

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Second Reading Briefing on
the Public Bodies Bill in the House of
Commons**

July 2011

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

Contact

Isabella Sankey

Director of Policy

Direct Line: 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Sophie Farthing

Policy Officer

Direct Line: 020 7378 3654

Email: sophief@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-right.org.uk

Introduction

1. The past few months have seen a remarkable series of debates in the House of Lords as principled opposition to the Public Bodies Bill united members of all political denominations and none. Over the course of several debates, powerful arguments have been made against the approach taken in the Bill. This process demonstrates the very point that those opposing the Bill sought to make, namely the importance of informed and detailed parliamentary scrutiny in keeping a check on Executive excesses.

2. The Public Bodies Bill, as it emerged from House of Lords, is vastly improved, not least on account of the removal of the old clause 11 which, when combined with now omitted Schedule 7, granted Ministers the power to add any of 150 listed bodies to those schedules subject to the wide-ranging powers set out at old clauses 1 to 7. Liberty also welcomes the insertion of additional duties of consultation, a new and more rigorous procedure for the scrutiny of orders made in accordance with clauses 1 to 5 of the Bill and the addition of new clause 7 which adds a level of additional protection against overweening executive interference.

3. Liberty welcomes these changes given our serious concern about the sweeping executive powers contained this Bill, even as amended, to abolish, merge and modify a number of bodies, many of which have the important function of independently scrutinising and overseeing government action.¹

Outline of the Bill, as amended

4. Clauses 1 to 5 of the Bill as amended still confer wide-ranging powers on Ministers in relation to specified bodies and offices, which include powers to abolish and merge identified entities and to modify the constitutional, funding and operational arrangements of others. A Minister may only exercise the order making powers conferred by clauses 1 – 5 where he *‘considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b)*

¹ See Liberty’s Second Reading Briefing on the Bill in the House of Lords at <http://www.liberty-human-rights.org.uk/pdfs/policy10/public-bodies-bill-second-reading-lords-november-2010.pdf>, and our briefing for Committee stage at <http://www.liberty-human-rights.org.uk/pdfs/policy10/public-bodies-bill-briefing-committee-stage-lords-november-2010.pdf>.

effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers.²

The Bill also makes these powers contingent on the Minister in question considering that a proposed 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 exercise'*.³ Clauses 1 to 5 each have attached schedules which list those organisations earmarked for abolition, merger etc. Schedule 1 includes those bodies and offices to be abolished; Schedule 2 includes those bodies to be merged; Schedule 3 lists those bodies which may be subject to modification of their constitutional arrangements; Schedule 4 relates to modification of funding arrangements and Schedule 5 lists those bodies liable to have their functions transferred or modified.

5. Under the newly added clause 7, the Minister cannot modify or transfer the functions of a body such that it would prevent the function from being exercised independently of the Minister, in circumstances where the body has judicial functions, functions which involve enforcement of ministerial obligations⁴ and those which involve oversight or scrutiny of Ministerial actions.⁵ Further, clause 7(3) is a stand alone safeguard ensuring that any order made under the Bill to modify, abolish, transfer etc in relation to any of the bodies listed in the Schedules must be proportionate to the reasons given for the order.⁶

6. New clause 10 inserts additional obligations to consult with the body or the holder of the office subject to an order, in addition to the Lord Chief Justice and others whose interests are substantially affected as determined by the Minister where he considers it appropriate.⁷ The Minister may change the proposed order in whole or in part as a result of the consultation, in which case he must carry out further consultation regarding those changes as seems appropriate.⁸ For future orders made

² Clause 8(1).

³ Clause 8(2).

⁴ "Enforcement activities" are defined by clause 7(4) and include the bringing of legal proceedings or the provision of assistance with the bringing of legal proceedings; the carrying out of an investigation with a view to bringing legal proceedings or to providing such assistance; or the taking of steps preparatory to any of those things.

⁵ Clauses 7(1) and (2).

⁶ Clause 7(3).

⁷ Clause 10(1). There are also obligations to consult with Ministers in devolved assemblies where proposals relate to Scotland, Wales or Northern Ireland.

⁸ Clause 10(2).

under this Bill, should it be enacted, it is immaterial whether consultation is carried out before or after the commencement of the section.⁹

7. New clause 11 significantly alters the procedure for the laying of orders under clauses 1 to 5, providing much greater protection than the simple affirmative resolution procedure proposed by the old clause 10. Under the new procedure a Minister, if he considers it appropriate after undertaking consultation, but no earlier than 12 weeks beginning on the day that consultation began,¹⁰ must lay the draft order with an explanatory document.¹¹ In that explanatory document the Minister must introduce the order and give reasons for it, including outlining how it meets the objectives in clause 8(1)¹² and the conditions in clause 8(2),¹³ and it must include a summary of representations received during consultation.¹⁴ After the draft order is laid, it can either be approved by both Houses of Parliament after 40 days,¹⁵ or a further consideration procedure will be triggered.

