

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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Fifth Report

# Public Bodies Bill [HL]

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Ordered to be printed 10 November and published 12 November 2010

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Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 57

## The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments”.

### *Current membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews

Lord Blackwell

Rt Hon the Lord Butler of Brockwell

Lord Carlile of Berriew QC

Baroness Gardner of Parkes

Lord Haskel

Rt Hon. the Lord Mayhew of Twysden QC DL

Baroness O’Loan

Lord Soley

Baroness Thomas of Winchester (*Chairman*)

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee’s email address is [dpr@parliament.uk](mailto:dpr@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006.

# Fifth Report

## PUBLIC BODIES BILL [HL]

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### Introduction

1. This Committee was established by the House as a result of “considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion”.<sup>1</sup> The powers in this Bill as it is currently drafted fall into that category. The Committee is instructed by the House in its terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power”. **The Committee considers that the powers contained in clauses 1 to 5 and 11 as they are currently drafted are not appropriate delegations of legislative power. They would grant to Ministers unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process.**
2. The Bill received its second reading on 9 November, following an extensive debate and a division on a motion to commit the Bill to a Select Committee, which was defeated by 188 votes to 151. **The Committee welcomes the commitments made by the Minister, Lord Taylor of Holbeach, in his concluding speech, to consider amending the Bill to meet the serious concerns expressed during the second reading.** We consider this commitment, and options for amendments, later in the report. First, the report outlines the delegated powers as they currently stand, in order to assist the House in its scrutiny of the Bill, and in due course the House’s examination of the amendments which may be tabled by the government.
3. The main purposes of the Public Bodies Bill are to enable the abolition or restructuring of a large number of public bodies, the transfer of some or all of their functions to other bodies, and for the altering of functions. The Bill is almost wholly enabling. With the exception of the three clauses covering interpretation of terms (clause 28), commencement (clause 30) and short title (clause 31), every clause in the Bill either creates, or relates to, the exercise of delegated powers. The powers would, if granted, be available not just to present Ministers in existing circumstances, but to all future governments in other circumstances as well. The Cabinet Office has provided a memorandum on the delegated powers in the Bill, printed in Appendix 2.
4. The Committee makes it clear that it takes no view on the proposals to restructure public bodies: as a matter of policy that is for the House as a whole to consider. The Committee’s concern is with the proper use of, and Parliamentary control over, delegated powers.
5. The statutory arrangements for the original constitution and functions of each public body named in the Bill will be widely different, according to the context and circumstances surrounding their establishment. The arrangements are likely in most cases to have been considered during the

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<sup>1</sup> Report from the Select Committee on the Work of the House, Session 1991-92, HL Paper 35-I

passage of a bill and many of the body's functions will be specified in primary legislation. In many cases, the membership of the body, its functions and its degree of independence from central government may have been a significant factor in the formulation of the other substantive provisions of the bill establishing the body (e.g. OFCOM). This Bill treats all of the bodies in the same way, whether they are purely advisory or exercise executive, judicial or legislative functions. This approach has created numerous difficulties.

6. The Bill confers powers on Ministers to make very significant changes. All orders under the Bill may amend or repeal any Act of Parliament and are thus Henry VIII powers. Orders under the Bill may even amend or repeal Acts of Parliament which have not yet been passed by Parliament (clause 27(2)).
7. The exercise of those powers is in each case made subject to the affirmative procedure. But that procedure cannot in any circumstances be regarded as a substitute for a bill, for two reasons in particular. First, as is normal with secondary legislation, the orders are considered only once and are unamendable, however much material the order contains. Second, in practice, it is very rare for either House to vote down subordinate legislation, whatever its concerns about them.
8. We shall now turn to the powers in the Bill. It should be noted that clause 8 sets out matters to be considered in relation to clauses 1 to 6, and that clauses 20 to 22 set out certain restrictions on the exercise of the significant powers in the Bill, outlined below.

#### **Clause 1 – abolition**

9. Clause 1 enables a Minister to abolish any body or office specified in Schedule 1. There is power to add to Schedule 1 – and to each of Schedules 2 to 6 – through clause 11 and Schedule 7: see paragraphs 21 to 24 below.
10. If a Minister exercises the power in clause 1 to abolish a body or office, he may also (but need not) include provision transferring the body or office's functions to:
  - a. a Minister, the Scottish Ministers, a Northern Ireland Department or the Welsh Ministers;
  - b. any other person exercising public functions;
  - c. a company limited by guarantee;
  - d. a community interest company; or
  - e. a body of trustees or other unincorporated body of persons.
11. Over 40 bodies, offices or types of body or office are currently listed in Schedule 1. The discernable policy of the Bill is that these are liable to abolition, but what, if anything, is to happen to their statutory and other functions is left entirely to Ministers. The Bill does not specify which, if any, functions are to be retained, or to whom any remaining functions may be transferred. Some of the bodies in Schedule 1 exercise a large number of statutory functions of significance to individuals (e.g Child Maintenance and Enforcement Commission). Others operate on perhaps a more modest scale, but even then the scope for re-writing the statute book is considerable. For example, abolition of the Football Licensing Authority (established in the wake of the Taylor Report following the Hillsborough disaster), without

transfer of its functions, would make much of Part 1 of the Football Spectators Act 1989 redundant.

#### **Clause 2 – merger**

12. Clause 2 enables a Minister to merge any group of bodies or offices listed in Schedule 2. The power is in some ways even more extensive than that conferred by clause 1, as it may be used to establish a new body. It enables the Minister, if he merges the bodies or offices in a group, to do any of the following:
  - a. to abolish all of the bodies or offices in a group, create a new body or office and transfer some or all of the functions of those bodies or offices to the new body or office;
  - b. to abolish all but one of the bodies or offices in a group and transfer some or all of the functions of the abolished bodies or offices to the remaining one;
  - c. in doing either of these things, to transfer functions of an abolished body or office to anybody to whom a function could be transferred under clause 1, and not just to another body in the same group.
13. The Bill does not specify, in relation to each group, whether both or just one of them is to be abolished; and, if so, which; which functions could be abolished and which retained; or which functions could be moved outside the group and, if so, where. So, for example, the Minister is enabled, in the course of merging the office of Director of Public Prosecutions with that of the Director of Revenue and Customs Prosecutions, to abolish the office of Director of Public Prosecutions and some of his functions, and to transfer some of his functions to a new body or office (of a nature to be specified in the order), and other functions to Ministers or a company limited by guarantee.

#### **Clause 3 – constitutional arrangements**

14. Clause 3 enables a Minister to modify the constitutional arrangements of a body or office specified in Schedule 3. What counts as “constitutional arrangements” is specified in subsection (2) (for bodies) and subsection (3) (for offices). These include the extent of accountability to Ministers and, in the case of bodies, the membership. These are matters which can be of considerable interest or even controversy when bills establishing such bodies and offices are considered in Parliament.

#### **Clause 4 – funding arrangements**

15. Clause 4 enables a Minister to modify the funding arrangements of a body or office specified in Schedule 4. An order under clause 4 may modify the extent to which a body or office is funded by central government and/or enable it to charge fees for exercising any of its functions. Thus an order under this power would enable organisations in Schedule 4 such as the Commission for Equality and Human Rights, or Natural England, to charge such fees as they determine for the exercise of their functions.

