



## Public Bodies Bill

## BRIEFING

### Introduction

This briefing note considers the scope and content of the Coalition Government's Public Bodies Bill, as amended at the conclusion of the House of Lords Report Stage. Where appropriate, it compares the Bill as currently drafted with the Bill as introduced. It also considers some of the constitutional issues surrounding the Bill, both as introduced and as subsequently amended. The final part of the note comprises a table of those bodies and offices included in the Schedules to the Bill as amended on report.

### Background<sup>1</sup>

The Public Bodies Bill aims to reduce the number of unelected bodies, funded by the taxpayer, that operate at arms' length from government but carry out wider governmental functions. The Bill as introduced sought to do this by giving wide-ranging powers to Ministers to abolish, merge or change the remit of those bodies named in the Schedules to the Bill.

The delegation of functions of government to arms' length public bodies (commonly known as "quangos"<sup>2</sup>) has been going on for many years. In 2001, the Public Administration Select Committee

defined quangos as "...all bodies responsible for managing or delivering public services or policies, or for performing public functions, under governing bodies with a plural membership of wholly or largely appointed or self-appointing persons..."<sup>3</sup> These are usually "NDPBs"<sup>4</sup> established by specific government departments (such as the Highways Agency, which is an executive agency of the Department for Transport) or creations of statute (such as the Agricultural Wages Board established by Act of 1948). They may also be established by Royal Charter, although this is less common.

Successive administrations have pledged and failed to cut the number and expense of these bodies. Indeed, it could be argued that, despite such pledges, government by unelected political appointee has been a growth industry. In 2009 David Cameron instructed his shadow Ministers to review the quangos operating in their areas of responsibility and, in May 2010, the Coalition Government undertook to "reduce the number and cost of quangos"<sup>5</sup>. The Queen's Speech<sup>6</sup> included a commitment that "the cost of bureaucracy and the number of public bodies will be reduced". On 14 October 2010, the Cabinet Office published a review of 901 public bodies, which summarised plans to abolish, merge or reform 481 of them. Some changes could be carried out by the

<sup>1</sup> There is a great deal of material available concerning the background to this Bill and the issues arising from it. This note draws on, in particular, the Standard Note SN/PC/05609 dated 11 November 2010 provided to members of Parliament and the Fifth Report of the Delegated Powers and Regulatory Reform Committee published on 12 November 2010

<sup>2</sup> "quasi-autonomous non-Governmental organisations"

<sup>3</sup> Public Administration Select Committee "Mapping the Quango State", 21 March 2001

<sup>4</sup> non-departmental public bodies

<sup>5</sup> The Coalition: Our Programme for Government, 21 May 2010

<sup>6</sup> 25 May 2010



responsible government department, and this has been ongoing since last year. Those public bodies established by statute or Royal Charter, however, could not be abolished or modified without primary legislation.

Given cross-party support for a reduction in the “quangocracy”<sup>7</sup>, one might have expected that legislation to reduce their number and expense would not be contentious. Nevertheless, the Public Bodies Bill introduced in the House of Lords on 28 October 2010 has proved extremely controversial because of its significant constitutional ramifications. It was the subject of heated debate at Second Reading and during the Committee stage. It is fair to say that the Government has listened to some of the criticism and that the Bill taken forward to the Commons does provide more constitutional safeguards than before.

With regard to the timetable for Royal Assent, Committee stage in the House of Lords took place from 23<sup>rd</sup> November 2010 to 9 March 2011 comprising 9 sittings. Some 181 amendments were initially tabled for debate in the Committee proceedings, most of which aimed to remove specific bodies from the scope of the Bill. Report stage in the House of Lords took place from 23 March to 4 April 2011 comprising 3 sittings. The Bill will receive its third reading on 9 May 2011 before passing over to the House of Commons. If all goes to plan, it can be expected to receive Royal Assent before the 2011 summer recess.

<sup>7</sup> Rule by quango or other unelected body

### **Constitutional implications of the Bill at introduction**

The Bill is enabling legislation meaning that it comprises a framework that gives Ministers powers, by secondary legislation<sup>8</sup>, to abolish, merge and transfer functions to and from the public bodies listed in the Schedules to the Bill even though such bodies were generally set up by primary legislation. The Impact Assessment accompanying the Bill stated that this *modus operandi* was the Government’s preferred option because it would save Parliamentary time and would allow individual departments to consider all the potential impacts of their proposals before bringing forward the relevant Ministerial orders. This approach has been widely criticised; in particular by three Select Committee Reports published in December 2010 and January 2011.

