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Chair of the Constitution Committee
House of Lords
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Friday 19th November 2010

**RESPONSE TO CONSTITUTION COMMITTEE REPORT PUBLISHED
THURSDAY 4 NOVEMBER 2010**

Dear Baroness Jay,

I am writing as Bill Minister for the Public Bodies Bill (HL), in response to the report of the Constitution Committee into the Bill, as published on 4 November 2010 as HL Paper 51. I would like to begin by thanking Committee members for their work in producing this report in advance of Second Reading.

As you will know, the Public Bodies Bill has been introduced as a means of enabling a series of reforms to specific public bodies which were agreed across Government and announced to Parliament by the Minister for the Cabinet Office on 14 October. In addition, it seeks to put in place a framework which would enable future reform of public bodies, specified in a schedule to the Bill, pending the outcome of future reviews.

When considering how we could most effectively legislate for these proposals, the Government had to address two issues: the extent of the legislative changes needed and how they could be delivered within a reasonable timeframe. There are a wide range of changes needed to a diverse range of bodies, however, many of the changes are, in policy terms, relatively straightforward, and seek to rationalise or re-structure.

To seek to enact them all through primary legislation would involve a bill or bills the size of which would be undeliverable, or waiting, over a number of sessions, for suitable legislative vehicles. Indeed, owing to other pressures on Parliament, and that fact that some Departments often do not have a legislative vehicle in a particular session, the use of primary legislation would cause severe delays to the proposed reform package. Given that these reforms stem from a commitment of the Coalition Government, and given that many of them enjoy wide public support, we remain of the opinion that such delays could not reasonably be justified.

For this reason, the Public Bodies bill as introduced into the House of Lords on 28 October is based on a series of order-making powers designed to enable all Departments to make their agreed reforms in a timely fashion through secondary legislation. Recognising that the use of secondary legislation has often proved a matter of concern for Parliament, the original Bill incorporates a series of limitations on the order-making powers it contains. Primarily, these are:

- a) Any order made under the powers in the Bill (with the exception of those made relating to taxation under Clause 24) would be subject to the affirmative procedure;
- b) Orders made under Clauses 1-6 (which incorporate the principal powers to make changes to public bodies and offices) are subject to the provisions in Clause 8 (2), stipulating that a Minister can make an order only if he or she considers that it does not remove any necessary protection, or prevent a person from exercising a right or freedom which that person should have a reasonable expectation of being able to exercise;
- c) Orders made under the Bill are subject to the restrictions in Clauses 20-22 relating to specific types of power (e.g. to search or to compel the giving of evidence), limits on the transfer of functions to parties other than public authorities, and the creation of new criminal offences; and
- d) The Schedules to the Bill specify the bodies to which each of the principal order-making powers can be applied, significantly restricting the scope of these powers.

In your report, and in what was considered a high quality 2nd reading debate, a number of concerns have been raised about different aspects of the Bill and I have now had time to fully consider how best to respond to these concerns. I undertook to bring forward Government amendments that provide reassurance to the House that this Bill is not an attempt to pool power with the executive. Rather it is a proportionate response to a very real and recurring problem that the Coalition Government has sought to tackle now and in the future, namely the proliferation, mission creep and lack of accountability for public bodies that operate at arms length from Government. I should like to now set out the detail and rationale of the Government's amendments and explain why I believe they represent a practical and measured response to the Constitution Committee's concerns.

Safeguards

In paragraph 7, the report welcomes the safeguards which have been included in the Bill but suggests that these are "far from sufficient". Paragraph 11 of the report also notes that the Bill contains "no provisions" with regards to the safeguarding of the independence of bodies named in Schedule 7. In drafting the Bill our objective was to strike a proportionate balance given the need to facilitate a broad reform

programme, but the Government rightly accept the learned views of Peers on the need to set out on the face of the Bill the limitations and safeguards that apply to order making powers.

As a result I have tabled a series of Government amendments that build in clear safeguards on the use of all order-making powers specified in the Bill. Specifically, this group of amendments ensures that when bringing forward an order a Minister must consider the extent to which functions affected by that order need to be exercised independently of Ministers. The range of safeguards that a Minister must satisfy before bringing forward an order range from whether a function needs to be independent to protect the provision of specialist or impartial advice to whether a function is vital for proper scrutiny of Ministers' actions.

The amendments provide clear reassurance that the Minister must be satisfied that an order does not remove any necessary protection, specifically regarding the independence of the judiciary. We listened carefully to the concerns of a number of Peers during the 2nd Reading debate and this protection is now explicitly listed on the face of the Bill, with reference to the definition of judicial independence in section 3 of the Constitutional Reform Act 2005.