### **Clause 5 – modification and transfer of functions**

16. Clause 5 confers perhaps the widest power in the Bill. It enables a Minister to abolish, add to or alter the functions of a body or office specified in Schedule 5, or to transfer one or more functions of such a body or office to any body to whom a function could be transferred under clause 1 (see paragraph 10 above).
17. Schedule 5 includes bodies which exercise a very significant range of statutory functions. Abolition or transfer of some of those functions could have enormous impact on the operation of the primary legislation which established them. And as well as abolition or transfer of functions, the clause permits the addition of new functions, and changing the underlying purpose for which a function is exercised. Bodies in Schedule 5 include:
  - the Commission for Equality and Human Rights;
  - the Environment Agency;
  - the Human Fertilisation and Embryology Authority.

### **Clause 6 – authorisation of delegation**

18. Clause 6 contains a relatively modest power enabling a Minister to authorise a body or holder of an office specified in Schedule 6 to enter into arrangements with any person to which functions could be transferred under clause 1 for the exercise by that other person of the body or office holder's functions. Only the Broads Authority and National Park Authorities are specified in Schedule 6.

### **Matters to be considered in relation to clauses 1 to 6**

19. Clause 8(1) provides for a Minister to have regard to “achieving increased efficiency, effectiveness and economy in the exercise of public functions” and securing appropriate accountability to Ministers. This does not limit the purpose for which the power may be exercised; it merely specifies factors to be taken into account.
20. Clause 8(2) allows a Minister to make an order only if he considers that the order does not remove any necessary protection and does not prevent a person from exercising a right or freedom which that person might reasonably expect to continue to exercise. The wording is taken from section 3(2) of the Legislative and Regulatory Reform Act 2006, but it is not entirely clear from paragraphs 9 and 10 of the Cabinet Office's memorandum exactly how it would be expected to work in this different context, especially without the various other procedural safeguards for which that Act provides. It is the judgment of the Minister, not of anyone else, that is decisive; and the courts will not generally interfere if the exercise of that judgment is both rational and procedurally proper. Perhaps significantly, the Bill does not import the other tests in section 3(2) of the 2006 Act: that the effect of the order is proportionate to the policy objective; that it strikes a fair balance; and that it is not constitutionally significant.

### **Clause 11 and schedule 7 – adding to schedules 1 to 6**

21. Even when they are only viewed in the context of the existing entries in the relevant Schedules, the powers conferred by clauses 1 to 5 are exceptionally

broad. The power in clause 11, which enables a Minister to add to any of Schedules 1 to 6 any of the 150 bodies or offices (or types of body or office) specified in Schedule 7, makes those powers remarkable in their potential scope. The power means that any of the bodies in Schedule 7 can become subject, following approval of an order, to the powers in clauses 1 to 6 to abolish, transfer or modify their functions or to change their constitutional or funding arrangements.

22. Clause 12(2) prevents an order under clause 11(1) from being combined with an order under another clause in the Bill, though it does not prevent draft orders from being debated together. Clause 12(2) does not therefore effectively prevent “one bite at the cherry”.
23. To give one example of the way in which clause 11 widens the potential scope of the other powers in the Bill, an order could be made adding the Judicial Appointments Commission to Schedule 1, so enabling an order under clause 1 to abolish the Commission and transfer its functions relating to judicial appointments to a Minister, thus dismantling the delicate balance struck in such detail, and following such extensive debate, by an Act of Parliament (the Constitutional Reform Act 2005).
24. Orders under the Bill cannot only move functions around and merge or abolish bodies: they can abolish functions altogether, or alter or add to them. The Committee has grave concerns as to whether all of the bodies in Schedule 7 (which include Channel Four, the Health and Safety Executive, the Law Commission and many other bodies) should be capable of being abolished, or have their functions rewritten by a process of subordinate legislation. There appears to be no current intention to change the status or functions of any of these bodies, so there is no way for Parliament to assess the likely effects of this power, should Parliament decide to grant it to Ministers. Paragraphs 18 to 22 and 76 to 78 of the Cabinet Office memorandum describe the power in clause 11 but make no attempt to justify it.

#### **Clauses 13 to 19**

25. Clauses 13 to 19 confer further powers to make delegated legislation in relation to environmental bodies and forestry. The Committee considers these below.

#### **Restriction of creation of functions**

26. Clause 20 prevents an order under any of the powers in clauses 1 to 19 from creating or authorising the creation of:
  - a new power to make subordinate legislation;
  - a new power of forcible entry, search or seizure;
  - a new power to compel the giving of evidence.
27. The last two reflect the restriction in section 7 of the Legislative and Regulatory Reform Act 2006 on the making of orders under that Act.

### Restriction on transfer and delegation of functions

28. Clause 21(1) prevents an order under any of the powers in clauses 1 to 19 transferring a function to an unwilling recipient, except where the recipient already exercises public functions.
29. Clause 21(2) and (3) prevents an order transferring a function to, or making it exercisable by, a person not otherwise exercising public functions if the function (“excluded function”) is:
  - that of a tribunal exercising the judicial power of the State;
  - a power to make subordinate legislation;
  - a power of forcible entry, search or seizure;
  - a power to compel the giving of evidence; or
  - any other function the exercise or otherwise of which would necessarily interfere with or affect the liberty of an individual.
30. This seems based on section 71(1) of the Deregulation and Contracting Out Act 1994. It is not a restriction on transferring those functions to a private sector or non-government body as such, though in practice it probably has much the same effect. If such a body has previously had a public function conferred on it, it becomes a body “otherwise exercising public functions” and may be the recipient of any of the excluded functions.

### Criminal offences

31. Clause 22 prevents an order under any of the powers in clauses 1 to 19 from creating criminal offences carrying penalties above a certain specified limit. This is the same as applies to orders under the Legislative and Regulatory Reform Act 2006. But the Cabinet Office memorandum does not explain why the orders would need to create criminal offences in the first place.

### Conclusion on clauses 1 to 5, and clause 11

32. Despite the limitations in clauses 8(2), 20, 21 and 22, the Bill currently places little effective restriction on Ministers’ extensive powers under clauses 1 to 5 and clause 11. There therefore remains potential for Ministers to re-write the statute book to a very considerable extent. (Clause 6 is more limited in character.)
33. Many of the speeches made during second reading echoed the concerns which we now express. The Minister himself announced during his concluding speech on the Bill the Government’s intention to devise

“a parliamentary procedure that will ensure proper public consultation and enhanced parliamentary scrutiny before any proposals to act under the legislation are approved.”

He went on to say:

“We will also seek to amend the Bill to include safeguards to give independence to public bodies against unnecessary ministerial interference when performing technical functions, and when their activities require political impartiality and the need to act independently to establish facts.

Finally, we will consider whether some of the bodies need to be removed entirely from Schedule 7". (HL Debates, 9 November 2010, col 184<sup>2</sup>)

34. Therefore, **there is general agreement that the Bill requires amendment. The precise nature of these amendments will have an important effect on the view that the Committee takes of the extensive package of powers in the Bill as a whole, and the Committee will examine them carefully when they are available.** We express the hope that this will be in good time for the start of the Committee stage given the potential impact on the overall shape and nature of the Bill (as explained to the Leader of the House in a letter from the Committee dated 10 November, printed in Appendix 3).