8. New clause 12, inserted prior to the introduction of the Bill in the House of Commons, effectively places a time limit on the availability of the powers provided for in clauses 1-5. As such Ministers have a five year time window within which to exercise powers to abolish, merge or modify the listed organisations.

9. A second procedure will apply if a resolution of either House of Parliament requires it, and passes such resolution within 30 days,¹⁶ or if a committee of either House reporting on the order recommends that the further procedure applies and that recommendation is not rejected by the House by resolution within the 30-day period.¹⁷ This second procedure will require the Minister to have regard to any representations, resolutions or recommendations of a committee, from either House,

⁹ Clause 10(3).

¹⁰ Clause 11(3).

¹¹ Clause 11(1).

¹² Clause 11(2)(b)(i). Under clause 8(1) the Minister must have regard to the following objectives in considering whether to make an order: achieving increased (a) efficiency, (b) effectiveness, (c) economy and (d) securing appropriate accountability to Ministers.

¹³ Clause 11(2)(b)(ii). Under clause 8(2) the Minister may make an order if the following conditions are met: (a) the order does not remove any necessary protection; and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

¹⁴ Clause 11(2)(d).

¹⁵ Clause 11(4).

¹⁶ Clause 11(5)(a).

¹⁷ Clause 11(5)(b).

made during a 60-day period.¹⁸ During that 60 days the order may be made following approval by both Houses.¹⁹ Or, if after 60 days the Minister wishes to make material changes to the draft order, he must lay a revised draft order and make a statement giving a summary of the changes proposed.²⁰ It is not clear on the face of the Bill what this second statement must contain, or whether it must provide the same information required in the statement tabled with the original order under clause 11(2). The revised draft order may then be approved by resolution of both Houses and subsequently will be made in terms by the Minister,²¹ however there is no specified time frame in this clause for the revised draft order process. There is also no specified procedure should either House wish to reject the revised draft order; following normal statutory instrument procedure either House could of course refuse to affirm the order, which by convention is a rare occurrence.²²

Liberty's remaining concerns

10. Liberty welcomes certain aspects of the key changes to the Bill. The scrapping of the original clauses 11 and 12 and by extension Schedule 7 was entirely necessary to reign in what would have been unprecedented executive powers in modern British government; it is encouraging to see Government respond to the chorus of dissent in the House of Lords. The procedure now contained in clause 11 of the Bill is akin to the super-affirmative statutory instrument procedure, something we suggested as an alternative in our Committee stage briefing on the Bill.²³ We maintain that making these kinds of significant changes by statutory instrument – by whatever procedure – is inadequate in the absence of the safeguards provided by the primary legislative process given the obvious limitations of all statutory instrument procedure (such as only allowing for 90 minutes of debate on any resolution to affirm an order). This said, the super-affirmative procedure is an improvement on the original ruthless approach of the Bill which revealed a disregard for the important functions many of these organisations perform as a check and balance on executive power.

¹⁸ Clause 11(6).

¹⁹ Clause 11(7).

²⁰ Clause 11(8).

²¹ Clause 11(9). Clause 11(10) provides that for the purposes of this section an order will be made in the terms of a draft order or revised draft order it is contains not material changes to its provisions.

²² See House of Commons Information Office *Statutory Instruments* (Factsheet L7) (2008), available at <http://www.parliament.uk/documents/commons-information-office/l07.pdf>.

²³ See *Liberty's Committee Stage briefing on the Public Bodies Bill*, *ibid.*

11. The new check on the power of the Minister under clause 7 is a welcome change. In briefing on this Bill Liberty has emphasised particular concern about the implications of the Bill for those bodies mandated to provide independent oversight of the discharge of public functions involving vulnerable people, bodies directly concerned with the administration of justice and organisations and offices with a mandate to monitor and enforce the adherence of local and central government with human rights protections. As outlined above, this new clause provides for restrictions on Ministerial powers in relation to certain of these bodies and it is an important step by the Government in response to articulation of these concerns in the lengthy Committee proceedings. Under clauses 7(1) and (2), any actions of the Minister to modify or transfer a body's functions must not result in the body being unable to exercise those functions independently where that body has a judicial function, is involved in enforcement activities or has oversight or scrutiny functions of the actions of a Minister. While we recognise that this is a significant amendment to the Bill, we do remain concerned as to whether this will prove a sufficient safeguard in the overall context of this Bill. Further, the clause may not go far enough, as the restriction on Ministerial powers will only be on those powers to *modify* or *transfer* the function of a body under clauses 3 to 5 of the Bill, and will not affect the power to abolish or merge.

