



## **Public Bodies Bill**

### **Briefing on Second Reading House of Lords**

**November 2010**

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## **Introduction and summary**

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE has serious concerns regarding the Public Bodies Bill, in particular:
  - **It creates broad ‘Henry VIII’ clauses which will allow ministers to amend primary legislation and create criminal offences without sufficient scrutiny;**
  - **It allows ministerial abolition of and interference with public bodies whose independence is vital for the protection of human rights and the maintenance of the integrity of the legal system.**
3. **We therefore believe that the Bill, in its entirety, should not be passed.**

## **Abolishing, merging and reforming public bodies by ministerial order**

4. Clauses 1 to 6 of the Bill create powers for ministers to abolish, merge, modify the constitutional or funding arrangements or functions, transfer the functions or authorise delegation of the functions of a large number of public bodies scheduled to the Bill in Schedules 1-6. Clause 11 allows ministers to add further bodies to Schedules 1 to 6 from a larger list in Schedule 7. A large number of the public bodies in Schedules 1-7 have vital oversight functions in ensuring compliance with human rights law and maintaining the independence of the legal system from government. JUSTICE therefore has serious concerns regarding the constitutional impact of this Bill and its effect upon human rights scrutiny of the UK government and others performing public functions for the purposes of the Human Rights Act 1998.
5. While the merits or otherwise of the abolition, merger or reform of non-departmental public bodies (NDPBs) in some policy areas is a political question upon which JUSTICE would not take a position, other NDPBs have been created precisely because their functions in, for example, adjudicating upon the exercise of governmental powers; investigating compliance with human rights standards by public authorities; or setting rules for courts and tribunals must be independent but

should be publicly funded. Their potential abolition (or even the transfer of their powers to ministers or others selected by ministers (*Clause 1*)) is thus of serious cause for concern, and it is inappropriate for government ministers to be able, by order, to interfere with them by changing their chair or members, qualifications for employees, accountability to ministers, funding arrangements or functions (*Clauses 3-5*).

6. We therefore regard the inclusion in this Bill of the Commission for Equality for Human Rights, HM Chief Inspector of Prisons, and other bodies with vital oversight functions, as a matter of the most serious concern. We consider the CEHR and Prisons Inspectorate in detail below and also provide a list of other bodies that should be removed from the Bill if, contrary to our recommendation below, it is to become law.
7. While public bodies cannot be perpetually unreformed, any change to any of these arrangements on the part of an independent body should take place with the highest level of scrutiny, by Parliament and others, through consultation and then primary legislation. A ministerial order, even one subject to the affirmative resolution procedure, does not offer this level of scrutiny or democratic participation. Orders cannot be amended once laid before Parliament and may not even be the subject of Parliamentary debate before being passed. It is indeed highly unusual for them not to be passed; as a safeguard the affirmative resolution procedure is in these circumstances, therefore, wholly insufficient.
8. The passing of this Bill into law and in particular the inclusion of individual independent NDPBs in its Schedules will compromise their independence and may have a 'chilling effect' upon its exercise as it signals the government's intention, now or in the future, to abolish or alter them. Knowledge of the government's ability to do just that, at any time, may affect a body's independent exercise of its functions for fear of being wound up or having its powers diminished or funding withdrawn.
9. While some of the substantive reforms that the government wishes to accomplish through this Bill may be unobjectionable, there is no reason why these should not take place through primary legislation. In addition to the higher level of scrutiny this would also have the merit of being specific, rather than creating perpetual and wide-ranging powers to threaten the independence and indeed existence of NDPBs whenever a minister decided to do so.

10. The use of so-called 'Henry VIII' clauses (ie granting powers to ministers to amend primary legislation by order), as noted by the Lord Chief Justice in a speech earlier this year, has become increasingly common; we agree with him that:<sup>1</sup>

proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature.

We further believe, as do the House of Lords Constitution Committee,<sup>2</sup> that there are inadequate procedural safeguards in the Bill to prevent constitutionally inappropriate exercise of these powers in the future. We note that even the safeguards present in the Legislative and Regulatory Reform Act 2006 of the 'super-affirmative resolution procedure', requirements for consultation, proportionality and that the order not be of constitutional significance do not appear in this Bill.

11. Those safeguards which do appear, at clauses 8 and 20-22 are in our view weak and inadequate. The wording of clause 8(2) is particularly vague. We are also concerned at the limited restriction on the creation of criminal offences in clause 22. Criminal offences should not, as a matter of principle, be created by statutory instrument. If they are to be, this should take place under a specific power in primary legislation related to specific subject-matter, for example, in the context of regulation. A wide-ranging power to create criminal offences punishable with up to two years imprisonment as exists in this Bill should not be delegated to ministers for exercise by order due to the inadequate scrutiny that this method of law-making offers.
12. We therefore believe that the Bill should not be passed at Second Reading.