### Options

35. In this section of the report the Committee sets out some of the ways in which the powers in the Bill could be restricted – many of which were suggested by Members during the second reading debate – with the intention of assisting the House's further scrutiny of the Bill. We, as a Committee, are not recommending any particular option. We shall consider any amendments which the government table. We do note however that the various options should not be seen as alternatives; more than one of them might well prove necessary.
36. First, if the House considers them to be inappropriate, certain powers could be removed from the Bill altogether. Future primary legislation could be introduced at the appropriate time.
37. Second, more detail could simply be placed on the face of the Bill about how the powers are to be exercised. For example, amendments might briefly specify, for each body listed in Schedule 1, which functions may be abolished, and which functions may be transferred and to whom. This would allow the broad principles to be settled through primary legislation, leaving all matters of detail to delegated legislation.
38. Third, as mentioned by the Minister and other speakers during the second reading, further general limitations might be placed on the extent of Ministerial powers under the Bill. For example, as noted above, the Minister suggested that the Bill could include "safeguards to give independence to public bodies against unnecessary ministerial interference" in certain respects.
39. Fourth, certain bodies could be removed from the Bill altogether or from Schedule 7. For example, during the second reading debate it was suggested that this might be appropriate for bodies exercising functions of a judicial nature; and it might equally apply to other types of body.
40. Fifth, the procedures for scrutinising orders to be made under the Bill could be enhanced. This covers a wide range of potential procedures.
41. For example, there could be a requirement for public consultation to be held prior to the laying of a draft order, and for the results of that consultation to be communicated to Parliament alongside the order.

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<sup>2</sup> See also the Minister's opening statement at col. 65.

42. A form of the “super-affirmative” procedure could be created for orders under the key provisions of the Bill. There is no standard form of this procedure, which is rarely used.<sup>3</sup> In essence the procedure usually entails a three stage process: a requirement for a proposed order to be laid before Parliament (possibly following public consultation) for scrutiny by both Houses; an opportunity for the government to amend the order in the light of that scrutiny; the laying of a draft order for approval by both Houses. The super-affirmative procedure therefore offers more opportunity for scrutiny than the affirmative, with the chance for Members of both Houses (and others) to make representations before being invited to approve a draft order. The procedure has been effective for the Legislative and Regulatory Reform Act 2006 in part because each House has appointed a select committee to scrutinise proposals. During the passage of the Legislative and Regulatory Reform Bill the government made a commitment that they would not use the process for highly controversial measures, and would not force through orders in the face of opposition from the parliamentary committees (HL Debates 13 June 2006, col. 125). This Committee has emphasized before that “the insertion of a super-affirmative procedure cannot bring a misconceived delegated power within the bounds of acceptability”<sup>4</sup>. A single stage of consultation is clearly no substitute for the detailed scrutiny afforded by the use of a bill (the process by which the functions of many of the bodies listed in this Bill were debated and decided). And the government, not Parliament, would retain the sole ability to make amendments to orders.
43. It has even been suggested that a procedure should be considered to allow Parliament to amend proposed orders under the Bill. This is virtually unprecedented<sup>5</sup>, and more importantly would require extremely careful consideration and design to have any chance of being workable, not least in addressing the difficulty in reconciling differences of view between the two Houses.
44. Finally, a sunset clause could be introduced for the Bill as a whole or for Schedule 7, time-limiting the powers made available to Ministers.

### Other powers in the Bill

#### *Clause 13 – powers of Welsh Ministers*

45. Clause 13(1) enables Welsh Ministers by order subject to affirmative procedure in the National Assembly for Wales (NAW) to alter, abolish or add to the functions of the Countryside Council for Wales (CCW), the Environment Agency (so far as relating to Wales) and the Forestry Commissioners (in so far as relating to Wales). Clause 13(2) to (4) provides for orders to transfer functions between Welsh Ministers, the CCW, the Environment Agency, the Forestry Commissioners or a new body. **We have similar concerns about this clause as for clauses 1 to 5 – at present the**

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<sup>3</sup> Examples include the powers in the Legislative and Regulatory Reform Act 2006 (under which either House has the power to require the use of the super-affirmative procedure for proposed Legislative Reform Orders) and in the Human Rights Act 1998.

<sup>4</sup> Delegated Powers and Regulatory Reform Committee, 4th Report of Session 2009-10, HL Paper 41, report on proposed amendments to clause 17 of the Digital Economy Bill.

<sup>5</sup> For example, section 27 of the Civil Contingencies Act 2004 provides a modern precedent, but only for regulations under its emergency powers. It is understood that these powers have not yet been exercised, whereas orders under the present Bill may be numerous.

**power is insufficiently limited and our conclusions on those clauses also apply to clause 13.**

46. There is a further aspect which seemed to the Committee to call for an explanation which is not provided in the memorandum. It is apparent from clause 13(7) that orders under subsection (7) should be capable of applying to matters which are not within the legislative competence of the NAW (see subsections (7)(a), (c) and (d) and (8)). It is by no means unprecedented for Welsh Ministers to have power to make subordinate legislation in relation to matters about which the NAW could not enact a measure. But these are no ordinary powers, for they involve re-writing the statute book. The net result of what is proposed here is that Parliament should delegate to Welsh Ministers the power to amend Acts of Parliament in matters as respects which Parliament has not delegated to the NAW the power to amend Acts of Parliament by enacting measures, and all subject to no Parliamentary control at Westminster whatsoever. **The Committee calls to the attention of the House this unexplained aspect of clause 13, so that it might seek an explanation from the Government.**

*Clause 18 – Powers in relation to forestry*

47. This clause enables the Secretary of State to act in many ways as though the Forestry Commissioners were listed in Schedules 3, 5 or 6, except that there is no limit on the person to whom a function may be transferred. **We have similar concerns about the lack of limits to this power as we have in relation to clauses 3 and 5, and our conclusions on those clauses also apply to clause 18.**

*Clause 27 – dehybridising*

48. Clause 27(4) disappplies the Hybrid Instruments procedure from those orders which might otherwise attract it. **The Committee draws this to the attention of the House, so that it might consider whether those whose interests would be protected by the hybrid instruments procedure are taken account of in some other way.**

## APPENDIX 1: ATTENDANCE AND DECLARATION OF INTERESTS

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 House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 10 November 2010 the following interests were declared in relation to the Public Bodies Bill.

Baroness Andrews, as Chairman of English Heritage and Vice-President of the National Parks Association

Lord Carlile of Berriew, as a chair of the Competition Appeal Tribunal, and as being involved in legal matters which could be affected by changes to some of the bodies listed in Schedule 7 of the Bill

Lord Blackwell, as a Board Member of OFCOM; and as a recent former Board member of the Office of Fair Trading

### **Attendance:**

The meeting was attended by Baroness Andrews, Lord Blackwell, Lord Butler of Brockwell, Lord Carlile of Berriew, Baroness Gardner of Parkes, Lord Haskel, Lord Mayhew of Twysden, Baroness O'Loan, Lord Soley and Baroness Thomas of Winchester.

## APPENDIX 2: PUBLIC BODIES BILL [HL]

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### Memorandum by the Cabinet Office

#### INTRODUCTION

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (“the Committee”) to assist with its scrutiny of the Public Bodies Bill (“the Bill”). The Bill was introduced in the House of Lords on the 28 October 2010.
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and the reason for, the procedure selected.

#### Background to the Bill

3. The impetus for the Bill comes from the Government’s review of public bodies in 2010, and the outcome of this review as reported to Parliament in oral and written statements by the Minister for the Cabinet Office, *Public Bodies Review Programme*, on 14 October 2010.<sup>6</sup>
4. The Bill provides a basis for changes to public bodies and offices where statutory authority for change is required, and includes provision to ensure that decisions regarding public bodies and offices take account of efficiency, effectiveness and economy and accountability to Ministers.

