

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

22nd Report of Session 2013-14

Special Report

**Public Bodies Act 2011:
Two Years On**

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*Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)**Historical Note*

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012-3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
 - (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 secondary legislation 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

Lord Richard	Baroness Hamwee	Lord Plant of Highfield
Lord Blackwell	Lord Methuen	Rt Hon. Lord Scott of Foscote
Lord Eames	Rt Hon. Baroness Morris of Yardley	Lord Woolmer of Leeds
Rt Hon. Lord Goodlad (<i>Chairman</i>)	Lord Norton of Louth	

Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee’s Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee’s work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@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.

Twenty Second Report

SPECIAL REPORT: PUBLIC BODIES ACT 2011: TWO YEARS ON

Introduction

1. In December 2012, the Committee made a report (the “First Report”) to the House on the first year of operation of the Public Bodies Act 2011 (the 2011 Act).¹ In this report, we review the second year. We do this in part because the 2011 Act is time-limited to lapse after five years, so we need to monitor progress in order to manage our scrutiny workload. Another element of the report is to offer our observations on how well the policy objectives of the 2011 Act are being achieved and how the Public Bodies Orders (PBOs) format is operating in practice.

Progress

2. The 2011 Act, which received Royal Assent on 14 December 2011, gives Ministers the power, by order, to abolish, merge or modify 285 bodies and offices listed in Schedules 1 to 5 to the Act. The Government originally envisaged that 58 PBOs would be needed. That number has increased to 60 because, in our First Report, we treated two “omnibus” Orders, each abolishing two unconnected bodies, as four separate items, reflecting the fact that each proposal had to be scrutinised in its own right.² The revised Cabinet Office figure indicates that further planned omnibus Orders will now be presented as individual items.
3. The table below shows the Government’s assessment of the progress of PBOs as at the end of November 2013. By the end of the first year, 17 draft PBOs (relating to 37 public bodies) had been laid before Parliament; in the second year, a further six (relating to eight public bodies) were laid.

¹ “Public Bodies Act 2011 : One Year On”: 19th report of Session 2012-13 (H Paper 90)

² They were the Public Bodies (Abolition of Her Majesty’s Inspectorate of Courts Administration and the Public Guardian Board) Order 2012 and the Public Bodies (Abolition of Crown Court Rule Committee and Magistrates’ Courts Rule Committee) Order 2012.

Table to show progress under the Public Bodies Act 2011

(Source: Cabinet Office to end November 2013)

	1	2	3	4	5	6	
	Number of Orders laid as at Nov 2013	Orders to be laid by Dec recess	Reform resolved via Alternative Legislative Vehicle (ALV) or Voluntary means	Reform awaiting suitable ALV; via voluntary or other means	Policy and/or vehicle under consideration	Remaining Orders	TOTAL
Orders	23	3	4	6	8	16	60
Bodies	45	5	33	177	8	17	285

4. So far, progress seems reasonable in that the 23 Orders laid to date represent just under 40% of the total envisaged after 40% of the time available has elapsed. However, the table indicates that this progress will not be sustained: although three further PBOs are scheduled to be laid before the end of 2013 and a further 16 before the end of March 2015, the remaining changes will be made by other means. On that basis, we deduce that a maximum of 42 Orders will be laid, or 70% of the number planned.

Bodies dealt with by other means

5. Nearly a third (18) of the reforms originally planned to have been made by PBO will now be taken forward using either an alternative legislative mechanism or a voluntary agreement. Columns 3-6 in the table above show the status of these "Orders". The bodies concerned and the revised approach are listed in Appendix 1.
6. The list includes a number of bodies originally scheduled for abolition in the 2011 Act which are now to be retained (for example the Disabled Persons Transport Advisory Committee). The most high-profile of these revisions relates to two health bodies: the Human Fertilisation and Embryology Authority (HFEA) and the Human Tissue Authority (HTA). Both bodies were originally due to be abolished by October 2014 and their functions transferred to other existing bodies. Following a consultation at the end of 2012, in which over 75% of respondents were strongly opposed to abolition, Cabinet Office Ministers agreed that the Department of Health could retain these bodies subject to an independent review being undertaken to identify potential efficiencies.³

³ An independent review was undertaken by Justin McCracken and reported in April 2013, making 18 recommendations to improve the efficiency, transparency and accountability of the work carried out by HTA and HFEA. The Government response, published in July 2013, accepted all these recommendations. The two bodies will be subject to Triennial Reviews in the next cycle of the programme which runs from 2014-15 to 2016-17.