### **Commission for Equality and Human Rights**

13. The maintenance of the Commission for Equality and Human Rights (CEHR), as the UK's national human rights institution, is an important part of the UK's compliance with its international human rights obligations including Article 1 of the European

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

<sup>2</sup> *Public Bodies Bill*, House of Lords Constitution Committee report, November 2010.

Convention on Human Rights, which requires states parties to secure to everyone within their jurisdiction the Convention rights and freedoms. The internationally recognised standards for national human rights institutions are laid out in the Paris Principles<sup>3</sup> which set out the requirements for independence:

The composition of the national institution and the appointment of its members...shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights...

...

The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.

14. The CEHR has important functions which include holding formal inquiries or seeking judicial review to secure compliance with the Human Rights Act, and enforcing equalities duties through inquiries, investigations and litigation. It is axiomatic that the CEHR must be independent of government in appearance and in fact properly to carry out these functions; ministers should not be able to abolish or merge it or make changes to its composition, governance, functions or funding arrangements. Nor should it be included in a list of bodies to whom such changes might be made in future if secondary legislation is passed. The inclusion of the CEHR in Schedules 3, 4, 5 and 7 substantially compromises its independence; if the Bill continues to go through Parliament, therefore, the CEHR should be removed from all Schedules.

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<sup>3</sup> Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

## HM Chief Inspector of Prisons

15. We are extremely concerned that the Prisons Inspectorate, by virtue of its appearance in Schedule 7 to the Bill, could be added by ministerial order to a schedule of bodies that can be subject to extensive interference, merger or abolition. The Inspector of Prisons provides a vital safeguard for the maintenance of safety and human rights standards in custody and as an impetus for the improvement of standards in our prisons through the inspection and reporting procedure. Further, the UK is required, under the Optional Protocol to the UN Convention Against Torture,<sup>4</sup> to

set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment,<sup>5</sup>

and to allow such body or bodies, as well as the international Subcommittee on the prevention of torture, access to

any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.<sup>6</sup>

16. The independence of the Prisons Inspectorate is vital if its remit is to be fulfilled. Even to be placed on the list of bodies in Schedule 7, thereby signalling that its future is at risk, could compromise the independence of the Inspectorate. We suspect that the inclusion of the Prisons Inspectorate and HM Inspectorate of Probation on the list points to the reconsideration of a potential merger between them – as was planned in 2006 in the Police and Justice Bill but then abandoned. JUSTICE argued against such a merger in the Police and Justice Bill due to the unique safeguarding responsibilities of the Prisons Inspectorate; however, if such a merger is being considered, it should be consulted upon and then proposed in a Bill as in 2006. As in the case of the CEHR, above, it is entirely inappropriate for an independent body with important human rights protection functions to be potentially signposted for abolition,

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<sup>4</sup> The UK signed and ratified the Optional Protocol in 2003.

<sup>5</sup> Article 3.

<sup>6</sup> Article 4(1).

variation or merger by ministerial order in this Bill. If Schedule 7 is maintained, therefore, HM Chief Inspector of Prisons should be removed.

### **Schedules 1-7: inclusions giving rise to particular concern**

17. Those bodies whose inclusion in the Bill gives rise to particular cause for concern due to their need for independence in scrutinising the maintenance of human rights standards and/or the integrity of the legal system include (this list is not exhaustive but highlights our main areas of concern):

#### Schedule 1

- Administrative Justice and Tribunals Council
- Chief Coroner, Deputy Chief Coroner, Medical Advisers to the Chief Coroner and Deputy Medical Advisers to the Chief Coroner
- Courts boards
- Crown Court Rule Committee
- Her Majesty's Inspectorate of Court Administration
- Public Guardian Board
- Youth Justice Board for England and Wales

#### Schedule 2

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

#### Schedule 3

- Commission for Equality and Human Rights

#### Schedule 4

- Commission for Equality and Human Rights

#### Schedule 5

- Commission for Equality and Human Rights

#### Schedule 7

- Accountant General of the Senior Courts
- Assessor appointed under section 133(4) of the Criminal Justice Act 1988 (compensation for miscarriages of justice)
- Children's Commissioner
- Civil Justice Council
- Civil Procedure Rule Committee
- Commissioners appointed under section 91 of the Police Act 1997 (Surveillance Commissioners)
- Criminal Cases Review Commission
- Criminal Procedure Rule Committee
- Family Procedure Rule Committee
- Immigration Services Commissioner
- Independent monitoring boards of prisons
- Independent Police Complaints Commission
- Information Commissioner
- Investigatory Powers Tribunal (established under section 65 of the Regulation of Investigatory Powers Act 2000)
- Judicial Appointments and Conduct Ombudsman
- Judicial Appointments Commission
- Legal Services Board
- Legal Services Commission
- Office for Legal Complaints
- Official Solicitor to the Senior Courts
- Parole Board
- Sentencing Council for England and Wales
- Tribunal Procedure Committee
- Visiting Committees appointed for removal centres under section 152 of the Immigration and Asylum Act 1999.

JUSTICE  
November 2010