#### General ministerial powers

5. In outline, the following clauses of the Bill give Ministers powers to make orders in respect of certain public bodies and offices<sup>7</sup> specified in the corresponding Schedules to the Bill, to:
  - a. Clause 1 – power to abolish bodies specified in Schedule 1,
  - b. Clause 2 – power to merge a group of bodies or offices (or both) specified in Schedule 2,
  - c. Clause 3 – power to modify the constitutional arrangements of a body specified in Schedule 3,
  - d. Clause 4 – power to modify the funding arrangements of a body specified in Schedule 4,
  - e. Clause 5 – power to modify the functions or transfer the functions of a body to an “eligible person” specified in Schedule 5,
  - f. Clause 6 – power to authorise delegation of functions by bodies specified in Schedule 6.
6. The exercise of these powers is subject to consideration of the matters provided for in clause 8 and the restrictions provided for in clauses 20 to 22, which afford a

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<sup>6</sup><http://services.parliament.uk/hansard/Commons/bydate/20101014/writtenministerialstatements/part003.html>

<sup>7</sup> In this memorandum the term “body” is used to refer to both bodies and offices, unless the context requires otherwise.

number of substantive protections, outlined below. The procedural protections that apply are also explained below, in particular in relation to the future use of the general powers to bodies and offices listed in Schedule 7.

### Matter to be considered

7. The Minister for the Cabinet Office said in his written statement of 14 October;

*“The landscape for public bodies needs radical reform to increase transparency and accountability, to cut out duplication of activity, and to discontinue activities which are simply no longer needed”.*

8. Clause 8(1), which applies when a Minister is considering whether to make an order under clauses 1 to 6, provides that a Minister must have regard to the following objectives-

- a. achieving the increased efficiency, effectiveness and economy in the exercise of public functions;
- b. securing appropriate accountability to Ministers in the exercise of such functions.

9. In addition, clause 8(2) further provides that an order under clauses 1 to 6 cannot be made unless the Minister considers that the order does not;

- a. remove any necessary protection;<sup>8</sup> and
- b. does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

10. This recognises that there are certain rights that it would not be appropriate to remove using an order. Any right conferred or protected by the European Convention on Human Rights is a right which a person might reasonably expect to keep.

11. In addition, clause 10 provides that orders under clauses 1 to 6 will be made by statutory instrument subject to affirmative procedure and, in accordance with normal practice, the Explanatory Memorandum accompanying the order will include a statement of compatibility with the Convention.

### Restriction on the creation of functions

12. Clause 20 also provides that orders under clauses 1 to 6 may not create;

- a. a power to make subordinate legislation,
- b. a power of forcible entry, search or seizure, or
- c. a power to compel the giving of evidence.

13. Clause 20 reflects restrictions provided for in sections 4 and 7 of the Legislative and Regulatory Reform Act 2006 in relation to orders made under the 2006 Act removing or reducing regulatory burdens.<sup>9</sup>

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<sup>8</sup> Protections which would have been thought to be necessary in the past may no longer be considered necessary

<sup>9</sup> The Government does not consider that the powers under the Bill would allow the creation of a tax and so the restriction provided for in section 5(1) of the Legislative and Regulatory Reform Act 2006, which prohibits the creation of a tax, is not reflected in the Bill.

### Restriction on the creation of criminal offences

14. Clause 22 provides that orders under clauses 1 to 6 may not create a criminal offence with penalties exceeding those set out in clause 22. Clause 22 reflects the restriction in section 6 of the Legislative and Regulatory Reform Act 2006, in relation to orders made under the 2006 Act (and provides the same threshold for the penalties that can be applied where an offence is created).

### Restriction on the transfer and delegation of functions to private bodies

15. In addition to the matters to be considered and restrictions on the creation of functions and criminal offences outlined above, clause 21(2) provides that an order under the Bill may not transfer or delegate an ‘excluded function’ to a person not otherwise exercising public functions<sup>10</sup>; ‘excluded functions’ being;

- a. a function of a tribunal which exercises the judicial power of the State,
- b. a power to make subordinate legislation,
- c. a power of forcible entry, search or seizure,
- d. a power to compel the giving of evidence,
- e. any function the exercise or non-exercise of which would necessarily interfere with, or otherwise affect, the liberty of an individual.

16. Clause 21(1) also provides that a function may not be transferred to any person not otherwise exercising public functions if that person has not consented to the transfer.

### Devolution

17. Clause 9 also limits the powers of Ministers in relation to devolved matters.

### **Powers to amend Schedules 1 to 6**

18. Clause 11(1) confers powers on a Minister to add bodies specified in Schedule 7 to Schedules 1 to 6. As the Minister for the Cabinet Office said in his written statement of 14 October;

*“All remaining public bodies will be subject to a rigorous triennial review to ensure that the previous pattern of public bodies often outliving the purpose for which they were established is not repeated”.*

19. Schedule 7 includes bodies and offices where there is (at the time date of this memorandum) no policy intention to make changes to their status or functions.

20. These bodies are listed as they were subject to the review process that was the impetus for the Bill, and any changes that might be brought forward following a future triennial review process, or the conclusion of the existing review process (in the case of bodies which are still under consideration at this time), would require legislation.

21. As provided for by clause 12(1), an order under clause 11(1) adding a body specified in Schedule 7 to any of Schedules 1 to 6 is to be made by statutory instrument subject to affirmative procedure. Additionally, clause 12(2) precludes

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<sup>10</sup> ‘Public functions’ is defined in clause 28 to mean functions conferred under an enactment or royal charter.

an order under clause 11(1) from being included in the same instrument as another order under the Bill.

22. It should additionally be noted that the bodies specified in Schedule 7 includes bodies where it is envisaged that the use of the powers in the Bill would not be used in relation to particular functions (for example, an economic or network regulatory function where the risk associated with the potential use of the powers could impact on regulatory stability or the cost of capital).<sup>11</sup>

23. Clause 11(6) provides that an order under clause 2 may also add a ‘new’ body created as the result of a merger, or a body which remains after a merger, to Schedule 7. Other than by primary legislation, this is the only way in which Schedule 7 can be amended.

### **Constitutional propriety of general powers in relation to public bodies and offices**

24. Schedules 1 to 6 to the Bill specify the bodies to which the powers in clauses 1 to 6 apply. If a body is not specified in Schedules 1 to 6 then the powers can not be exercised in relation to it. Most of the bodies specified in Schedules 1 to 6 were established under statute (or otherwise they have significant statutory functions). Public bodies are usually established under statute to provide statutory authority to;

- a. impose charges and fees,
- b. enter premises,
- c. require the provision of information, or
- d. make binding decisions in a dispute.

25. It is an established principle that Government should not give public functions to independent public bodies (i.e. those without Crown status) without statutory authority. In addition, for reasons of Government accounting, statutory authority is required for new and continuing (lasting more than 2 years) expenditure by government departments which is not de minimis (currently under £1.5 million) and so statutory authority is required where new public bodies fall within these parameters.

26. Powers to make changes to public bodies by way of secondary legislation are not unprecedented. Section 8(4) of the Child Poverty Act 2010 provides a power for the Child Poverty Commission to be abolished by an order under that section. Further, section 125C of the Energy Act 2006 provides that the functions of ‘the Administrator’ (known as the ‘Renewable Fuels Agency’) may be transferred to another person appointed as ‘Administrator’ or any body corporate established for the purpose.<sup>12</sup>

27. There are also powers to transfer functions of existing statutory tribunals listed in Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 into the First-tier and Upper Tribunal established under the 2007 Act, and to abolish the existing tribunal as a consequence of transferring functions into the new unified system.

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<sup>11</sup> See paragraph 84 of the Explanatory Notes accompanying the Bill.

<sup>12</sup> Clause 27(3) provides that the powers conferred by the Bill are without prejudice to any other power conferred on a Minister of Welsh Ministers.

28. Therefore, it is not considered inappropriate, in principle, for changes to be made to public bodies and their functions by way of secondary legislation. Further, as outlined above, the Government considers that the Bill contains significant substantive and procedural safeguards that apply to the use of the order-making powers.

