



Using the Public Bodies Act 2011

A Guidance and Best Practice Note for Officials

September 2013

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Chapter 1: Introduction

1.1: History of the Public Bodies Act and reform programme

The Public Bodies Act received Royal Assent on 14 December 2011. The Act is an enabling Act, which gives Ministers powers to abolish, merge, modify constitutional or funding arrangements, or modify or transfer functions of public bodies through secondary legislation. The bodies subject to the Act are listed in five schedules which correspond to the powers in the Act (for example schedule 1 lists the bodies subject to the power to abolish in section 1, and so on). For those bodies listed in the schedules at Royal Assent, the entry is valid for a period of five years plus two months from Royal Assent. Entries to the schedules by later primary legislation will be valid for a period of five years from the day upon which that entry is commenced.

The Public Bodies Act was designed as a legislative vehicle to take forward changes from the Coalition Government's 2010 review of public bodies, and to provide a mechanism to make further changes to such bodies as necessary following future reviews. It is possible to add further bodies to the Act's schedules using primary legislation, or to reflect the Act's provisions in departments' own bills, modified to the specific reform of a public body (for example, the Protection of Freedoms Bill).

1.2: What can you use the Public Bodies Act to do?

The Public Bodies Act can be used to make a wide range of changes to those public bodies with a statutory basis listed in the schedules. These include NDPBs, Non-Ministerial Departments, and public corporations. An order under the Act can:

- abolish a body and transfer some or all of its functions to an eligible person (section 1)
- merge a group of bodies, and transfer some or all of their functions to the merged body or another eligible person (section 2)
- modify the constitutional arrangements of a body or office (section 3)
- modify the funding arrangements of a body or office (with the consent of HM Treasury) (section 4)
- modify the functions of a body - including the abolition of functions, the creation of new functions, or the transfer of some functions to an eligible person (section 5)
- make consequential provision in relation to an order made under sections 1-5 (with the consent of HM Treasury where consequential provision includes the modification of funding arrangements) (section 6).

The Public Bodies Act cannot be used to:

- create a new public body (except as a result of a merger under section 2)
- make changes to non-statutory bodies, such as executive agencies
- make changes to a body which is not listed in the relevant schedule of the Act
- make an order which does not relate to public bodies; it does not provide general order-making powers along the lines of the Legislative and Regulatory Reform Act 2006.

1.3: Why use the Public Bodies Act?

