



HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2010–11

Public Bodies Bill [HL]

Report

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Declaration of Interests

Members declared the following interests relevant to scrutiny of this Bill:

Lord Hart of Chilton expects to become a Member of the House of Lords Appointments Commission.

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

Publications

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Committee Staff

The current staff of the Committee are Emily Baldock (Clerk), Stuart Stoner (Policy Analyst) and Nicola Barker (Committee Assistant)

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: constitution@parliament.uk

Public Bodies Bill [HL]

1. The Constitution Committee is appointed “to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution.” In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.
2. The Public Bodies Bill [HL] was introduced in the House of Lords on 28 October 2010; its second reading debate is scheduled for 9 November 2010. The Bill follows from the Cabinet Office review of public bodies.¹
3. The Bill grants extensive powers to Ministers to abolish, to merge, to modify the constitutional arrangements of, to modify the funding arrangements of, to modify or transfer the functions of, or to authorise delegation in respect of a very significant number and range of public bodies, as listed in the Schedules to the Bill.
4. The majority of these public bodies were created by statute (some were created by Royal Charter). Thus, the Bill vastly extends Ministers’ powers to amend primary legislation by order. Such powers are commonly referred to as ‘Henry VIII’ powers. We have several times in recent years reported on the extended use of such powers.² As we have previously acknowledged, while they may have become an established feature of the law-making process in this country, they remain a ‘constitutional oddity’.³ That is: they are pushing at the boundaries of the constitutional principle that only Parliament may amend or repeal primary legislation.
5. Where the further use of such powers is proposed in a Bill, we have argued that the powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight.⁴ **When assessing a proposal in a Bill that fresh Henry VIII powers be conferred, we have argued that the issues are ‘whether Ministers should have the power to change the statute book for the specific purposes provided for in the Bill and, if so, whether there are adequate procedural safeguards’.**⁵ In our view, the Public Bodies Bill [HL] fails both tests.

The point of principle

6. The Government has not made out the case as to why the vast range and number of statutory bodies affected by this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in Parliament. As we have said, and as is axiomatic, the ordinary constitutional position in the United Kingdom is that primary legislation is amended or repealed only by Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective. While we acknowledge that exceptions

¹ For the ministerial statement on the Cabinet Office review, see HL Deb, 14 October 2010, cols 622–33.

² See, most recently, our report on the Digital Economy Bill, 6th report of 2009–10, HL 40.

³ See our report on the Legislative and Regulatory Reform Bill, 11th report of 2005–06, HL 194, para 34.

⁴ Ibid.

⁵ Ibid, para 35.

are permitted – as in the case of fast-track legislation, for example – we have also sought to ensure that such exceptions are used only where the need for them is clearly set out and justified.⁶ As we have said, the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle. **Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.**

Safeguards and limitations

7. Under clause 10, ministerial orders to abolish, merge, or modify (etc) a public body are subject to the affirmative resolution procedure. This is a necessary procedural safeguard (and, as such, we welcome it) but of itself it is far from sufficient. Two comments may be made in this regard. First, unlike in the Legislative and Regulatory Reform Act 2006, no mention is made in the Public Bodies Bill [HL] of ‘super-affirmative resolution procedure’ (see section 18 of the 2006 Act). This procedure requires Ministers to take into account any representations, any resolution of either House, and any recommendations of a parliamentary committee, in respect of a draft order (a draft order being laid for a period of 60 days). Secondly, and again unlike in the Legislative and Regulatory Reform Act, there is in the Public Bodies Bill [HL] no requirement on Ministers to consult with interested or affected parties before an order is made. This strikes us as an unacceptable omission. Under the Legislative and Regulatory Reform Act (section 12) not only must there be consultation, but following that consultation the Minister must lay his order in draft, and it must be accompanied by an explanatory document.
8. Furthermore, the Bill as drafted appears to allow for the rolling up in a single ministerial order of changes to a number of diverse public bodies. Such bodies may even operate in unrelated policy domains. We are concerned that “omnibus orders”, covering a disparate range of institutions, pose yet more difficulties in terms of effective parliamentary scrutiny.⁷
9. We note that, under clause 8(2), an order to abolish, merge or modify (etc.) may neither ‘remove any necessary protection’ nor ‘prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise’. While we welcome these provisions, we are concerned whether they go far enough as safeguards. They are drawn from the safeguards contained in the Legislative and Regulatory Reform Act 2006, section 3(2). But it is to be noted that there are several further safeguards included in that Act which are absent from the present Bill. These include the following: that the effect of the order is proportionate to the policy objective, that the order strikes a fair balance between the public interest and interests of any person adversely affected by it, and that the order is not of constitutional significance.
10. Clause 9 limits the powers of UK Ministers in relation to devolved matters. Orders made under clauses 1–6 which contain provision that would be within the legislative competence of the Scottish Parliament, the Northern Ireland Assembly or the National Assembly for Wales require the consent respectively of Scottish Ministers, the appropriate Northern Ireland

⁶ See our report on Fast-track Legislation, 15th report of 2008–09, HL 116, especially para 186.

⁷ We have previously expressed similar concerns in the context of Welsh Legislative Competence Orders: see our 13th report of 2008–09, HL 105.

Department or the Welsh Ministers. We are concerned that it should be the consent of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales which should be obtained in these circumstances. We note that the protection afforded to the devolved institutions is considerably stronger in sections 9–11 of the Legislative and Regulatory Reform Act 2006 than that which is offered in this Bill.

11. Under clause 11 Ministers have the power to add any public body listed in Schedule 7 to the range of bodies over which the Bill confers powers to abolish, merge, modify (etc.). We note that the Bill makes no provision safeguarding the continuing independence of these bodies.

Conclusions

12. The House will recall various occasions in recent years on which Parliament has sought to resist Executive proposals for wide-ranging Henry VIII powers. In the last Parliament, both the Constitution Committee and the Delegated Powers and Regulatory Reform Committee expressed their concerns in a series of reports, most notably as regards the Legislative and Regulatory Reform Bill. In the event, that Bill was very considerably amended in the light of criticism from many sources, so reflecting and reinforcing the fundamental constitutional requirement of detailed legislative scrutiny.⁸ In our report on that Bill,⁹ we underlined the then Minister's eventual acceptance of the fact that:

“Our subject matter is sensitive, because it [is] not just about what the Government of the day might want; it also takes us into the realm of the relationship between Government and Parliament, and Parliament's proper role in the scrutiny and approval of Government proposals in this sphere”.

13. The Public Bodies Bill [HL] strikes at the very heart of our constitutional system, being a type of ‘framework’ or ‘enabling’ legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising chamber.
14. The Public Bodies Bill [HL] is concerned with the design, powers and functions of a vast range of public bodies, the creation of many of which was the product of extensive parliamentary debate and deliberation. **We fail to see why such parliamentary debate and deliberation should be denied to proposals now to abolish or to redesign such bodies.**
15. The Committee will closely monitor the progress of the Bill and may report again to the House.

⁸ For a thorough analysis, see P. Davis, ‘The significance of parliamentary procedures in control of the executive: the passage of Part 1 of the Legislative and Regulatory Reform Act 2006’ [2007] *Public Law* 677.

⁹ Constitution Committee, 11th report of 2005–06, HL 194, para 3.