29. It is acknowledged that, further to clause 27(2), provision which may be made by an order under clauses 1 to 6, including the consequential provision under clause 7(1), is likely to be made by amending primary legislation. The Government has thus had regard to the view of the Committee that the affirmative procedure should apply where such changes to primary legislation are to be achieved through secondary legislation.<sup>13</sup> All orders made under clauses 1 to 6 are to be made by statutory instrument subject to the affirmative procedure.

### **Powers of Welsh Ministers relating to environmental bodies**

30. Clauses 13 to 15 together contain seven provisions delegating powers to the Welsh Ministers to make orders. The order-making powers will enable the Welsh Ministers to restructure the delivery of environmental regulation and forestry management in Wales in the way they consider best meets their policy aims, having had regard to the matters listed in clause 13(9), and subject to the restrictions set out in clause 13(10).

### **Background to powers of Welsh Ministers**

31. The Welsh Assembly Government is currently consulting on 'A Living Wales'<sup>14</sup>, the Government's Natural Environment Framework which proposes a new, integrated approach to managing the natural environment. The effective delivery of the principles contained within 'A Living Wales' is likely to require changes to the way that environmental policies are delivered in Wales. Consequently, and linked in to the wider consultation 'A Living Wales', the Welsh Assembly Government is considering a number of options in relation to how its environmental policies are delivered by its key delivery agencies, namely the Countryside Council for Wales, Environment Agency Wales and Forestry Commission Wales. The Countryside Council for Wales is a body corporate which exercises its functions solely in relation to Wales. The Environment Agency operates in Wales under the name Environment Agency Wales as an administrative sub-division of the Environment Agency. Like the Environment Agency, the Forestry Commissioners have a separate Welsh division, Forestry Commission Wales, which again constitutes an administrative rather than legal separation.

32. The order-making powers for Welsh Ministers in clauses 13 to 15, relating to environmental bodies seek to ensure that Welsh Ministers can make the changes that they conclude, in the light of the review, are desirable to the way in which environmental policies are delivered in Wales. In particular, the powers will enable the Welsh Ministers to modify the existing functions of the key delivery bodies; and/or to transfer individual functions between public bodies in Wales; and/or establish a new environmental body. The order-making powers clarify that particular environmental bodies can provide services to each other, carry out each

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<sup>13</sup> 3<sup>rd</sup> Report, Session 2002-03, HL Paper 21.

<sup>14</sup><http://wales.gov.uk/consultations/environmentandcountryside/eshlivingwalescons/?lang=en>

others' functions, etc, thus facilitating an efficient and economic sharing of services and back-office resources.

33. The consultation on '*A Living Wales*' concludes in December and will help inform decisions regarding the review of environmental delivery options.

### **Background to powers relating to the Secretary of State and Forestry Commissioners**

34. Clause 17 provides the Secretary of State with a power, by order, to amend the Forestry Act 1967 and clause 18 provides the Secretary of State with powers in relation to the functions of the Forestry Commissioners. The Department for the Environment, Food and Rural Affairs made the following announcement on 29 October 2010:

*"We are committed to shifting the balance of power from 'Big Government' to 'Big Society' by giving individuals, businesses, civil society organisations and local authorities a much bigger role in protecting and enhancing the natural environment and a much bigger say about our priorities for it. By including enabling powers in the Bill we will be in a position to make reforms to managing the estate. We will consult the public on our proposals later this year, and will invite views from a wide range of potential private and civil society partners on a number of new ownership options and the means to secure public benefits. We envisage a managed programme of reform to further develop a competitive, thriving and resilient forestry sector that includes many sustainably managed woods operating as parts of viable land-based businesses. We will not compromise the protection of our most valuable and biodiverse forests. Full measures will remain in place to preserve the public benefits of woods and forests under any new ownership arrangements. Tree felling is controlled through the licensing system managed by the Forestry Commission, public rights of way and access will be unaffected, statutory protection for wildlife will remain in force and there will be grant incentives for new planting that can be applied for. When publishing our proposals we will explore further the options for securing and increasing the wide range of public benefits currently delivered by Government ownership and how they might be achieved at lower cost."*<sup>15</sup>

35. The Committee is referred to the explanatory notes accompanying the Bill for further background.

## **B. GENERAL MINISTERIAL POWERS**

### **Clause 1: power to abolish**

*Power conferred on:* a Minister

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

36. Clause 1 confers on a Minister the power, by order, to abolish a body specified in Schedule 1. Subsection (2) provides that such an order may include provision transferring any or all of the functions of a body to an 'eligible person' (as defined

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<sup>15</sup> <http://ww2.defra.gov.uk/news/2010/10/29/forestry/>

in Clause 1(3)). Clause 7(2) also provides that where an order under clause 1 transfers functions the power includes a power to make consequential and supplementary provision to modify the functions or constitutional or funding arrangements of the transferor or transferee.

37. On this basis, an order made under clause 1 may abolish all of the functions of a body as a consequence of abolishing the body itself, or might transfer some or all of a body's functions to an 'eligible person'. A power to abolish a body and transfer its remaining functions by order will therefore provide Departments with the flexibility to determine how any remaining functions are delivered (subject to the matters and constraints referred to below).

38. A Minister must consider the matters provided for in clause 8 when making an order under clause 1. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses 20 to 22 on the creation and transfer of functions and on the creation of criminal offences apply to orders made under clause 1.

39. The powers under clause 1 are to be exercised by statutory instrument subject to the affirmative procedure. This level of Parliamentary scrutiny is considered necessary because, further to clause 27(2), provision in an order under clause 1 may be made by amending primary legislation and so it is consistent with the view of the Committee that the affirmative procedure should apply in such circumstances. It is also consistent with the level of procedure applied to other powers to abolish public bodies by order. For example, as noted above, the Child Poverty Commission may be abolished by an order under section 8(4) of the Child Poverty Act 2010. Subsections 8(5) and (6) of the 2010 Act provide that such an order may contain such transitional or consequential provision as is necessary in connection with the abolition and that this may include provision amending primary legislation. Consequently, section 28(4)(b) of the 2010 Act provides that an order made under section 8(4) is subject to affirmative procedure.

40. Only those bodies which are specified in Schedule 1 are subject to the power to abolish. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order, including any transfer of functions to an 'eligible person' further to clause 1(2). Consequently, it is not considered that any additional Parliamentary scrutiny is required.

### **Clause 2: power to merge**

*Power conferred on:*                      *a Minister*

*Power exercised by:*                      *order made by statutory instrument*

*Parliamentary procedure:*              *affirmative procedure*

41. Clause 2 confers on a Minister the power, by order, to "merge" any group of bodies or offices (or both) specified in Schedule 2. Subsection (2) provides that the merger can be effected either by;

- a. abolishing all of the bodies or offices in the group and transferring some or all of their functions to a new body corporate or office created for that purpose; or

- b. abolishing all but one of the bodies or offices and transferring some or all of the functions of the abolished bodies or offices to the remaining one.

42. An order under clause 2 may abolish a listed body and its functions but clause 2 also provides for the transfer of functions from a body being abolished to the new body created for the purpose of the merger or a remaining body, or (under clause 2(3)) to an ‘eligible person’ not included in the group. Clause 7(2) also provides that where an order under clause 2 transfers functions the power includes a power to make consequential and supplementary provision to modify the functions or constitutional or funding arrangements of the transferor or transferee.