7. That so large a proportion of the original proposals for PBOs are either not being pursued at all or pursued by a different mechanism leads us to question whether the Government had undertaken sufficient consultation with relevant parties before deciding to include them in the Act. Several of these proposals, in particular the proposed abolition of the HFEA and HTA, were extensively debated by the House and pressed to several votes. **That a third of the proposals have been dropped within two years of the 2011 Act receiving Royal Assent may be seen as a significant waste of Parliamentary time: better consultation prior to legislating might have avoided this.**

Generic concerns

8. In our First Report, we identified a number of generic concerns:
- The robustness of the Government's case for individual orders;
 - The evidence provided to show that the statutory tests in the 2011 Act have been met;
 - The Government's approach to consultation and ongoing engagement with stakeholders; and
 - The arrangements that the Government have put in place to ensure the future monitoring of reforms and in some cases continued assurances to Parliament.
9. In response,⁴ the Minister, the Rt Hon. Francis Maude MP, said that systems had been put in place to ensure that the Explanatory Documents provided with PBOs were more robust and consistent. For the majority of the seven Orders scrutinised in the last 12 months, we would say that this has been successful. However, in two instances, there were surprising difficulties.
10. In these two cases, the Explanatory Document provided by the department failed to follow the "checklist" of tests set out in the 2011 Act:
- in relation to the abolition of the Administrative Justice and Tribunals Council (the AJTC Order), the Ministry of Justice (MOJ) did not appear to have met the requirement in section 10(1)(a) of the Act to consult the body proposed for abolition until after the decision to abolish the organisation had been made;
 - in the Office of Fair Trading Transfer of Consumer Advice Scheme Function Order, the Explanatory Document was silent on the consideration of economy, required by section 8(1)(c) of the 2011 Act.

In both cases, we corresponded with the responsible Minister who reassured us that these points had been carefully considered. The House accepted those assurances.

⁴ "Public Bodies Orders – One Year On: Government Response" 31st Report of Session 2012-13 (HL Paper 137).

Box 1: the statutory tests

A public bodies order can only be made if the Minister 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.

The order does not remove any necessary protection.

The order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

Particular difficulties with the AJTC Order

11. There were further difficulties about the quality of evidence provided with the AJTC Order. The Committee found the initial Explanatory Document unclear and recommended that the MOJ should provide a “map” setting out the future monitoring arrangements for each of the organisations then under the aegis of the AJTC. This was to allow the House to satisfy itself that the Order did not remove any necessary protections under section 8(2)(a) of the 2011 Act. The MOJ’s response, published in our 32nd Report, showed that MOJ planned to roll out the new arrangements as part of a three-year “Strategic Work Programme”. Consideration of the Strategic Work Programme lead us to believe that some smaller organisations might be left out, a belief reinforced by the oversight arrangements for eight organisations being left completely blank in MOJ’s response. The Minister later explained that the information for those eight organisations was incorrect due to a formatting error.
12. We continued to have wider questions about the extended transition into the new oversight arrangements and, as a result, the Committee invited the Minister to give oral evidence. The session was not as helpful as we had hoped it would be. Written responses were subsequently provided;⁵ and just prior to the Lords’ debate on the Order the Minister wrote again stating that she had considered the points raised by the Committee and intended to amend the constitution of the proposed Advisory Group to appoint an independent Chairman.⁶ This was an extraordinary series of events which we hope not to see repeated.

