the despatch box during the debate on the draft order, or by means of a Written Ministerial Statement laid prior to the debate. Alternatively, after the end of the 60 day period, the Minister can lay a revised draft order along with an accompanying statement summarising the changes proposed, which would be subject to scrutiny by the Merits Committee and JCSI before being put to the House for approval.

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<sup>8</sup> House of Commons Votes and Proceedings: 19 January 2012

### Keeping track of progress and taking part

22. When a public bodies order is laid before Parliament, its progress will be listed in the House of Lords Business document. Information on the progress of scrutiny of each order will also be available on the Merits Committee website at [www.parliament.uk/merits](http://www.parliament.uk/merits). The draft orders and explanatory documents are published by the Government and can be found at [www.legislation.gov.uk](http://www.legislation.gov.uk).
23. We welcome views and comments on draft public bodies orders under consideration. Any views or comments received will be taken into account as part of our scrutiny exercise and may be published. Our website gives details of how to send us your views or you can contact the Committee secretariat by email at [merits@parliament.uk](mailto:merits@parliament.uk).

## APPENDIX 1: INTERESTS

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

For the meeting on 24 January 2012 Members declared no interests.

### *Attendance:*

The meeting was attended by Baroness Butler-Sloss, Lord Eames, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Norton of Louth and Lord Scott of Foscote.