

# EVIDENCE TO HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION INQUIRY ON THE PRE-EMPTION OF PARLIAMENT

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## **ORGANISATIONAL CHANGE IN ADVANCE OF LEGISLATION: THE REFORM OF PUBLIC BODIES AND THE NHS**

### **Statement of evidence**

Our evidence concentrates on the organisational rather than the financial aspects of the Committee's inquiry, drawing on our analysis of the Coalition government's public bodies and NHS reform process.<sup>1</sup> We focus on pre-legislative action by government in relation to the proposed closure of the Audit Commission and the Regional Development Agencies (RDAs), and proposed reform of NHS commissioning from Primary Care Trusts (PCTs) to GP-led Clinical Commissioning Groups (CCGs). These cases have been selected because (a) they have high political salience for the Coalition government, (b) the proposed reforms have far-reaching implications on the bodies' existence, and (c) they exhibit significant pre-legislative reform activity.

The legislative centre-piece of the Government's reform of public bodies<sup>2</sup> is the Public Bodies Act 2011. It is enabling legislation giving ministers powers by order to abolish, merge or otherwise reform most of those public bodies created through statute. A small number of statutory public bodies were excluded from the Act, as the intention was to reform these using existing powers or by introducing new departmental legislation. There are also a large number of non-statutory public bodies that can be reformed through executive decision. NHS bodies are reformed under the Health and Social Care Act 2012.

### **Qu. 8. In what circumstances is it appropriate for the Government to change the structure of an organisation in the expectation that legislation will be passed?**

Where public bodies are created by statute, the legislation tends to concentrate on the duties, functions and powers of a public body and its accountability relationships, rather than on its organisation. Any legislation on organisational matters is generally about governance (e.g. appointment of chair, size of board) rather than its internal structure or staff complement.

As a result, individual public bodies are subject to frequent changes in their organisational structure as a result of decisions by their management, or in response to external events (e.g. changes in policy, legislation, resources, technology, demands from citizens, etc.). The Audit Commission, for example, grew its inspection function considerably in the light of the Labour government's Best Value policy. And one of the most substantial reforms of Whitehall, the creation of executive agencies, took place without the need for legislation.

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<sup>1</sup> The 'Shrinking the State' project is a 3 year study ending in May 2015, also involving Prof Anthony M. Bertelli, University of Southern California. We acknowledge the financial support of the ESRC (Grant Ref. ES/J010553/1) and the extensive cooperation of politicians, civil servants, public body board members, the Public Chairs Forum and the Institute for Government. The views expressed are our own, and do not necessarily reflect those of our interviewees. [www.shrinkingthestate.org](http://www.shrinkingthestate.org)

<sup>2</sup> This reform covers non-departmental public bodies, as well as a number of non-ministerial departments and public corporations. It does not cover executive agencies.

Consequently, it is not unexpected that the case studies reveal that the Coalition government has been able to make considerable organisational change. Post-May 2010 alterations in departmental policy and budgets have led to downsizing of the Audit Commission and RDAs, including termination of particular activities (e.g. inspections and new investment respectively), and there have also been some transfers of activities to other bodies. These could have occurred regardless of the intention to abolish or reform. But in addition there has been explicit planning for closure, with associated actions such as the extensive transfers of RDA staff. In the NHS case, the agenda has been about facilitating the development of the GP consortia so that they have the capacity to take on their intended statutory responsibilities once PCTs are abolished.

The ability to make major organisational changes in advance of legislation is advantageous from the perspective of a government wanting to realise its electoral commitments. It helps resolve the 'implementation gap' between policy decision and realisation by preparing the ground for a swift change once legislation is enacted. There are also benefits for management and employees.

The danger of planning for change in advance of legislation is that it creates an environment of inevitability. For example, discussion of the Audit Commission is often phrased in terms of 'the abolition of...' rather than, more correctly, 'the proposed abolition of...'. Similarly, the pre-appointment hearing for the new chairman of the Audit Commission was framed by the Government's requirement that the individual should be able to manage the closure of the organisation, even though the legislation authorising abolition was only in draft form.