43. Following the Government’s review of public bodies some 118 bodies will be merged into 57 bodies, removing wasteful and complicating duplication of effort. This power will provide the necessary statutory authority for merging particular groups of bodies and offices specified in Schedule 2 and will provide Departments with flexibility to determine how functions are delivered, including whether any particular function would more appropriately be carried out by an ‘eligible person’ (subject to the matters and constraints referred to below).

44. A Minister must consider the matters provided for in clause 8 when making an order under clause 2. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses 20 to 22 on the creation and transfer of functions and on the creation of criminal offences apply to orders made under clause 2.

45. The powers under clause 2 are to be exercised by statutory instrument subject to affirmative procedure. This approach is considered appropriate because, as noted above, further to clause 7(5), provision in an order under clause 2 may be made by amending primary legislation and so it is also consistent with the view of the Committee that the affirmative procedure should apply in such circumstances.

46. Only those bodies which are specified in Schedule 2 are subject to the power to merge. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order, including any transfer of functions to an ‘eligible person’ further to clause 2(3). Consequently, it is not considered that any additional Parliamentary scrutiny is required.

### **Clause 3: power to modify constitutional arrangements**

*Power conferred on:*                      *a Minister*

*Power exercised by:*                      *order made by statutory instrument*

*Parliamentary procedure:*              *affirmative procedure*

47. Clause 3 confers on a Minister the power, by order, to modify the constitutional arrangements of a body or office specified in Schedule 3. Clause 3(2) sets out the type of internal arrangements of a body included within the ‘constitutional arrangements’. Clause 3(3) sets out the type of arrangements of an office included within the ‘constitutional arrangements’. These are a wide range of matters relating to the internal structure and governance of bodies and offices. The exercise of the power in clause 3 would allow, for example;

- a. Provision to ensure a particular number of non-executive directors on the Board of a body;
- b. Provision requiring a body to report publically on how it has sought to increase efficiency in the exercise of its functions;
- c. Provision requiring permission from a Minister in relation to employment of staff, or remuneration of staff in excess of an agreed threshold;
- d. Provision requiring that the chair of a body be required to undergo a pre-appointment hearing process before taking up their post.

48. The Government considers it appropriate to leave precise details of these modifications to 'constitutional arrangements' to be set out in orders under clause 3.

49. As outlined above, a Minister must consider the matters provided for in clause 8 when making an order under clause 3. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses 20 to 22 also apply.

50. The powers under clause 3 are to be exercised by statutory instrument subject to the affirmative procedure. This approach is considered necessary because, as noted above, clause 27(2) provides that provision in an order under clause 3 may be made by amending primary legislation and so it is consistent with the view of the Committee that the affirmative procedure should apply in such circumstances.

51. Only those bodies which are specified in Schedule 3 are subject to the power to modify their constitutional arrangements. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order. Consequently, it is not considered that any additional Parliamentary scrutiny is required.

#### **Clause 4: power to modify funding arrangements**

*Power conferred on:*                    *a Minister*

*Power exercised by:*                *order made by statutory instrument*

*Parliamentary procedure:*        *affirmative procedure*

52. Clause 4 confers on a Minister the power, by order, to modify the funding arrangements of a body specified in Schedule 4. Clause 4(2) provides that this includes;

- a. Modifying the extent to which the body or office is funded by a Minister;  
or
- b. Conferring power on the body to charge fees for the exercise of a function (and to determine the amount).

53. For example, the power to modify funding arrangements may be used to allow a body which has the function of granting licences to persons carrying out regulated activities to charge a fee for performing that function, and determine the amount of the fee. This will ensure that, where bodies do not have existing powers to charge or those powers are insufficient to ensure full cost recovery, that the body can recover its costs.

54. The Government considers it appropriate to leave precise details of these modifications to ‘funding arrangements’ to be set out in an order under clause 4.

55. A Minister must consider the matters provided for in clause 8 when making an order under clause 4. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses 20 to 22 also apply.

56. The powers under clause 4 are to be exercised by statutory instrument subject to affirmative procedure. This approach is considered necessary because, further to clause 27(2), provision in an order under clause 4 may be made by amending primary legislation and so it is consistent with the view of the Committee that the affirmative procedure should apply in such circumstances.

57. Only those bodies which are specified in Schedule 4 are subject to the power to modify funding arrangements. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order. Consequently, the Government does not consider that any additional Parliamentary scrutiny is required.

#### **Clause 5: power to modify or transfer functions**

*Power conferred on:*                    *a Minister*

*Power exercised by:*                    *order made by statutory instrument*

*Parliamentary procedure:*        *affirmative procedure*

58. Clause 5 confers on a Minister the power, by order, to modify functions or transfer functions of a body specified in Schedule 5 to an ‘eligible person’.

59. Clause 5(2) further provides that ‘modifying’ functions includes;

- a. Conferring a function,
- b. Abolishing a function,
- c. Changing the purpose or objective for which a function is exercised,
- d. Changing the conditions under which a function is exercised.

60. Clause 7(2) also provides that where an order under clause 5(1)(a) modifies functions the power includes a power to make consequential and supplementary provision to modify the constitutional or funding arrangements of the body.

61. The Government considers it appropriate to leave the precise details of the modifications of functions and transfer of functions to be set out in orders under clause 5, with the associated flexibility for Departments to determine how functions are best delivered, including whether they would be more appropriately delivered by an ‘eligible person’ (subject to the matters and constraints referred to below).

62. A Minister must consider the matters provided for in clause 8 when making an order under clause 5. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses

20 to 22 on the creation and transfer of functions and on the creation of criminal offences apply to orders made under clause 5.

63. Also of particular relevance to an order making provision for the transfer of functions is clause 21(2), which provides that an order under clause 5 may not transfer an ‘excluded function’ to a person not otherwise exercising public functions<sup>16</sup>; ‘excluded functions’ being;

- e. a function of a tribunal which exercises the judicial power of the State,
- f. a power to make subordinate legislation,
- g. a power of forcible entry, search or seizure,
- h. a power to compel the giving of evidence,
- i. any function the exercise or non-exercise of which would necessarily interfere with, or otherwise affect, the liberty of an individual.

64. The powers under clause 5 are to be exercised by statutory instrument, subject to affirmative procedure. This approach is considered necessary because, further to clause 27(2), provision in an order under clause 5 may be made by amending primary legislation and so is it consistent with the view of the Committee that the affirmative procedure should apply in such circumstances. It is also consistent with the level of procedure applied to other powers to transfer functions of public bodies by order. As referred to above section 125C of the Energy Act 2006 provides that the functions of ‘the Administrator’ (known as the ‘Renewable Fuels Agency’) may be transferred to another person appointed as ‘Administrator’ or any body corporate established for the purpose. Section 125C(8) of the 2006 Act provides that where an order makes provision appointing a body corporate as the Administrator, or amends primary legislation, the order is subject to the affirmative procedure.

65. Only those bodies which are specified in Schedule 5 are subject to the power to modify or transfer their functions. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order, including the identity of the ‘eligible person’ to whom functions are transferred. Consequently, the Government does not consider that any additional Parliamentary scrutiny is required.

### **Clause 6: power to authorise delegation**

*Power conferred on:* a Minister

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

66. Clause 6 confers on a Minister the power, by order, to authorise a body specified in Schedule 6 to enter into arrangements with an ‘eligible person’ for the functions of the body to be exercised by the ‘eligible person’. Clause 7(4) provides that an order may also make consequential provision to modify the functions or constitutional arrangements of ‘eligible persons’ who exercise public functions.

67. Clause 6(2) provides that such arrangements may be subject to conditions specified in the order. Clause 6(3)(a) further provides that arrangements may be

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<sup>16</sup> ‘Public functions’ is defined in clause 28 to mean functions conferred under an enactment or royal charter.

revoked at any time by the body authorised to enter into them. Clause 6(3)(b) provides that the arrangements do not preclude the body from exercising the function and clause 6(3)(c) provides that the arrangements do not affect the responsibility of the body in relation to the function.