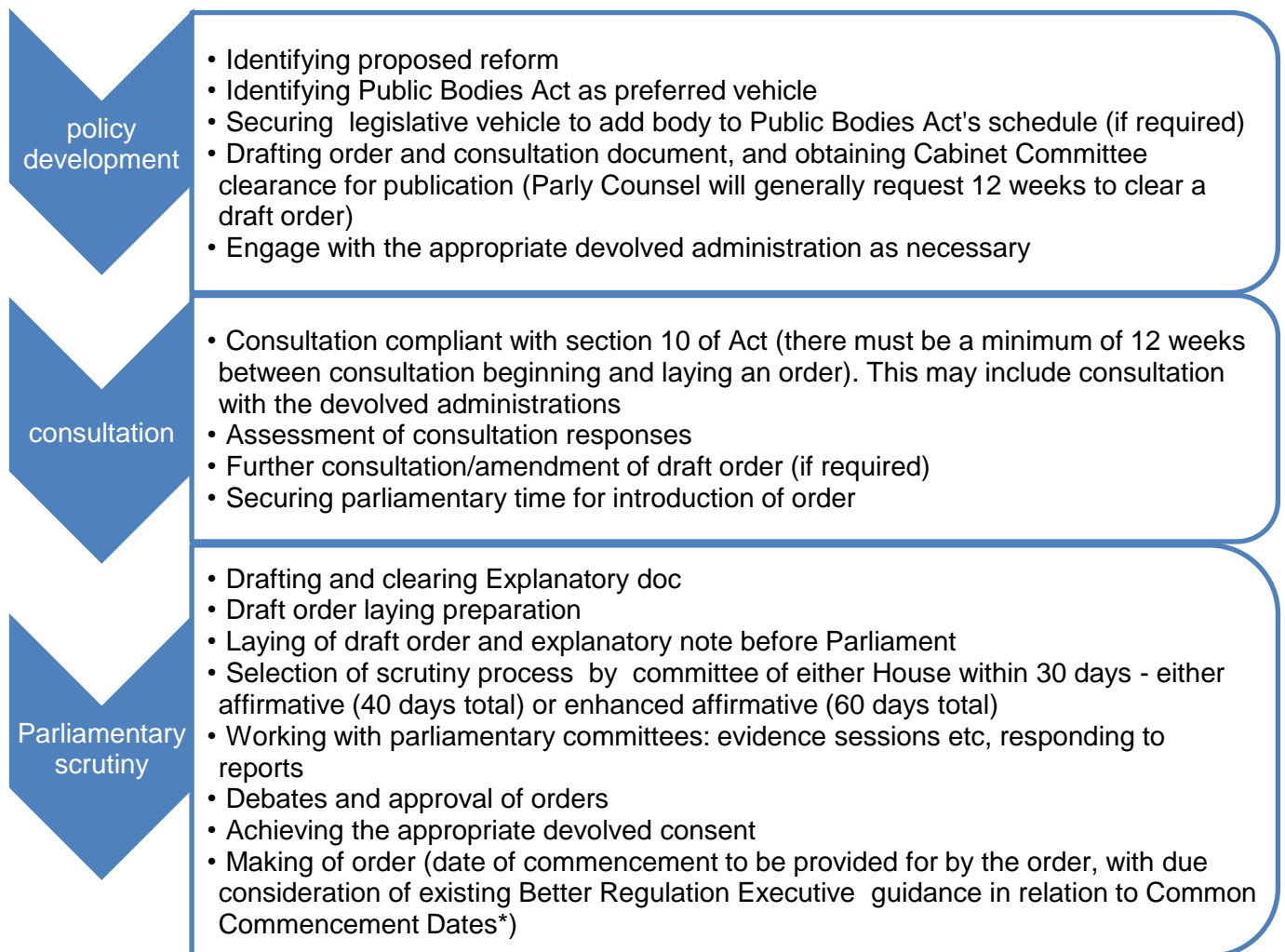
The Public Bodies Act may be a suitable vehicle where your proposed reform does not fit within an upcoming piece of primary legislation. It is also a suitable mechanism where a department

wishes to make a series of changes to its public bodies, or wishes to create a vehicle for future changes following a period of review or consultation, for example.

However the procedure attached to the Act itself requires significant resource and planning. If your proposed reform is particularly controversial or complex, you may wish to consider whether it would be more effectively delivered through a primary legislative vehicle.

1.4: Overview of process and indicative timings

The time required to make an order under the Public Bodies Act depends on a variety of factors, including the readiness of the policy, the completion of consultation, and the degree of scrutiny which Parliament selects for the proposal. The process chart below sets out the main stages involved in making an order.



* <https://www.gov.uk/government/publications/common-commencement-dates-a-guide-for-policy-makers>

Depending on the nature of the reform, you will need to allow at least 6 - 9 months in total for making a Public Bodies Act Order. If this means that you are not likely to be able to complete

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your reform within the required timeframe, you should consider what other vehicles (including non-legislative changes, or the use of bespoke primary legislation) may be more appropriate.

The following chapters of this guidance describe the processes for making an order in greater detail. However, departments should be aware that each order will attract distinct issues. This guidance should therefore be used as a broad framework against which departments can develop their own project management for each order.

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Chapter 2: Policy Development

Designing the proposal

2.1: Is your proposal developed?

The Public Bodies Act uses secondary legislation to take forward changes to public bodies, by conferring a series of powers to amend primary legislation through secondary legislation on Ministers in relation to specific bodies. Powers of this type often attract a significant degree of attention in Parliament. It is therefore essential that any proposed use of the Public Bodies Act is based on a robust, well-developed policy proposal, which can be defended to stakeholders, parliamentarians, and the media. The Public Bodies Act should not be used to make undefined changes to bodies.