We are pleased to note the Committee's acknowledgment of the provisions set out in clause 8(2), and welcome the opportunity to clarify our reasoning for the differences between the safeguards in this Bill and those in the Legislative and Regulatory Reform Act 2006. We were of course mindful of this Act, but we recognised the more restricted subject matter of the Public Bodies Bill, and concluded that a replication of the conditions in that Act was neither desirable nor appropriate. We see proportionality as something for policy officials and Ministers to consider at the policy stage, and as bound up in the matters Ministers will consider as part and parcel of normal policy development. A decision which was not proportionate, or was irrational, could of course be challenged in the Courts in the normal way.

We considered the limitation on constitutional significance, but again, decided that the Public Bodies Bill presented a much more targeted set of proposals than the Legislative and Regulatory Reform Act because the Schedules to the Bill name the specific bodies applicable to the powers. Parliament therefore has the opportunity to consider and debate the powers in relation to the bodies and whether they are appropriate within the confines of the safeguards in the Bill. We also had concerns about including a definition which could lead to difficulties of interpretation in the future.

Parliamentary Scrutiny

In paragraph 7 the Committee propose the addition of the 'super affirmative resolution procedure' as a method of building in additional safeguards akin to those in the Legislative and Regulatory Reform Act 2006. There is no standard form for the 'super affirmative procedure' although two recent Acts (the Act named above and the

Digital Economy Act 2010) have specified a type of 'super affirmative' procedure for the exercise of their order making powers. While a form of this procedure would build in limited additional scrutiny requirements, we do not believe the powers in the Public Bodies Bill are of a similar nature or extent to those taken in the LRA meaning an exact replication would neither be appropriate or proportionate.

As a result, we have considered existing precedents and tabled an amendment to the order making procedure to build in additional Parliamentary scrutiny in a way that is practical and proportionate for the diversity of reforms that will be facilitated by this Bill. In practice this revised procedure will stipulate that draft affirmative orders are laid for a period of 30 days during which, if either House of Parliament considers it necessary, the procedure can be escalated to an 'enhanced affirmative procedure'. This enhanced procedure allows Parliament to further scrutinise the draft, during the 60 days in which the draft order must be laid, and to make recommendations to the Minister who must have regard to those recommendations before proceeding. In addition, draft orders will now have to be accompanied by an explanatory document that must include details of the purpose and reasoning of the order, why the Minister considers that the safeguards set out in clause 8 have been satisfied and contain a summary of the representations received in the consultation (on which I elaborate below).

Regarding the Committee's concerns about the use of omnibus orders we should like to clarify that departments will be responsible for the bodies they sponsor, though we envisage that it would usually be appropriate for Departments to use individual orders for each body. However, we are prepared to consider whether omnibus orders should be explicitly prohibited on the face of the Bill.

We believe this procedure meets the Committee's principal criteria that Parliament are given the opportunity to scrutinise orders in detail while also providing a mechanism that allows Ministers to deliver these important reforms in line with public expectations.

Consultation

Among the Committee's concerns was the absence of a statutory requirement to consult on the proposed reforms that will be taken forward by the orders. In drafting the Bill without such a requirement we were mindful of the existing code of practice on consultation. However, we acknowledge the Committee's concerns on this matter and have tabled amendments that will set out in statute the requirement that Ministers undertake formal consultation before laying draft orders before Parliament.

Specifically, the new consultation clause will require Ministers to consult the body of office holder to which the proposals relate, other stakeholders substantially affected by the proposals, the devolved administrations, the Lord Chief Justice where appropriate and any other stakeholders the Minister considers appropriate. Where substantive changes are made as a result of the consultation process, the Minister

will also be required to undertake further consultations on these changes. In order to ensure this requirement is proportionate to scope of some reforms and does not introduce unnecessary burdens on reforms that have already been subject to substantial consultation, the statutory twelve week period can start before the commencement of this clause.

Devolved matters

Clause 9, which relates to the limits placed on UK ministers regarding devolved matters, this has been developed following extensive dialogue with the devolved administrations in Scotland, Wales and Northern Ireland. It reflects the collaborative approach we have taken in drafting the Bill and in building in necessary checks where orders relate to areas within the legislative competence of the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly. Legislative Consent Motions are being sought for the Bill as a whole, and the provisions within Clause 9 reflect commonly accepted practice in dealing with devolved matters through primary legislation. However, this dialogue is ongoing and we are working constructively with the devolved administrations to explore your concerns and attempt to reach a position that is acceptable to Parliament, the devolved administrations, the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly and the Government.

I hope that the information above assists the Committee in explaining the rationale behind the introduction of the Bill as drafted, and provides adequate reassurances in relation to the concerns raised in the report of 4 November. Again, I would like to thank the Committee for its work in producing this report, and reiterate that Ministerial colleagues and I are keen to work with Parliamentarians to reach a mutually agreeable and practical solution to the questions that the report rightly poses. We are looking forward to Lords Committee stage and see it as an opportunity to further explain our rationale and to use the considerable expertise of this House to further scrutinise the Bill.

A handwritten signature in blue ink, appearing to read 'Lord Taylor of Holbeach', with a horizontal line underneath.

LORD TAYLOR OF HOLBEACH