12. We also welcome the new test in clause 7(3), which provides for *any* order under this Bill – not only affecting those bodies with a judicial, enforcement or oversight role²⁴ - to be proportionate to the reasons for making the order. The proportionality test can act as a key check and safeguard on Executive excess and again is a step in the right direction.

13. We are pleased that the Chief Coroner, Deputy Chief Coroners, Medical Advisors to the Chief Coroner and Deputy Medical Advisors to the Chief Coroner are no longer included in the list of bodies earmarked for abolition. However the Lord Chancellor's statement of the 14th June sets out specific plans to transfer the functions of the Office of Chief Coroner, splitting them between the Lord Chancellor and the Lord Chief Justice.²⁵ We can only assume that the Government intends to re-

²⁴ As protected by clause 7(1) and (2).

²⁵ See Hansard, 14th June:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110614/wmstext/110614m0001.htm#11061450000007>.

insert these bodies back into the Bill during Committee Stage. The office of Chief Coroner, created by the *Coroners and Justice Act 2009*, is intended to provide valuable judicial oversight of the operation of the coronial system, and to help ensure consistent standards in service provision for bereaved people. The coronial system plays a critical role in ensuring the UK's compliance with its positive obligation to protect the right to life under the *Human Rights Act 1998*.²⁶ Liberty is concerned that, if implemented, these proposals would seriously compromise the operational independence of the Office.

14. Finally, Liberty remains concerned about the significant changes that could be made to the Commission for Equality and Human Rights by virtue of its inclusion in Schedules 3 and 5 of the Bill. Although the power to abolish the Commission has been removed, the risk is that the Commission remains vulnerable to being rendered ineffective in its functioning by having its constitution altered or its functions amended or transferred. The Commission has a statutory mandate, amongst other roles, to encourage good practice and public sector compliance with human rights norms, monitor the effectiveness of implementation of the law and bring or contribute to legal challenges raising equality and human rights issues; including challenging governmental decision-making by means of judicial review.²⁷ As such the Commission has an important role in ensuring the UK's compliance with its human rights obligations. When this Bill was read for a second time in the House of Lords, Lord Taylor of Holbech, Government Spokesperson for the Cabinet Office, said:

*Clauses 3 and 4 give Ministers the power to modify respectively the constitutional and funding arrangements for bodies. For example, the Government intend to improve the accountability of the Equality and Human Rights Commission to Ministers and Parliament by requiring it to lay its annual business plan before Parliament, and to emphasise the importance of effective internal governance by placing the EHRC's Audit and Risk Committee on a statutory footing.*²⁸

In a consultation paper released in March this year, the Government reiterated a concern to increase the accountability of the EHRC by requiring that it lay its annual

²⁶ Protected by under Article 2 of the European Convention on Human Rights, as incorporated into UK law by the *Human Rights Act 1998*.

²⁷ *Equality Act 2006*: sections 9(1)(b)-(d) and 30(1).

²⁸ House of Lords *Hansard*, 9th November 2010 at column 66.

business plan before Parliament.²⁹ Liberty agrees with a number of the Government's proposed reforms to the Commission which would increase its accountability and the transparency of its operations. Indeed in our response to the consultation on the Commission's future we have suggested additional reforms which would enhance accountability to Parliament.³⁰ However, this said, we have ongoing concerns about other suggested reforms which would remove some of the Commission's key functions and reduce its practical and principled autonomy.³¹ In particular the scope for the fundamental restructuring of the organisation provided for at clauses 3 and 5 of the Bill. Despite amendment to the Bill, Liberty remains worried about the potential for future moves to scale back the EHRC's regulatory and enforcement functions. We believe that the existence of a body which undertakes these functions is extremely important for ensuring local and central government compliance with human rights standards.

Conclusion

15. This Bill follows a trend popular with the last Government of introducing change but avoiding the necessary rigours of parliamentary scrutiny. As we saw with the debates on 42-day pre-charge detention of terror suspects, incitement to religious hatred, and elected Police Commissioners, Parliament plays a vital role in safeguarding our fundamental rights and freedoms. Not only does proper parliamentary scrutiny create a vital opportunity for unacceptable new laws to be amended as Bills pass through Parliament, it also gives interested parties, the general public and the press the time to consider the implications of proposed new laws. The amendments made to this Bill are without doubt extremely important and reflect the deep-seated concerns so forcibly argued in the House of Lords. But no matter how many amendments are made to this Bill, unless changes to statutory bodies are made through primary legislation the dangers of overbroad Executive power remain.

Rachel Robinson
Sophie Farthing

²⁹ *Building a fairer Britain: Reform of the Equality and Human Rights Commission*; March 2011: http://www.equalities.gov.uk/what_we_do/ehrc_reform.aspx.

³⁰ Liberty's Response to the Government's Consultation on the Future of the EHRC: <https://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-response-to-the-government-s-consultation-on-the-future-of-the-ehrc.pdf>

³¹ *Ibid.*