Powers to amend primary legislation by order are informally known as Henry VIII powers.<sup>9</sup> In its report dated 4 November 2010, the Constitutional Committee described such powers in general as “*pushing at the boundaries of the constitutional principle that only Parliament may amend or repeal primary legislation*”. It goes on to state: “*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*

<sup>8</sup> Statutory Instrument

<sup>9</sup> After King Henry VIII’s Statute of Proclamations 1539 which provided that proclamations made by the King with the assent of the Privy Council should have the force of Acts of Parliament if they were not prejudicial to “any person’s inheritance, offices, liberties, goods, chattels or life.” (This enactment was repealed by an Act of 1547.)



*oversight...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.”*

The final two paragraphs of the Constitutional Committee’s Report read as follows:

*“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.*

*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.”*

The Constitutional Committee were also critical that no “super-affirmative” resolution procedure was proposed in the Bill, requiring Ministers to take into account any representations or resolution of either House, and any recommendations of a Parliamentary Committee in respect of a draft order or any requirement for prior consultation with interested or affected parties (both of which had been included in the Legislative and Regulatory Reform Act 2006).

The Fifth Report of the Delegated Powers and Regulatory Reform Committee published on 12 November 2010 stated that *“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.”*

That Committee did not consider that a super-affirmative resolution procedure would compensate for a *“misconceived delegated power”*. It suggested that the Bill should contain more detail about how powers would be exercised in relation to particular bodies and that some other bodies should be removed from the Bill altogether, that there should be further limits on Ministers’ exercise of those powers and that a sunset clause should be introduced in order to limit the duration for which those powers would remain available to Ministers.

The idea of a sunset clause was supported in chapter 8 of the Public Administration Select Committee’s Fifth Report, published on 7 January 2011 and entitled *“Smaller Government: Shrinking the Quango State”*. The report considered both the Bill and the suggestions for additional safeguards made in those earlier reports. It recommended that the process for conducting a regular review of public bodies proposed by the Government should be included in the Bill and in its summary it reported<sup>10</sup> that the Bill *“contains insufficient*

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<sup>10</sup> Para. 135



*safeguards to prevent the misuse of powers by Ministers*” and that it should only serve the current review of public bodies, with fresh primary legislation required for future reviews.

As referred to below, an amendment to provide for a sunset clause was duly tabled by the Government and will, if enacted, have the effect of emptying schedules 1 to 5 five years after the relevant entries come into force. The result of this is that primary legislation would be required to repopulate the Schedules thereafter. The Government’s reasoning for not sunseting the whole Bill is that it intends the remaining public bodies to be subject to three yearly reviews and that Departments often find it difficult to find a legislative vehicle to implement their reforms. The 12<sup>th</sup> Report of the Delegated Powers and Regulatory Reform Select Committee<sup>11</sup> accepted that this provides an effective limitation on the extent of the powers in the Bill.

## **Content of the Bill**

### **Clauses 1 to 6 – Powers of Ministers**

#### **Clause 1 & Schedule 1 – power to abolish**

Clause 1 would enable a Minister to abolish any public body or office specified in Schedule 1 and to transfer any or all of its functions to an “eligible person”, defined as:

- a Minister, the Scottish Ministers, a Northern Ireland Department or the Welsh Ministers

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<sup>11</sup> Published 31 March 2011

- any other person exercising public functions
- a company limited by guarantee
- a community interest company; or
- a body of trustees or other unincorporated body.

Government amendments tabled at Report Stage provide that a UK Minister would not have power to abolish certain bodies insofar as they relate to Wales but that Welsh Ministers would have such powers. This appears in a new clause 13 (Powers relating to other bodies).

#### **Clause 2 & Schedule 2 – power to merge**

Clause 2 would enable a Minister to merge any group of bodies or offices listed in Schedule 2, including establishing new bodies or offices and transferring functions within that group or to an eligible person not included in the group.

#### **Clause 3 & Schedule 3 – power to modify constitutional arrangements**

Clause 3 would enable a Minister to modify the “constitutional arrangements” of a body or office specified in Schedule 3. “Constitutional arrangements” are defined broadly in clauses 3(2) and (3).



