



Public Bodies Bill

Briefing for Report Stage House of Lords

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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 at Second Reading, 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 welcome the amendments made to the Bill at 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 16.
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. In particular, we oppose the continued inclusion of the Commission for Equality and Human Rights in the Bill.
5. **We therefore continue to believe that the Bill should not be passed.**

Abolishing, merging and reforming public bodies by ministerial order

6. 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 1-6. We will go on to discuss the adequacy of the safeguards inserted into the Bill at 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:¹

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 clause 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.
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

¹ The Rt Hon the Lord Judge, Lord Mayor's Dinner for the Judiciary, The Mansion House Speech, 13 July 2010.

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 Commission for Equality and Human Rights 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 16 (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 Commission for Equality and Human Rights.
12. We are also concerned that the Bill authorises the creation of offences by ministerial order punishable by up to 2 years' imprisonment. 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 at Report Stage.

Commission for Equality and Human Rights

14. The maintenance of the Commission for Equality and Human Rights (CEHR), 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 Principles² 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.

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 CEHR 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 CEHR 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 CEHR in Schedules 3, 4, and 5 substantially compromises its independence; if the Bill continues to go through Parliament, therefore, the CEHR should be removed from all Schedules.

² Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

Schedules 1-7: inclusions giving rise to particular concern due to role in human rights compliance/administration of justice

16. Schedule 1

- Administrative Justice and Tribunals Council
- Courts boards
- Crown Court Rule Committee
- Her Majesty's Inspectorate of Court Administration
- Magistrates' Courts Rule Committee (established under section 144 of the Magistrates' Courts Act 1980)
- Public Guardian Board
- Youth Justice Board for England and Wales

Schedule 2

- Director of Public Prosecutions
- Director of Revenue and Customs Prosecutions

Schedule 3

- Commission for Equality and Human Rights

Schedule 4

- Commission for Equality and Human Rights

Schedule 5

- Commission for Equality and Human Rights

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