**Qu. 9. Where organisational change is appropriate, what degree of change should be permitted? Are there any particular types of organisational alteration that should never be undertaken in advance of legislation?**

The fundamental constraint on organisational change in advance of legislation should be that the body is still viable – i.e. able to undertake its statutory responsibilities. If Parliament has passed legislation in the expectation that certain duties, functions and powers will be exercised by the body, then it should continue to be able to exercise these until Parliament deems otherwise.

Viability can be assessed in two ways:

1. Resource allocation: Does the extent of pre-legislative change reduce the level of resource available to the body such that it is no longer able to undertake any or all of its duties, functions or powers?
2. Policy direction: Does a change in government policy fatally undermine the body's ability to undertake its statutory responsibilities?

In the case of the Audit Commission, reduced resource allocation has resulted in the body stopping or downsizing its work programmes where its statutory powers are discretionary.<sup>3</sup> On the policy criteria, the Audit Commission's inspection role is a discretionary power that is subject to Secretary of State's guidance.<sup>4</sup> In the NHS local commissioning case, PCTs retain statutory responsibility for commissioning. The RDAs' statutory purposes are broadly defined, and open to interpretation.

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<sup>3</sup> Audit Commission (2012) *Annual Report and Accounts 2011/12*, HC 249, London: The Stationary Office, page 14 <http://www.official-documents.gov.uk/document/hc1213/hc02/0249/0249.pdf>

<sup>4</sup> Local Government Act 1999, as amended, s10 <http://www.legislation.gov.uk/ukpga/1999/27/part/1>

To establish pre-emption of Parliament requires an ability to establish whether (a) the intentions and (b) the effects of governmental actions are such that a public body is unable to meet its statutory obligations. In terms of government statements and documentation, our case studies show that the intention does not seem to have been to pre-empt Parliament; departments were well aware of the need for legislative authority prior to closing the Audit Commission and RDAs, or releasing CCGs from PCT delegations.

The question of effects is more complex, and rests on a judgement about whether the Audit Commission and RDAs were so reduced in scale and capacity that they were unable to meet their statutory obligations, or whether the effect of delegations to CCGs effectively negated the PCTs' statutory responsibilities. This judgement is complex because of the lack of specific performance standards in the primary legislation for public bodies of all types. For example, RDAs had broad statutory purposes (e.g. 'to further the economic development and the regeneration of its area') and power to 'do anything which it considers expedient for its purposes'.<sup>5</sup>

To ensure that Parliament was not pre-empted by government reforms, legislation creating public bodies would need to contain specific safeguards such that the body had the resources and capacity to undertake its statutory responsibilities at a minimum level. These safeguards might be specified in terms of minimum budget allocations or staffing levels. Such standards might be applied selectively, for example to regulatory bodies where independence and continuity was at a premium. This would reduce the executive's influence on such bodies, and safeguard Parliament's intentions.

The wider constitutional issue concerns the degree of flexibility available to ministers, local authorities and others public sector decision-makers in relation to the organisation of public functions.

## **Supporting case studies**

### ***Case study 1: Preparing to abolish the Audit Commission***

The Coalition Agreement contained the commitments to 'cut local government inspection and abolish the Comprehensive Area Agreement'.<sup>6</sup> On 25 June 2010, the Rt. Hon. Eric Pickles MP, Secretary of State for Communities and Local Government, formally instructed the Audit Commission to cease work on the CAA (Comprehensive Area Assessment) and associated inspection work. As a result, the Audit Commission started a process to reduce its inspectorial workforce.

On 13 August 2010, the Secretary of State announced his intention to 'disband' the Audit Commission.<sup>7</sup> Following the announcement, DCLG started to develop a closure plan. A DCLG-

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<sup>5</sup> *Regional Development Agencies Act 1998*

<sup>6</sup> HM Government (2010) *The Coalition: Our Programme for Government*, May, page 11

[http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_187876.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf)

<sup>7</sup> DCLG Press Release 'Eric Pickles to disband Audit Commission in new era of town hall transparency', 13 August 2010 <https://www.gov.uk/government/news/eric-pickles-to-disband-audit-commission-in-new-era-of-town-hall-transparency>

led project team was established, and in November 2010 disbanding the Audit Commission became an item in the DCLG Structural Reform Plan.<sup>8</sup>

On 18 April 2011, FTI Consulting Ltd. were appointed to provide advice on the most cost effective options for disbanding the Audit Commission and transferring the balance of its audit work into the private sector (30% was already outsourced).<sup>9</sup> On 28 July DCLG announced the Audit Commission would outsource all its in-house local public audit work from 2012/13.