### **Clause 4 & Schedule 4 – power to modify funding arrangements**

Clause 4 would enable a Minister to alter the funding arrangements of a body or office specified in Schedule 4 so as to change the extent to which it is funded by the taxpayer and/or to enable it to charge fees for exercising any of its functions, and to decide how much they should be.

### **Clause 5 and Schedule 5 – power to modify or transfer functions**

Clause 5 would enable a Minister to abolish, add to or alter the functions of a body or office specified in Schedule 5, to devolve them to an eligible person (as defined in clause 1(3)) or even to change the purpose or objective for which the person exercises a function or the conditions under which it is exercised.

### **As at introduction - Clause 6 and Schedule 6 – power to authorise delegation**

*This clause has been deleted by Government amendment. It would have enabled a Minister to authorise a body specified in Schedule 6 to take over the functions of another eligible person. (Delegation of this sort was limited to 10 years and liable to revocation at any time.) The explanation for its deletion provided by a Cabinet Office memorandum<sup>12</sup> is that following consultation on the proposals in relation to the two bodies in*

<sup>12</sup> Prepared to assist the Delegated Powers and Regulatory Reform Committee in relation to amendments tabled on 21 and 22 March 2011

*Schedule 6 the Government concluded that such powers would not be utilised.*

### **Clause 6 – consequential provision etc**

Clause 6 would enable orders made under clauses 1 to 5 to include provisions and savings incidental to their main purpose. Clause 6(4) was introduced as an amendment. It would allow (but not require) orders made concerning a particular body to remove that body from the relevant Schedule, thereby providing them with some security about their future.

### **Clauses 7 to 11 – Powers of Ministers: supplementary**

#### **Clause 7 – Restrictions on Ministerial powers**

Clause 7 is an amendment that enjoyed all party support. It would prevent orders being made that curtail the independent exercise of existing judicial, enforcement and scrutiny functions.

#### **As at introduction - Clause 8 – matters to be considered**

*Clause 8 set out matters to be considered by Ministers in relation to clauses 1 to 6. As introduced, clause 8(1), whilst not limiting the purposes for which powers in clauses 1 to 6 could be exercised, specified that the Minister had to take into account “achieving increased efficiency, effectiveness and economy in the exercise of public functions” and securing appropriate accountability to Ministers. Clause 8(2) would have allow 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 be able to continue to exercise. In other words, it was left to the Minister to make this judgement. The clause has been substantially revised following a Government defeat at Committee stage as set out below.*

#### **Amended Clause 8 – purpose and conditions**

Clause 8, after the amendment tabled for consideration at Report Stage increases the restrictions on Ministers by providing that a Minister may make an order “*only*” if he considers that it will serve the purposes of “*improving the exercise of public functions, “having regard to (a) efficiency, (b) effectiveness, (c) economy and (d) securing appropriate accountability to Ministers.”* The rationale of the amendment is to limit the discretion to make orders so as to prevent them being made for purposes outside the intended scope of the Bill.

#### **Clause 9 – devolution**

Clause 9 would restrict the powers of Ministers in respect of devolved matters. As introduced, it required orders made under clauses 1 to 6 that included provisions within the legislative competence of the devolved administrations to have the consent of the Scottish or Welsh Ministers or Northern Ireland Department. The thrust of a Government amendment to clause 9 is to substitute the consent of the Scottish

Parliament, Welsh Assembly and Northern Ireland Assembly for the consent of their Ministers.

It should be noted that the provisions of the Bill will now be subject to the practical effect of the “yes” vote in the Welsh Referendum in March 2011. The “yes” vote means that the Welsh Assembly can pass primary legislation in 20 broad policy areas without first obtaining consent to do so from Westminster. This increases the likelihood that approval of the Assembly will be required before the order-making powers in clauses 1 to 5 may be exercised by UK Ministers.

#### **Clause 10 – consultation**

The amended Bill inserts a new clause 10 that would oblige a Minister proposing to make an order under clauses 1 to 5 to first consult with the persons or bodies listed in clause 10(1) (a) to (g). These include the body to which the order relates and other persons representative of those whose interests are “*substantially affected*”. If changes are made to the proposed order as a result of consultation, the Minister must carry out such further consultation with respect to the changes as seems appropriate. (The Bill does not expressly provide for further consultation where changes are made after consultation but do not result from it.)

