Public Bodies Bill

Briefing for Public Bill Committee
House of Commons

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE outlined its serious concerns regarding the Public Bodies Bill when it was introduced in the House of Lords, in particular that the Bill created broad 'Henry VIII' clauses which would allow ministers to amend primary legislation and create criminal offences without sufficient scrutiny, and that it allowed ministerial abolition of and interference with public bodies whose independence is vital for the protection of human rights and the maintenance of the integrity of the legal system. We stated our belief at that stage that the Bill, in its entirety, should not be passed.

3. We welcomed the amendments made to the Bill at House of Lords Committee stage, in particular the removal of Schedule 7 to the Bill, and the insertion of restrictions on ministerial powers in what is now clause 7.

4. However, we remain seriously concerned that these amendments are insufficient to address the danger posed by this Bill to our constitutional arrangements, and that in particular Ministers still may by means of this Bill abolish, interfere with and compromise the independence of bodies with judicial/quasi-judicial or oversight functions and those tasked with promoting, protecting and enforcing human rights.

5. In particular, we **oppose the continued inclusion of the Equality and Human Rights Commission (EHRC) in the Bill**. We append to this briefing our response to the Government Equalities Office consultation on the reform of the EHRC; we strongly oppose the planned reforms on the grounds that they would breach the UK's obligations under international human rights law, including Article 1 European Convention on Human Rights and the UN Paris Principles on National Human Rights Institutions; diminish the EHRC's role as a UN-accredited National Human Rights Institution; and be likely to undermine the independence of the EHRC.

6. **We therefore continue to believe that this Bill should not be passed.** We further **oppose the potential reinstatement of the Office of the Chief Coroner into the Bill**. At Second Reading the Minister stated that 'the office of chief coroner will be

brought into existence':[1] we await government amendments at Committee Stage to assess whether essential aspects of the office will indeed be retained but our primary position remains that the Chief Coroner should be excluded from this Bill. We also have concerns about the arrangements for youth justice that will replace the **Youth Justice Board** if it is reinserted into the Bill.

Abolishing, merging and reforming public bodies by ministerial order

7. Clauses 1 to 6 of the Bill create powers for ministers to abolish, merge, modify the constitutional or funding arrangements or functions, transfer the functions or authorise delegation of the functions of a number of public bodies scheduled to the Bill in Schedules 1-5. We will go on to discuss the adequacy of the safeguards inserted into the Bill at House of Lords Committee stage, but the existence of these powers per se is, we believe, contrary to constitutional principle and open to abuse. The use of so-called 'Henry VIII' clauses (ie granting powers to ministers to amend primary legislation by order), as noted by the Lord Chief Justice in a speech earlier this year, has become increasingly common; we agree with him that:[2]

> *proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature.*

7. Where a public body has been created by Parliament in primary legislation it is, we believe, essential that its abolition, merger, and changes to its structure, functions and funding arrangements are also included in statute, and can be properly debated by Parliament and amended at Parliament's discretion. The procedure laid down in clauses 10 and 11 of the Bill for the making of an order under clauses 1-6 does contain provision for both consultation and Parliamentary scrutiny. However, the ability to amend orders is confined to the Minister under clause 11(8). Parliament may refuse to pass the order in its original form but may not specify the amendments which are to be included. Further, the opportunity for Parliamentarians to debate the proposals will not be equivalent to that for a government Bill, where several stages in each House offer the opportunity to debate, amend and insert provisions.

[1] *Hansard*, HC Debates, 12 July 2011, col 214.

[2] The Rt Hon the Lord Judge, Lord Mayor's Dinner for the Judiciary, The Mansion House Speech, 13 July 2010.

8. Further, while we would expect changes under primary legislation to public bodies to follow a public consultation exercise, the consultation requirements under clause 10 are very limited and contain no obligation to make the exercise public. The opportunity for democratic participation is therefore limited.

9. Now that the number of public bodies annexed to the Bill in Schedules has been reduced substantially, there is an even stronger case for abandoning this Bill and accomplishing any appropriate changes to public bodies through primary legislation. In addition to the higher level of scrutiny this would also have the merit of being specific, rather than creating perpetual and wide-ranging powers to threaten the independence and indeed existence of non-departmental public bodies (NDPBs) at any time in the future.

10. Being included in the schedules to this Bill will, we believe, act to compromise the independence of NDPBs who will who know that Ministers can act to abolish or amend them by order. This is of particular significance where a body is charged with judicial/quasi-judicial functions, the promotion, protection or enforcement of human rights, or oversight of/comment upon ministerial actions. We deal in detail with the case of the Equality and Human Rights Commission below. However, the Commission is not the only body in the Schedules whose inclusion gives rise to particular concern: S4C, for example, must be able to broadcast freely on matters of political interest without fear of consequences for its funding arrangements. We also list at the end of this briefing other bodies whose role in the administration of justice and/or human rights compliance means that they should be removed from the Bill if it continues to go through Parliament.