Orders in the Second Year

13. As anticipated, the second tranche of PBOs has included some that were controversial. In the case of the AJTC Order, the controversy focused on the degree of independence required when commenting on the efficiency of the administrative justice system. In the merger of Gambling and Lottery Commissions, the contention was around the handling of potential conflicts of

⁵ In a letter published in Appendix 1 to our 2nd Report of session 2013-14 (HL Paper 8).

⁶ 7th Report Session 2013-14 (HL Paper 36).

interest when certain functions were brought together in one organisation. Both of these Orders demonstrate that a department's explanation of a proposal needs to look beyond the immediate savings to be made from reducing administration and also provide reassurance of how functions will operate in the new set-up.

14. Of the seven PBOs considered in the last 12 months, three have proceeded under the 40-day affirmative procedure without substantial comment. The Committee has on average reported to the House within nine sitting days from the date the order was laid, although several have been laid just before a recess and so the actual time spent has been rather longer. The 60-day enhanced affirmative procedure has been triggered four times. In each case, either this Committee or the relevant Commons Committee has not been satisfied by the Explanatory Document that one or more of the tests set out in the 2011 Act have been met. We have only once called a Minister to give oral evidence (in relation to the AJTC Order).

Effectiveness of the Public Bodies Order format

Savings

15. Given the emphasis that the Government placed on the financial savings to be made from public bodies reform, we have sought to ensure that the explanatory material clearly states the Government's expectations of the savings to be achieved from each Order, offset by any costs (such as redundancies).
16. In our First Report, we recommended that the Government provide a statement of the net savings arising from all the Orders laid under the 2011 Act in the first year. This figure, £29.6 million, was provided in the Government response to our report. The Cabinet Office also assures us that the calculations of costs and benefits given in the Explanatory Documents to the PBOs laid in the second year have been made on a more consistent basis. However, although Appendix 1 gives an estimate of savings for each Order laid so far, the Cabinet Office was unable to provide an updated cumulative total for the end of the second year. We were told:

“The Committee has asked for an aggregate figure for net administrative reductions from orders laid under the Public Bodies Act to date. Cabinet Office has recently completed an exercise with departments to update the administrative reductions and costs of reform and we are in the process of finalising this work. It is our intention to provide the Committee with this information once the verification process is complete.”

Improving the exercise of public functions

17. We have also sought to ensure that, where functions of a body are taken over by another, there is continuity in the publication of statistics and other financial information so that the House will have the means to evaluate, in due course, whether the change effected by the Order has improved the exercise of public functions, as required by the 2011 Act.
18. While some departments appear to have had no trouble in presenting an evidence-based argument for their proposal, others have struggled with the tests set out in the 2011 Act. A number of departments, for example, have chosen to address efficiency and economy together in their Explanatory

Documents because they have found it difficult to isolate the interdependent effects of reducing administration.

19. The Government were not given an unfettered power to reform the organisations included in the 2011 Act. The statutory tests require a rigorous examination of the costs and benefits of these reform proposals. With respect to each Order, the Committee has scrutinised the Government's explanation carefully, pressing departments to provide evidence to back up assertions that the tests have been met. For some Orders this appears to have been easily accomplished (for example, the abolition of the British Railway Residuary Board or the Registrar of Public Lending Right). For others, compliance has proved surprisingly difficult, with one Department overlooking the need to include evidence on economy at all.
20. We believe that the detailed requirements set out in the 2011 Act provide an effective safeguard in ensuring the proper use of the order-making power. Comments made during debates on PBOs support the view that the role of the scrutiny Committees in each House, examining the Order in detail before the debates take place, has been necessary to ensure that the safeguards set down by the House have been properly respected.
21. What constitutes the appropriate procedure and level of safeguards is particularly relevant at the moment, as there are, for example, proposals for new order-making powers in the Draft Deregulation Bill currently being subjected to pre-legislative scrutiny by a Joint Committee. Our experience of how the tests in the 2011 Act have been applied in practice may prove informative to those seeking to find the right balance between accountability and freedom of action in the controls to be applied to future forms of delegated legislation.