#### **Clause 11 – procedure**

This replaces the former Clause 10 (procedure for orders) which provided simply that orders made under clauses 1 to 6 would be made by affirmative procedure (and which was one of the more contentious aspects of the Bill). Under clause 11,



there would be a minimum 12 week period between the start of consultation and the laying before Parliament of not just the draft order but also an explanatory document. Clause 11(2) would require the explanatory document to give reasons for the order and to set out why the Minister considers it serves the purpose (and satisfies the conditions) in clause 8. Importantly, the explanatory document would summarise the representations received in consultation and, where an order contains provisions in relation to multiple bodies (“omnibus orders”), the Minister would be required to explain why he considers this appropriate. If approved by a resolution<sup>13</sup> of each House after 40 days<sup>14</sup>, the order could be made.

To allay constitutional concerns, however, an alternative “enhanced” procedure would apply if, within 30 days of the order being laid, either House so resolved or a Committee of either House charged with reporting on the draft order were to require it. In such cases, the Minister would be obliged to have regard to any representations, any resolutions of either House of Parliament or any recommendations of the Committee made within a 60 day period. If, thereafter, the Minister wished to proceed with a materially amended order, he would lay before Parliament both that order and a summary of the proposed changes for making by affirmative resolution.

***As at introduction - Clause 11 and Schedule 7 – power to amend Schedules 1 to 6***

*Clause 11 would have enabled a Minister to add a body or office named in Schedule 7 to Schedules 1 to 6, for example, at one of the three yearly reviews of public bodies. Also, clause 11(6) provided that an order under clause 2 (power to merge) could add a new body created as the result of a merger (or a body that remains after a merger) to Schedule 7. This was the only way in which Schedule 7 might be revised (other than by further Act of Parliament) and meant, in effect, that the scope of the Act once passed would be limited to those bodies or types of bodies already included. Both clause 11 and Schedule 11 are now deleted, meaning that bodies can now only be added to Schedules 1 to 5 by primary legislation. However, certain bodies introduced in Schedule 7 have been moved to other Schedules.*

***As at introduction - Clause 12 – procedure for orders under section 11***

*With the deletion of clause 11, this clause was rendered redundant.*

**Clauses 12 to 15 – powers of Welsh Ministers**

The provisions relating to Wales have been expanded since the Bill was introduced. The overall policy objective of these provisions is that Welsh Ministers should be able to review, holistically, the delivery of functions relating to the environment in, and in relation to, Wales.

<sup>13</sup> Affirmative resolution

<sup>14</sup> From the date the order is laid before Parliament



### **Clause 12 – powers relating to environmental bodies**

Clause 12 contains powers that would enable Welsh Ministers by order to modify or transfer the functions of the Countryside Council for Wales, the Environment Agency, Forestry Commissioners and a Welsh Flood and Coastal Committee, including the transfer of functions to a new body. In relation to the Environment Agency and Forestry Commissioners, the original wording provided for order-making in respect of functions “so far as relating to Wales”. Government amendment at Report Stage changed the wording so that powers cover only “Welsh devolved functions.” The explanation for so doing<sup>15</sup> is that it reflects more accurately the territorial scope of the Welsh Ministers’ existing powers in relation to bodies exercising environmental functions affecting parts of Wales. The provisions in respect of the Welsh Flood and Coastal Committees (defined in clause 12(8)) were not present at introduction.

Clause 12(6) would enable Welsh Ministers to transfer any Welsh devolved function relating to the environment to a new body or one of the three named bodies.

Clause 12(9) requires Welsh Ministers to consult the Secretary of State before making an order relating to a Welsh Flood and Coastal Committee for a region not wholly in Wales.

<sup>15</sup> Set out in the Cabinet Office’s memorandum to the Delegated Powers and Regulatory reform Committee in relation to amendments tabled on 21 and 22 March.

### **Clause 13 – powers relating to other bodies**

As referred to in relation to clause 1, the revised Bill provides powers to Welsh Ministers to abolish the bodies named in clause 13(1)<sup>16</sup> insofar as they relate to Wales. Clauses 13(3) to (6) contain provisions allowing Welsh Ministers to modify arrangements relating to water quality inspectors and internal drainage boards.

### **Clauses 14 & 15 – powers of Welsh Ministers – consequential provisions and delegation**

Clauses 14 and 15 provide for orders of the Welsh Ministers to contain consequential provisions and for arrangements to be made between the Environment Agency, the Forestry Commissioners (and any other person exercising Welsh devolved functions relating to the environment) for carrying out of functions and provision of services by one body to another. The Secretary of State’s consent is required for arrangements relating to the two named bodies and any other cross-border operators<sup>17</sup>.