On 9 May 2012 the Queen's Speech announced a Bill to close the Audit Commission and on 6 July 2012 the draft Local Audit Bill was published for pre-legislative scrutiny.

Throughout, the DCLG project team - in liaison with other stakeholders, including the Audit Commission - had been continuing the planning for downsizing and eventual closure. This included considering options for the Audit Commission pension scheme, transfer of assets, and other related matters.

A significant development in mid-2012 was the recruitment of a new chairman and new commissioners, in the light of the then chairman and some commissioners coming to the end of their terms of office. These posts were advertised with a specific brief related to winding-down the body. On 19 September 2012, a new Chairman was appointed to lead the Commission 'to an effective and efficient closedown, and oversee the delivery of its reduced functions in the run up to closure.'<sup>10</sup> The appointment followed a formal recruitment process and approval from the Communities and Local Government Select Committee following their pre-appointment hearing on 3 September 2012.<sup>11</sup>

The result of ending inspection, closing the audit practice, ending the Commission's research functions, and a general tightening of resources in the light of the June 2010 Budget has been to leave a much smaller organisation. It is anticipated the Audit Commission will continue into existence until at least 2015, subject to passage of the Local Audit Bill. This plan for closure is reflected in the Audit Commission's Annual Report 2011/12.<sup>12</sup>

### ***Case study 2: Preparing to close the Regional Development Agencies***

In June 2010, the Emergency Budget contained the announcement that 'Regional Development Agencies will be abolished'.<sup>13</sup> This reflected commitments in the Coalition Agreement to change the local economic delivery landscape, and to reduce the number of public bodies.

The BIS (Department for Business, Innovation and Skills) Structural Reform Plan, published in July 2010, contained the following action:

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<sup>8</sup> DCLG *Structural Reform Plan*, implementation update, November 2010, <https://www.gov.uk/government/publications/dclg-structural-reform-plan>

<sup>9</sup> DCLG (2011) *Future of local public audits: Summary of report prepared by FTI Consulting Limited*, October [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6276/2005112.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6276/2005112.pdf)

<sup>10</sup> DCLG Press Release 'New chairman appointed to close down the Audit Commission', 19 September 2012 <https://www.gov.uk/government/news/new-chairman-appointed-to-close-down-the-audit-commission>

<sup>11</sup> House of Commons Communities and Local Government Committee *Pre-appointment hearing for the Chair of the Audit Commission*, Fourth Report of Session 2012-13, HC553

<sup>12</sup> Audit Commission (2012) *Annual Report and Accounts 2011/12*, HC 249, London: The Stationary Office <http://www.official-documents.gov.uk/document/hc1213/hc02/0249/0249.pdf>

<sup>13</sup> HM Treasury (2010) *Budget 2010*, HC61, para 1.89

Work ... to abolish the Regional Development Agencies (RDAs). Support the creation of Local Enterprise Partnerships (LEPs), including ... accelerat[ing] the transition of functions from RDAs ...

Tasks within this action include 'review and transfer all remaining RDA functions to other bodies' and 'manage out assets, commitments and liabilities of RDAs in an orderly fashion'.<sup>14</sup>

Because RDA closure was a Structural Reform Plan priority for BIS and DCLG, a closure programme was developed. Its aim was 'to close the RDAs swiftly in order to put the new economic landscape in place, also avoiding prolonged uncertainty for staff or for part-completed projects.'<sup>15</sup> A BIS-led transition team was established in order to deliver this ambition. The team recognised that closure was dependent on legislation. The Bill was published 4 months after the closure announcement.