Our recommendations

22. With the exceptions mentioned above, the standard of supporting evidence for these Orders has been much better in the second year. **For the Orders yet to come we would simply repeat our earlier recommendations:**
 - **The 2011 Act sets out the statutory tests the Minister must meet before making an order, they must all be addressed. The responsibility lies with the Minister to put a convincing case to Parliament (where possible with evidence) on how the proposal complies with the Act's requirements; it is not sufficient for the Explanatory Document simply to assert that the tests have been met;**
 - **Where the body is still functional the Committee expects to see that there has been adequate consultation both with the body itself and its constituency, with an effective solution proposed to any concerns raised by the consultation;**
 - **Where the Order merges existing functions into another organisation, to satisfy the tests in section 8(2) of the 2011 Act the Government need to explain how they will operate in the new regime and how Parliament will be able to monitor future performance of those functions.**
23. **As soon as possible the Cabinet Office should publish an aggregate figure for net savings from orders laid under the Public Bodies Act to date. It should also be prepared to provide a similar aggregate figure for Orders laid in year 3 before the end of November 2014.**

APPENDIX 1: USE OF PUBLIC BODIES ACT AND ESTIMATED SAVINGS FROM PBA AS REPORTED BY DEPARTMENTS AS AT NOVEMBER 2013 (SOURCE: CABINET OFFICE)

Public Body	Orders Under the Public Bodies Reform Act 47 orders scheduled for reform 2011 - 2013 *3 additional orders brought forward	Proposed Reform	Progress update as at November 2013	Forecast savings as reported by Departments in Explanatory Document (£m)
BIS	Aircraft and Shipbuilding Industries Arbitration Tribunal	No longer an NDPB	Already laid	£0.00
BIS	British Shipbuilders	No longer a Public Corporation	Already laid	£15k per annum
BIS	Office of Fair Trading	Transfer of consumer and enforcement and information/education functions (followed by a merger of competition functions with the competition commission)	Already laid	£0.00
BIS	NESTA	No longer an NDPB	Already laid	£1.84m over 10 years
Culture, Media and Sport (DCMS)	Ofcom	Several Ofcom duties remain to be removed or modified (Merger with Postcomm completed in October 2011)	Already laid	£165k - 240k per annum
DCMS	Gambling Commission National Lottery Commission	Merge	Already laid	£1.033m per annum
DCMS	Registrar of Public Lending Right	No longer an NDPB	Already laid	£1.36m over 10 years
Environment, Food and Rural Affairs (DEFRA)	Advisory Committee on Hazardous Substances	No longer an NDPB	Already laid	£0.00
DEFRA	Drinking Water Inspectorate	-	Already laid	£0.00

DEFRA	British Waterways Board	No longer a Public Corporation	Already laid	£0.00
DEFRA	Commission for Rural Communities	No longer an NDPB	Already laid	£17m over SR
DEFRA	Environment Protection Advisory Committee	-	Already laid	£192k per annum
DEFRA	Regional and Local Fisheries Advisory Committees	-	Already laid	£225k per annum
DEFRA	Inland Waterways Advisory Council	No longer an NDPB	Already laid	£0.00
DfT	Railway Heritage Committee	No longer an NDPB	Already laid	£100k per annum
DfT	BRB (Residuary) Ltd	No longer a statutory body	Already laid	£3m over 2 years
Dept for Work and Pensions (DWP)	Child Maintenance and Enforcement Commission	No longer an NDPB	Already laid	£500k per annum
DWP	Disability Living Allowance / Advisory Board	No longer an NDPB	Already laid	£5k per year
Ministry of Justice (MoJ)	Administrative Justice and Tribunal Council	No longer a statutory body	Already laid	£1.4m 2012 - 2015
MoJ	Courts Boards (x 19)	No longer an NDPB	Already laid	£450k per annum
MoJ	HM Inspectorate of Court Administration Public Guardian Board	No longer a statutory body	Already laid	£6.8m over SR
MoJ	Magistrates' Courts Rule Committee Crown Court Rule Committee	No longer a statutory body	Already laid	£0.00
MoJ	Victims' Advisory Panel	No longer a statutory body	Already laid	£50k per annum
BIS	Competition Service	No longer a statutory body	To be Laid by recess	
DEFRA	Committee on Agricultural Valuation	No longer a statutory body	To be Laid by recess	
MoJ	Director of Public Prosecutions Director of Revenue and Customs Prosecutions	Merge	To be Laid by recess	Brought forward from October 2014