<sup>16</sup> The specified bodies are (a) an agricultural dwelling-house advisory committee, (b) an agricultural wages committee, (c) the Environmental Protection Advisory Committee established under section 12(6) of the Environment Act 1995 (Wales), (d) the regional and local fisheries advisory committee established under section 13(5) of that Act and (e) a regional advisory committee maintained under section 37(1)(b) of the Forestry Act 1967.

<sup>17</sup> Term defined in clause 28(1).



### **Clauses 16 to 19 - Powers of Welsh Ministers – supplementary**

#### **Clause 16 – purpose and conditions for orders made by Welsh Ministers**

Clause 16 replaces the requirement in clause 13(7) of the Bill as at introduction (and subsequently deleted) that, in exercising powers relating to environmental bodies, Welsh Ministers must have regard to the matters listed in clause 13(9) and the restrictions in clause 13(10). These replicated the matters to be considered by Ministers set out in the then clause 8. The new provision at clause 16 applies to orders under clauses 12 and 13 and mirrors, in relation to Welsh Ministers, those requirements as to purpose imposed on UK Ministers by the revised clause 8.

#### ***As introduced - Clauses 17 to 19 – powers relating to the Secretary of State and Forestry Commissioners***

*Clauses 17 to 19 were particularly contentious. They gave rise to significant publicity and concerns about the long term retention of Forestry Commission land for the benefit of the public. On 17 February 2011, the Secretary of State for Environment, Farming and Rural Affairs, Caroline Spelman, made a statement to the House of Commons during which she said “the forestry clauses in the Public Bodies Bill...gave the wrong impression as to the Government’s intentions” and that these provisions would be withdrawn. Clause 19 provided that orders made under clauses 17 and 18 would be subject to affirmative resolution.*

*The relevant clauses have since been withdrawn and the Forestry Commissioners no longer appear in any of the Schedules to the Bill.*

#### **Clause 17 – Consent of UK Ministers**

Clause 13(7), as introduced and subsequently deleted, would have required the consent of the Secretary of State to an order affecting a function that was not a Welsh devolved function or transferring a function to a body that did not previously exercise devolved functions. The rather odd result of clause 13(7), if enacted, would have been that Parliament in Westminster could devolve power to Welsh Ministers (albeit with Ministerial consent from Whitehall) to amend by order Acts of Parliament concerning matters which were not within the competence of the Welsh Assembly. Clause 13(7) has been replaced with a requirement for the consent of the Secretary of State to any order that transfers a function to, or confers a function on, the Environment Agency, Forestry Commissioners or any other cross-border operator, or which modifies their functions as provided for by clause 14.

#### **Clauses 18 and 19 – Consultation and Procedure for Orders by Welsh Ministers**

Clause 18 imposes on Welsh Ministers, with appropriate modifications, similar obligations in relation to consultation as apply to UK Ministers pursuant to clause 10. Clause 19 (1) to (10) applies to the Welsh Assembly the same affirmative resolution procedure and enhanced procedure set out in relation to the UK Parliament in clause 11. Clause 19(11) prevents a Secretary



of State making an order under section 14(6)<sup>18</sup> unless the order has been subject to affirmative resolution by both Houses of Parliament (but does not provide for any enhanced procedure).

### **Clauses 20 to 22 –Restrictions on powers of Ministers and Welsh Ministers**

#### **Clause 20 – restriction of creation of functions**

Save where an order repeals and then re-enacts such a power, clause 20 would prevent an order made under 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.

#### **Clause 21 – restriction on transfer and delegation of functions**

Clause 21 would prevent the transfer of a function to a body or office that does not want it unless that body already exercises public functions. Public functions are defined as functions conferred under an enactment or royal charter. Because some of the bodies exercising public functions are

<sup>18</sup> This would be an order made by the UK Secretary of State modifying the constitutional or funding arrangements of the Environment Agency, Forestry Commissioners or other cross-border operator in consequence of an order made by Welsh Ministers under clauses 12 or 13.

charities, however<sup>19</sup>, the Government introduced an amendment that would apply the consent requirement to charitable bodies (even if they already exercise public functions).