68. The Government considers it appropriate to leave the precise details to be set out in orders under clause 6, with the associated flexibility for Departments to determine how functions are best delivered, including whether they would be more appropriately delivered by an ‘eligible person’ (subject to the matters and constraints referred to below).

69. A Minister must consider the matters provided for in clause 8 when making an order under clause 6. In particular, the Minister may only make an order if he considers the order does not remove any necessary protection and does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. The restrictions in clauses 20 to 22 on creation and delegation of functions and on the creation of criminal offences apply to orders made under clause 6.

70. Also of particular relevance to an order making provision for the authorisation of delegation of functions is clause 21(2), which provides that an order under clause 6 may not authorise arrangements for an ‘excluded function’ to be exercised by someone not otherwise exercising public functions<sup>17</sup>; ‘excluded functions’ being;

- j. a function of a tribunal which exercises the judicial power of the State,
- k. a power to make subordinate legislation,
- l. a power of forcible entry, search or seizure,
- m. a power to compel the giving of evidence,
- n. any function the exercise or non-exercise of which would necessarily interfere with, or otherwise affect, the liberty of an individual.

71. The provision to ‘enter into arrangements’ provided for in clause 6 is not novel. Section 15 of the Marine and Coastal Access Act 2009 provides that the Marine Management Organisation (a public body) may, with the approval of the Secretary of State, enter in to an agreement with an ‘eligible body’ authorising the eligible body to perform any functions of the Marine Management Organisation. Further to section 15(3)(b) of the 2009 Act the Secretary of State’s approval may be subject to specified conditions.

72. A further example is section 83 of the Government of Wales Act 2006, which provides that Welsh Ministers and a ‘relevant authority’ (a Minister of the Crown or any public authority) may enter into arrangements for any functions of one of them to be exercised by the other.

73. Arrangements entered into pursuant to section 15 of the 2009 Act and section 83 of the 2006 Act referred to above are not subject to any Parliamentary procedure.

74. The powers under clause 6 are to be exercised by statutory instrument subject to affirmative procedure. This approach is considered appropriate because, further to clause 27(2), provision in an order under clause 6 may be made by amending

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<sup>17</sup> ‘Public functions’ is defined in clause 28 to mean functions conferred under an enactment or royal charter.

primary legislation and so it is also consistent with the view of the Committee that the affirmative procedure should apply in such circumstances.

75. Only those bodies which are specified in Schedule 6 are subject to the power to authorise delegation of functions. An affirmative procedure will provide an opportunity for debate and Parliamentary approval on the details of the order, including the identity of the ‘eligible person’ who may perform the body’s functions. Consequently, the Government does not consider that any additional Parliamentary scrutiny is required.

### Clause 11: power to amend Schedules

*Power conferred on:* a Minister

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

76. Clause 11(1) confers on a Minister the power, by order, to amend the ‘principal Schedules’ (Schedules 1 to 6) by adding a body specified in Schedule 7. It also provides that orders made under clauses 3 to 6 may remove the body or office from the corresponding Schedule and that orders under clause 2 may add the ‘new’ or ‘remaining body’ of a merger to Schedule 7.

77. The power under clause 11(1) is to be exercised by statutory instrument subject to affirmative procedure. Importantly, clause 12(2) provides that an order under clause 11(1) adding a body to Schedules 1 to 6 may not be contained in the same instrument as any other order under the Bill. Thus, two affirmative orders will be required, one to move the body from Schedule 7 to Schedules 1 to 6 and another to exercise the order-making power corresponding to that Schedule.

78. The Government considers that clause 12(2) provides a significant safeguard in relation to the future use of the general powers under clauses 1 to 6 as it will provide Parliament with the opportunity to debate and approve both in principle that the relevant general power should apply to a particular body and provide the opportunity to debate the details of the order in relation to the exercise of the general powers, as outlined above.

### Clause 13: power of Welsh Ministers

*Power conferred on:* Welsh Ministers

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure in the National Assembly for Wales

79. Clause 13 provides Welsh Ministers with the powers, by order, to:-

- a. modify the functions of the Countryside Council for Wales (“CCW”), the Environment Agency (“EA”) so far as relating to Wales and the Forestry Commissioners (“FC”) also so far as relating to Wales;
- b. transfer any function of CCW to a new body, the Welsh Ministers, the EA or FC or any other person exercising public functions in relation to Wales (“a Welsh public authority”);

- c. transfer any function of the EA or FC so far as relating to Wales to a new body, the Welsh Ministers, the CCW or a Welsh public authority;
- d. transfer any Welsh Ministers' function relating to the environment to a new body, CCW, EA or FC;
- e. transfer any Welsh devolved function to a new body, CCW, EA or FC.

80. The term "Welsh devolved function" is defined in clause 13(8).

81. Clause 13(7) requires the consent of the Secretary of State to any order made by the Welsh Ministers under clause 13(1) to (5) which modifies or transfers a non-devolved function of the EA or FC. This is in recognition of the fact that neither the EA nor the FC are Wales-only bodies.

82. The Government considers that these order-making powers are appropriate in light of the Welsh Assembly Government's desire to have sufficient flexibility to develop and implement its own policies in reforming provision of public functions by the named environmental bodies (to the timescales set out above).

83. The powers under clause 13 are to be exercised by statutory instrument subject to affirmative procedure in the National Assembly for Wales. Clause 14(1) provides that an order under clause 13 may contain consequential, supplementary, incidental or transitional provision, or savings. As above, clause 27(2) provides that provision which may be made in an order under clause 13 may be made by amending primary legislation. An affirmative procedure is therefore consistent with the level of procedure that applies to similar orders under clauses 1 to 6 making changes to other public bodies. Only those bodies which are specified in clause 13 are subject to the powers. An affirmative procedure will provide an opportunity for debate and approval by the National Assembly for Wales on the details of the order. Consequently, it is not considered that any additional scrutiny is required.

#### **Clause 14: power of Secretary of State**

*Power conferred on:* Secretary of State

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

84. Clause 14 provides the Secretary of State with a power, by order to make consequential or supplementary provision modifying the constitutional or funding arrangements of the Environment Agency ("EA") or Forestry Commissioners ("FC") where the Welsh Ministers make an order under clause 13 modifying the functions of or transfer functions to or from the EA or FC.

85. This power is necessary because the Welsh Ministers do not have the power under clause 13 or 14 to modify the constitutional or funding arrangements of the EA or FC. The Welsh Assembly Government and Department for the Environment, Food and Rural Affairs agree and consider that this should be exercisable by the Secretary of State in light of the fact that EA and FC are not Wales-only bodies.

86. Clause 16(2) provides that an order under clause 14(4) is to be made by statutory instrument subject to affirmative procedure. Further to clause 27(2) provision in such an order may be made by amending primary legislation and so an affirmative procedure is considered appropriate.

**Clause 17: Powers relating to the functions of Secretary of State**

*Power conferred on:* Secretary of State

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

87. Clause 17(2) enables the Secretary of State to amend the Forestry Act 1967 so as to modify the purposes or objectives for which, or conditions under which, the functions under s39 of that Act can be exercised in relation to land in England. Those functions are: the disposal of land acquired for forestry purposes (s39(2)); the management and use of that land (s39(3)(a)); and the letting of that land or the granting of any interest or right in or over it (s39(3)(b)). Under clause 17(3) provision can be made to secure that these functions can be exercised for any purpose or without condition.