11. We welcome the inclusion in the Bill of clause 7 (restrictions on ministerial powers) but it cannot meet the concerns outlined in the previous paragraph. In particular, clause 16(1) provides that (emphasis added): '[t]he modification or transfer or a function by an order under the preceding provisions of this Act must not prevent it (*to the extent that it continues to be exercisable*) from being exercised independently of Ministers…'. The clause then goes on to outline the functions to which it applies, which include judicial functions, and enforcement/oversight/scrutiny activities related to the work of a Minister. Therefore, the clause would prevent a Minister from transferring such functions to him/herself or someone not independent of him/her. It would not, however, prevent him/her from abolishing such functions altogether. This is of particular concern with regard to the Equality and Human Rights Commission.

12. We are also concerned that the Bill authorises the creation of offences by ministerial order punishable by up to two years' imprisonment (clause 23). Except in very limited contexts (eg industry-specific regulatory offences) criminal offences should only be created in primary legislation, as it is particularly important that they are carefully scrutinised by Parliament and the public.

13. We therefore believe that the Bill should not be passed in Public Bill Committee. We deal specifically with the inclusion of the EHRC in the Bill and the potential reinclusion of the Youth Justice Board (YJB) and Office of the Chief Coroner below.

Equality and Human Rights Commission

14. The maintenance of the EHRC, as the UK's national human rights institution, is an important part of the UK's compliance with its international human rights obligations including Article 1 of the European Convention on Human Rights, which requires states parties to secure to everyone within their jurisdiction the Convention rights and freedoms. The internationally recognised standards for national human rights institutions are laid out in the Paris Principles[3] which set out the requirements for independence:

> *The composition of the national institution and the appointment of its members…shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights…*
>
> *…*
>
> *The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.*

[3] Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.

15. The EHRC has important functions which include holding formal inquiries or seeking judicial review to secure compliance with the Human Rights Act, and enforcing equalities duties through inquiries, investigations and litigation. It is axiomatic that the Commission must be independent of government in appearance and in fact properly to carry out these functions; ministers should not be able to abolish or merge it or make changes to its composition, governance, functions or funding arrangements. Nor should it be included in a list of bodies to whom such changes might be made in future if secondary legislation is passed. The inclusion of the EHRC in Schedules 3, 4, and 5 substantially compromises its independence; if the Bill continues to go through Parliament, therefore, the EHRC should be removed from all Schedules.

16. Further, the planned reforms of the EHRC outlined in the Government Equalities Office consultation *Building a Fairer Britain: Reform of the Equality and Human Rights Commission* (March 2011) would be likely further to compromise its independence, prevent it fulfilling its role as a national human rights institution, in particular in relation to the promotion of human rights, and would breach the UK's obligations under international human rights law. A copy of JUSTICE's response to the consultation paper is appended to this briefing. We therefore suggest amendments below that would remove the EHRC from Schedules 3, 4 and 5 to the Bill.

Amendments

Page 20 [*Schedule 3*], leave out line 27

Page 21 [*Schedule 4*], leave out line 10

Page 21 [*Schedule 5*], leave out line 24

Youth Justice Board

17. While JUSTICE has not opposed the inclusion of the Youth Justice Board (YJB) in the Bill we have some concerns about the new arrangements for youth justice provision following its anticipated abolition.

18. While the YJB's record in securing the rights of children has been mixed, its existence has at least gone some way to secure the obligation in Article 41(3) UN Convention on the Rights of the Child to 'seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law'. We further welcome, in this regard, the substantial reduction during the YJB's tenure in the use of shared-site YOIs where young adults are imprisoned on the same site as children.[4] We seek assurance that youth justice functions undertaken by the YJB will remain distinct from those for adults and that there will be no increase in shared-site placements.

19. We also believe that the multi-disciplinary expertise of the YJB's Board Members and externally recruited staff is valuable and would welcome assurance that such expertise will continue to inform youth justice provision inside the Ministry of Justice. This is of particular importance since the previous Joint Youth Justice Unit incorporating staff from what is now the Department for Education is no longer operative. It is of particular importance that youth justice is not viewed in isolation from other policy and practice regarding children, in order that: multiple needs of children in the youth justice system can be addressed appropriately, through service provision and where appropriate, diversion; prevention services are fully informed as to best practice outside the criminal justice system; and the role of other services and government departments/local government in reducing offending and reoffending by children and young people is properly recognised. We would welcome assurance from government that appropriate expertise and liaison will operate in the new youth justice arrangements.

Office of the Chief Coroner

20. The creation of a Chief Coroner for England and Wales was recommended by the Luce Review[5] in 2003 as central to the new structure proposed. The Coroners and

[4] Now 10% of YOI places; in 2000 the figure was 71% (YJB response to MoJ Consultation on the Public Bodies Bill, p14).

[5] *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003*, Cm 5831, June 2003.

Justice Act 2009 gave effect to the recommendations that the Chief Coroner should have standard-setting, case allocation and appellate functions. This would, we believe, be instrumental in tackling delay in the system and improving accountability, consistency, and standards for bereaved families. Further, we believe that the Chief Coroner for England and Wales would be able to promote recommendations from inquests both within and outside government to ensure that proper account was taken of them.

21. We therefore believe that the office of Chief Coroner should be created at a suitably high level, with sufficient profile, resources and independence in order that these functions can be fulfilled and therefore that the Chief Coroner should not feature in the Public Bodies Bill. Failing this, we would welcome ministerial assurances on the above points.

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