Where a recipient body does not already exercise public functions, clauses 21(2) and (3) prevent the transfer of certain “excluded functions”. These are:

- that of a tribunal exercising judicial powers
- 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 that would interfere with or affect the liberty of an individual.

#### **Clause 22 – restriction on creation of criminal offences**

Clause 22 would prevent an order made under the powers in clauses 1 to 19 from creating criminal offences above the specified limit (although there is no explanation why orders made under this Bill would need to create criminal offences.)

### **Clauses 23 to 25 - transfer of property, rights and liabilities**

Clause 23 enables a Minister (or Welsh Ministers, where appropriate) to make a transfer scheme providing for the transfer of property, rights and

<sup>19</sup> The National Trust, for example.



liabilities in connection with an order under clauses 1 to 5 (or 12 and 13). A further Government amendment at clause 23(4) requires a charity to consent to any transfer of property, rights or liabilities to it. Clause 23(5) includes a requirement to make TUPE-style<sup>20</sup> provision for employees.

By clause 24, such transfer schemes may be included in any order to which they relate or, if that is not done, must be laid before Parliament (or the Welsh Assembly, where appropriate) after being made.

Clause 25 gives the Treasury power to vary the way certain tax provisions<sup>21</sup> apply to transfer schemes under clause 23. (This particular power is subject merely to the negative resolution procedure.)

#### **Clause 26 – scope of power to amend Schedule 1 to Superannuation Act**

Employees at some quangos are presently eligible for civil service pension arrangements even though they are not formally civil servants. This clause amends the 1972 Act to make it clear that when an employment or office is added by Ministerial order to Schedule 1 (so that its staff become eligible to membership of the Civil Service Pension Fund and linked schemes), the condition that the remuneration of those staff must be paid

<sup>20</sup> Provision the same or similar to that contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246)

<sup>21</sup> Income tax, corporation tax, capital gains tax, stamp duty and stamp duty reserve tax

by funds provided by Parliament applies **only** at the time that the addition to Schedule 1 is made. Thus, employees of bodies whose status or funding arrangements are altered by Ministers under this Bill will be able to retain their membership of the civil service scheme.

#### **Clauses 27 to 31: Final**

##### **Clause 27 – orders: supplementary**

Orders under this Bill would have to be made by statutory instrument. By clause 27(4), no order made under this Bill would be regarded as a hybrid instrument. This effectively disapplies the Hybrid Instruments procedure which gives persons particularly affected by a statutory instrument an opportunity to present arguments against it to the Hybrids Instrument Committee (and then potentially to a Select Committee). The Explanatory Notes to the Bill state that this is designed to ensure that all orders made under the Bill are subject to the same level of Parliamentary scrutiny. It does not, however, provide for any alternative protection for affected people.

##### **Clauses 28 and 29 – interpretation and extent**

These clauses define some of the words and phrases used in the Bill and its extent. The Bill covers the whole of the United Kingdom and any order made under it that repeals, revokes, or amends another enactment extending outside England, Scotland, Wales and Northern Ireland may have the same territorial extent as the enactment it changes.



## Summary of Outstanding Constitutional Issues

- The Bill still contains considerable scope for rewriting the statute book by Ministerial orders. It would still allow for a single order to make changes to a number of bodies or offices, whose functions may be quite different from one another. Although this only relates to the bodies currently listed in the Schedules to the Bill, it would be open to a future Government to add bodies to these Schedules by further primary legislation. It is questionable whether the revised scope of clause 8 (purpose and conditions) will be an effective restraint on the purposes for which Parliament (now or in the future) will permit Ministers to use their broad powers.
- The Bill has been compared with the Legislative and Regulatory Reform 2006 Act, which also provides a framework for amending primary legislation by order. Unlike clause 3(1) of the 2006 Act, however, clause 8 (purpose and conditions) does not include safeguards that the effect of the order must be proportionate to the policy objective, strike a fair balance and not constitutionally significant.
- The statutory basis of various public bodies may differ widely for very good reasons that were scrutinised by Parliament at the time they were established, but the Bill treats them all in the same way. Orders under this Bill may even amend or repeal Acts of Parliament that have not yet been made.<sup>22</sup>
- In practice, it is very rare for either House to vote against secondary legislation. Thus, it could be argued that the proposed safeguards under the Bill providing for an “enhanced” affirmative resolution procedure are insufficient.
- The mere fact of being placed in one of the Schedules to the Bill may well introduce an element of uncertainty to the future of a Public Body, which may be damaging to its success and jeopardise its impartiality if it fears that it may be interfered with if it does not tow the Government’s party line.
- Interference with the Hybrid Instruments Procedure<sup>23</sup> would curtail existing protections without replacing them.