88. Clause 17(4) provides that an order under this clause may contain consequential, supplementary, incidental or transitional provision, or savings.

89. The power in this clause is to be exercised by statutory instrument subject to the affirmative resolution procedure. This level of Parliamentary scrutiny is considered appropriate because this is a power to amend primary legislation. This is also consistent with the view of the Committee that the affirmative procedure should apply where consequential changes to primary legislation are to be achieved through secondary legislation. The affirmative resolution procedure is also considered appropriate because it will provide an opportunity for debate on the detail of the order, which will encompass a new approach to the management and ownership of forests in England.

**Clause 18: Powers relating to functions of Forestry Commissioners**

*Power conferred on:* Secretary of State

*Power exercised by:* order made by statutory instrument

*Parliamentary procedure:* affirmative procedure

90. Clause 18 provides the Secretary of State with powers to modify or transfer the Forestry Commissioners' functions in relation to England (18(1)(b) and (c)). Under clause 18(1)(d) the Secretary of State may authorise the Forestry Commissioners to enter into arrangements with another person for that person to exercise functions in England on their behalf.

91. Clause 18(1)(a) also provides a power for the Secretary of State to modify the constitutional arrangements of the Forestry Commissioners.

92. Clause 18(4) provides that orders under clause 18(1) may make consequential, supplementary, incidental or transitional provisions, or savings. Where an order is made to transfer a function of the Forestry Commissioners under clause 18(1)(c), it may also contain provision to modify the functions, funding or constitutional arrangements of the transferee (18(5)). An order under clause 18(1)(d) that authorises the Forestry Commissioners to enter into arrangements with another person exercising public functions may also contain provision to modify those

functions or modify the constitutional or funding arrangements of that person (18(6)).

93. Clause 18(7) imposes a restriction on the exercise of these powers. Before making an order under this clause the Secretary of State must have regard to the objectives of achieving increased efficiency, effectiveness and economy in the exercise of public functions and securing appropriate accountability to Ministers in the exercise of those functions.

94. Clause 18(8) provides a safeguard on the exercise of the powers in that it only permits an order to be made where the Secretary of State considers that it would not remove a necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

95. The powers under clause 18 are exercisable by statutory instrument subject to affirmative resolution procedure. This level of Parliamentary scrutiny is considered appropriate because provision, including consequential provision, in an order made under this clause may be effected by amending primary legislation. This is also consistent with the view of the Committee that the affirmative procedure should apply where consequential changes to primary legislation are to be achieved through secondary legislation. An affirmative procedure is also considered appropriate as it will afford an opportunity to debate the detail of the order.

### Clause 23: Transfer schemes

*Power conferred on:*

- a. a Minister in connection with orders under clauses 1 to 6,
- b. the Welsh Ministers in connection with the transfer of a function under clause 13, and
- c. the Secretary of State in connection with the transfer of a function of the Forestry Commissioners under section 18(1)(c)

*Power exercised by:* transfer scheme

*Parliamentary procedure:* affirmative where included in an order under clauses 1 to 6, otherwise no Parliamentary procedure applies

96. Clause 23 confers on a Minister the power to make a transfer scheme in connection with an order made under clauses 1 to 6. A transfer scheme is a scheme providing for the transfer of property, rights and liabilities; including rights and liabilities relating to contracts of employment. In the case of a scheme made by a Minister, the transfer of property, rights and liabilities must be to an 'eligible person' or any body corporate unless constitutional or funding arrangements are being modified under clauses 3 or 4, in which case the transfer must be to a Minister. In the case of other schemes in connection with transfers of functions under clauses 13 and 15 the transfer must be to the person to whom the function is transferred.

97. Clause 23(5) lists supplementary, incidental and transitional provision that may be made by a transfer scheme. These include making provision the same as or similar to the TUPE regulations (the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246)).

98. The Government considers it appropriate that the details of transfers of property, rights and liabilities, which may be very complex, should be set out in a transfer scheme.

99. A transfer scheme made by a Minister under clauses 1 to 6 may be included in an order under clauses 1 to 6 (subject to affirmative procedure) but if not so included must be laid before Parliament. Similarly, a transfer scheme made by the Welsh Ministers or the Secretary of State may be made in an order under clauses 13 or 18 (subject to affirmative procedure) but if not so included must be laid before the National Assembly for Wales and Parliament respectively.

100. The Government considers this is an appropriate procedure as it will allow details of the transfer scheme to be combined with an order under the Bill if that is considered appropriate; but provide flexibility for transfer schemes to be made after orders have been made where this is considered the appropriate course of action.

### **Clause 25: Transfer schemes: taxation**

*Power conferred on:*                    *the Treasury*

*Power exercised by:*                *order made by statutory instrument*

*Parliamentary procedure:*        *negative procedure*

101. Clause 25 confers on the Treasury the power to make an order to provide for varying the way in which certain tax provisions apply either for anything transferred under a scheme made under clause 23, or anything done for the purposes of, or in relation to a transfer under such a scheme. For the purposes of this power the relevant taxes are income tax, corporation tax, capital gains tax, stamp duty and stamp duty reserve tax.

102. This power will enable the Treasury to ensure that appropriate tax provision is made, and at the appropriate time, to ensure that a transfer does not give rise to a tax change or confer a tax advantage on either party.

103. The power under clause 25 is exercisable by statutory instrument subject to negative procedure in the House of Commons. This reflects the level of Parliamentary procedure applicable to equivalent powers in section 5 of the Legislative and Regulatory Reform Act 2006 (see section 5(6) of the 2006 Act) in relation to provision for 'tax neutrality' of transfers of property, rights and liabilities which may arise from the merger of bodies under an order under Part 1 of the 2006 Act. The Government also considers it appropriate that the order is not subject to any procedure in the House of Lords, as the House of Commons is the correct forum for input on taxation matters.

Cabinet Office

Department for the Environment, Food and Rural Affairs

Welsh Assembly Government

29 October 2010

### APPENDIX 3 – LETTER TO THE LEADER OF THE HOUSE

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**Letter to the Leader of the House of Lords, The Rt Hon. Lord Strathclyde, from the Chairman.**

At its meeting this morning the Committee considered the Public Bodies Bill, which received its second reading yesterday.

The Committee's report on the Bill, to be published later this week, will set out the Committee's serious concerns about the very extensive delegated powers contained in the Bill as it was recently introduced in this House on 28 October.

The Committee notes however that the Government announced last night its intention significantly to amend the Bill. Lord Taylor of Holbeach made statements to the House yesterday concerning proposed amendments, including:

“devising a parliamentary procedure that will ensure proper public consultation and enhanced parliamentary scrutiny before any proposals to act under the legislation are approved”; and that

“We will also seek to amend the Bill to include safeguards to give independence to public bodies against unnecessary ministerial interference when performing technical functions, and when their activities require political impartiality and the need to act independently to establish facts. Finally, we will consider whether some of the bodies need to be removed entirely from Schedule 7”. (col 184)

These possible changes, which could alter the balance of delegated powers in the Bill as a whole, appear to the Committee to be extremely important. When these proposals and amendments come forward, the Committee will wish to scrutinise them – insofar as they relate to delegated powers – extremely carefully.

In order to discharge this duty to the House (to which Lord Taylor referred in his concluding speech), the Committee expressed the hope that the amendments will be available in sufficient time before the start of the Committee stage (which has been scheduled to start on 23 November) for the Committee to examine and report on them.

The Committee has decided that a copy of this letter should be placed in the library and published in our Report on the Bill.

Baroness Thomas of Winchester

Chairman

Delegated Powers and Regulatory Reform Committee

House of Lords