DCMS	The Theatres Trust	Retain and substantially reform	Policy by other Means	Scope of reform widened to abolish body and transfer statutory functions. Suitable primary legislation under consideration
DCMS	S4C	Retain	Policy by other Means	Modification of constitutional arrangements completed by Voluntary Agreement
DEFRA	Environment Agency	Retain and substantially reform	Policy by other Means	Further reforms and suitable primary legislation under consideration
DEFRA	Joint Nature Conservation Committee	Retain	Policy by other Means	Further reforms and suitable primary legislation under consideration
DEFRA	Marine Management Organisation	Retain	Policy by other Means	Modification to charging powers and suitable primary legislation under consideration
DEFRA	Agricultural Dwelling House Advisory Committees (x16)	No longer a statutory body	Policy by other Means	Abolition of body by Enterprise and Regulatory Reform Act 2013
DEFRA	Agricultural Wages Board for England and Wales	No longer a statutory body	Policy by other Means	Abolition of body by Enterprise and Regulatory Reform Act 2013
DEFRA	Agricultural Wages Committees (x15)	No longer a statutory body	Policy by other Means	Abolition of body by Enterprise and Regulatory Reform Act 2013

DEFRA	Broads Authority	Modify constitutional arrangements	Policy by other Means	Scope of reform widened to introduce direct elections. Suitable primary legislation under consideration
DEFRA	National Park Authorities (x9)	Modify constitutional arrangements	Policy by other Means	Scope of reform widened to introduce direct elections to Broads Authority. Suitable primary legislation under consideration
DEFRA	Internal Drainage Boards (x164)	modify constitutional arrangements	Policy by other Means	IDB = 164 bodies at Royal Assent, current count is 107 bodies due to mergers – Exploring modification of constitutional arrangements by Voluntary Agreement
DEFRA	Natural England	modify funding arrangements	Policy by other Means	Introduction to charging may now be possible without need for an order but options under consideration
DfT	Passenger Focus/Passengers' Council	Retain and substantially reform	Policy by other Means	Modification of constitutional arrangements completed by Voluntary Agreement

DoH	Human Fertilisation and Embryology Authority	Modify or transfer functions	Policy by other Means	Brought forward from October 2014, Recommendations from Independent Review and suitable primary legislation under consideration
DoH	Human Tissue Authority	Modify or transfer functions	Policy by other Means	Brought forward from October 2014. Recommendations from Independent Review and suitable primary legislation under consideration
Home Office (HO/GEO)	Commission for Equality and Human Rights	Retain and substantially reform	Policy by other Means	Modification of Constitutional Arrangements; funding and transfer of functions by the Enterprise and Regulatory Reform Act 2012
DEFRA	Advisory Committee on Pesticides	No longer an NDPB	Scheduled to be laid 2014/2015	
DEFRA	Home Grown Timber Advisory Committee	-	Scheduled to be laid 2014/2015	
DCMS	Horserace betting Levy Board	Retain	Scheduled to be laid 2014/2015	
DCMS	Sports Grounds Safety Authority (previously FLA)	No longer an NDPB	Scheduled to be laid 2014/2015	
MoJ	Advisory Council on Public Records Advisory Council on National Records and Archives	Merge	Scheduled to be laid 2014/2015	

APPENDIX 2: INTERESTS AND ATTENDANCE

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 Parliamentary Archives.

For the business taken at the meeting on 10 December 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Blackwell, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Methuen, Lord Norton of Louth, Lord Plant of Highfield and Lord Scott of Foscote.