## Conclusion

We look forward with great interest to the passage of the Bill through the House of Commons.

<sup>22</sup> Clause 27(2).

<sup>23</sup> Clause 27(4)



#### Schedule 1 – Power to Abolish

Administrative Justice and Tribunals Council  
Advisory Committee on Hazardous Substances  
Advisory Committee on Pesticides and Advisory Committee on Pesticides for Northern Ireland  
Agricultural dwelling-house advisory committees for areas in England  
Agricultural Wages Board for England and Wales  
Agricultural wages committees for areas in England  
Aircraft and Shipbuilding Industries Arbitration Tribunal  
British Shipbuilders and any subsidiary of British Shipbuilders  
BRB (Residuary) Limited  
Child Maintenance and Enforcement Commission  
Commission for Rural Communities  
Committee on Agricultural Valuation  
Competition Service  
Courts boards  
Crown Court Rule Committee  
Disability Living Allowance Advisory Board  
Disabled Persons Transport Advisory Committee  
Environment Protection Advisory Committees  
Food from Britain  
Football Licensing Authority  
Home Grown Timber Advisory Committee  
Inland Waterways Advisory Council  
Her Majesty's Inspectorate of Court Administration  
Library Advisory Council for England  
Magistrates' Courts Rules Committee  
National Consumer Council (Consumer Focus)  
National Endowment for Science, Technology and the Arts  
Plant Varieties and Seeds Tribunal  
Public Guardian Board  
Railway Heritage Committee  
Regional and local fisheries advisory committees  
Regional Development Agency for the East Midlands  
Regional Development Agency for the Eastern Region  
Regional Development Agency for the North East  
Regional Development Agency for the North West



Regional Development Agency for the South East  
Regional Development Agency for the South West  
Regional Development Agency for the West Midlands  
Regional Development Agency for Yorkshire and the Humber  
Valuation Tribunal Service  
Victims' Advisory Panel

Schedule 2 – Power to merge

*Group 1*  
Central Arbitration Committee  
Certification Officer  
*Group 2*  
Gambling Commission  
National Lottery Commission  
*Group 3*  
Pensions Ombudsman  
Ombudsman for the Board of the Pension Protection Fund  
*Group 4*  
Director of Public Prosecutions  
Director of Revenue and Customs Prosecutions  
*Group 5*  
Competition Commission  
Office of Fair Trading  
*Group 6*  
Administrative Justice and Tribunals Council  
Civil Justice Council

Schedule 3 – Power to modify constitutional arrangements

Administrative Justice and Tribunals Council  
British Hallmarking Council  
Broads Authority  
Civil Justice Council  
Commission for Equality and Human Rights  
English Tourist Board  
Internal drainage boards for areas wholly or mainly in England  
Joint Nature Conservation Committee  
National Park authorities in England



Passengers' Council (Passenger Focus)  
Sianel Pedwar Cymru (S4C)  
Theatres Trust

Schedule 4 – Power to modify funding arrangements

Administrative Justice and Tribunals Council  
Civil Justice Council  
Commission for Equality and Human Rights  
Inspectors appointed by the Secretary of State under section 86 of the Water Industry Act 1991  
Marine Management Organisation  
Natural England  
Office of Communications (Ofcom)  
Sianel Pedwar Cymru (S4C)

Schedule 5 – power to modify or transfer functions

Administrative Justice and Tribunals Council  
Advisory Council on Public Records  
British Hallmarking Council  
British Waterways Board  
Civil Justice Council  
Commission for Equality and Human Rights  
Environment Agency  
Horserace Betting Levy Board  
Human Fertilisation and Embryology Authority  
Human Tissue Authority  
Internal drainage boards for areas wholly or mainly in England  
Keeper of Public Records  
Office of Communications (Ofcom)  
Office of Fair Trading (OFT)  
Public Records Office



For more information please contact:

Paul Irving

DT: 020 7593 5021

E: [pirving@wslaw.co.uk](mailto:pirving@wslaw.co.uk)

or

Jane Wakeham

DT: 020 7593 5066

E: [jwakeham@wslaw.co.uk](mailto:jwakeham@wslaw.co.uk)