Financial considerations were paramount once the intention to close the RDAs had been announced. Ministers quickly withdrew delegated authority to enter new financial commitments, other than those relating to transition and closure, in order to focus available RDA resources on decommitment and to manage down RDA expenditure. The Spending Review settlement subsequently reinforced this, requiring RDAs to decommit where possible.<sup>16</sup>

There were considerable transfers of staff and activities in advance of the Act, including:<sup>17</sup>

- May 2011: Transfer of c.70 staff to PA Consulting, UKTI's contractor for Foreign Direct Investment services.
- July 2011: Transfer of 196 staff to DCLG to manage ERDF (European Regional Development Fund); transfer of 102 staff to DEFRA to manage RDPE (Rural Development Programme for England).
- August 2011: Transfer of RDAs' 52 coalfields staff to the Homes and Communities Agency (HCA).
- September 2011: Transfer of £600m of RDA land and property assets and associated projects and contracts, plus 91 associated staff; transfer of Grants for Business Investment programme to BIS with 16 staff; transfer of most RDAs' Grant for Research and Development programmes to the Technology Strategy Board; transfer of 6 staff to BIS Local.
- October 2011: Transfer of RDA interests in Venture Capital and Loan Funds (VCLFs) to BIS; transfer of Business Link staff to Business Link helpline contractor.

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<sup>14</sup> BIS *Draft Structural Reform Plan*, July 2012, page 14

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31920/10-1086-bis-draft-structural-reform-plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31920/10-1086-bis-draft-structural-reform-plan.pdf)

<sup>15</sup> BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, para 2.3.1

<http://www.bis.gov.uk/assets/biscore/economic-development/docs/c/12-986-closing-rdas-lessons-from-transition-and-closure-programme.pdf>

<sup>16</sup> BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, para 4.7.6

<sup>17</sup> BIS *Closing the RDAs: Lessons from the RDA Transition and Closure Programme*, July 2012, annex A

By the time of Royal Assent in December 2011, the majority of activity necessary for closure had been undertaken. RDAs were eventually closed in July 2012.

### ***Case Study 3: Proposed reform of NHS local commissioning in England***

The NHS White Paper was published in July 2010 and proposed devolving power and responsibility for commissioning health services in England to local GP consortia (subsequently termed clinical commissioning groups – CCGs).<sup>18</sup> The Health and Social Care Bill was published in January 2011.

In October 2010, just prior to publication of the Bill, the Department of Health launched a GP Pathfinder Consortia Programme, inviting groups of GPs to come together to pilot and learn from GP-led commissioning of services prior to the introduction of formal arrangement envisaged in the White Paper and yet to be published Health and Social Care Bill.<sup>19</sup> Applications from GP consortia were vetted, and the consortia were announced in a series of phases over the following 12 months. The intention was that GP consortia would eventually become the CCGs proposed in the Bill.

Commissioning remained the duty of PCTs as the responsible statutory bodies, and could not be delegated or transferred. GP consortia took on a number of specific responsibilities, using powers and budgets formally delegated to them by PCTs within their statutory framework. The mechanism through which PCTs retained their ultimate responsibility was by establishing a formal scheme of delegation to the GP consortia, and by constituting the board of the consortia as a committee or sub-committee of the relevant PCT board.

In light of this process of delegation, and the pressure on NHS management costs, PCTs were required to aggregate their management into formal ‘cluster’ arrangements by mid 2011.<sup>20</sup> This involved establishing a combined board and single management team across several PCTs. Nominally, the constituent PCTs remained as individual statutory organisations, but worked in an integrated way. The *NHS Operating Framework* emphasises that this development was designed to ensure PCT statutory functions were delivered up to April 2013, when the new system is planned to become operational.

The new NHS Commissioning Board Authority was created in shadow form in October 2011, and began to develop draft guidance for the new system. The Health and Social Care Act received Royal Assent in March 2012.

8 January 2012

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<sup>18</sup> Department of Health (2010) *Equality and Excellence: Liberating the NHS*, London: Department of Health

<sup>19</sup> Department of Health (2010) ‘GP commissioning pathfinders announced’, 8 December [http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/Aboutus/Features/DH\\_122396](http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/Aboutus/Features/DH_122396)

<sup>20</sup> Department of Health (2011) *The Operating Framework for the NHS in England 2011/12*, London: Department of Health, para 2.12