2.2: Is the proposal within the limitations in the Public Bodies Act 2011?

The Public Bodies Act contains a number of restrictions and limitations on the powers it provides to Ministers. If your proposed reform requires powers beyond those granted by the Act, you will not be able to use the Public Bodies Act and should seek an alternative legislative vehicle (see sections 7 to 9 and 20 to 22 of the Act).

a) Independence of public functions (section 7)

An order made under the Act must not prevent a function from being exercised independently of Ministers if the function is judicial in nature, or involves enforcement, oversight or scrutiny in relation to the actions or duties of a Minister. Thus, an order under the Public Bodies Act could not be used to remove the function of the Equality and Human Rights Commission under the Equality Act 2006 to instigate a judicial review of actions undertaken by Ministers.

b) Proportionality (section 7)

An order made under the Act must be proportionate to the reasons for the order. One way of achieving a policy objective may be more onerous than another, and so there must be a reasonable relationship between the objective the Minister is seeking to achieve and the provision being made in the order to achieve it.

c) Purpose (section 8)

Section 8 (1) makes it clear that a Minister can only make an order in relation to sections 1 to 5 if they believe that the order will serve the purpose of improving the exercise of public functions. The explanatory document accompanying any draft order must include an explanation of why the Minister laying the order considers the purpose described in section 8(1) has been fulfilled.

d) Necessary protection and rights/freedoms (section 8)

A minister can only make an order using the Public Bodies Act if they consider that the order will not remove any necessary protection from an individual or group, or prevent a person from exercising a right or freedom where they have a reasonable expectation to

do so. Rights and freedoms in this context include political and social rights, cultural heritage and environmental protection.

e) Consent of Devolved Administrations (section 9)

If an order contains a provision which, if it were contained within an Act of a devolved legislature, would be within the legislative competence of that legislature, it will require the consent of that legislature before the order can be made. In some cases consent is also required where the functions of Ministers are modified even if the function is not within the competence of the relevant devolved legislature. It is essential that territorial offices and the Devolved Administrations are engaged early in the policy development phase so that the need to gain consent is confirmed promptly.

Please note that some proposals which do not fall within the scope of this requirement will still require the Devolved Administrations to be consulted - please see Sections 9 and 10 of the Act, and Chapter 3.5 of this guidance for more details. For information on the legislative process for obtaining consent of devolved administrations, if it is agreed that this is required for your policy proposal, see Chapter 4 Section B of this guidance.

f) Restriction on creation of functions (section 20)

An order under the Act cannot be used to create powers to make subordinate legislation, powers of forcible entry, search or seizure, or a power to compel the giving of evidence. However, an order can be used to repeal and re-enact an existing power of this nature.

g) Restriction on transfer and delegation of functions (section 21)

An order under the Act cannot be used to transfer functions to a charity, or another body or person not already exercising public functions without their consent. In addition, some functions (set out in 22(3)) cannot be transferred to a person not already exercising public functions. This restriction is designed to ensure that certain functions cannot be transferred to 'private' bodies.

h) Restriction on creation of criminal offences (section 22)

An order under the Act cannot be used to create a new criminal offence punishable by terms of imprisonment or fines above that described in section 23. This restriction does not apply to the re-enactment of an existing offence (for example, where powers relating to an existing offence are transferred to an eligible person).

2.3: Roles and responsibilities relating to orders

Departments are responsible for the drafting and handling of all aspects of the order-making process, including the consultation, draft order, the explanatory document and any associated documents. Departmental Ministers will be ultimately responsible for the order, and will be expected to lead any debates on the order in both Houses.

Departments should contact spending teams where it is unclear whether the HM Treasury formal consent requirement applies to a particular order. See Contact list below for HM Treasury contact.

Cabinet Office will provide advice and support on the parliamentary scrutiny process during the order-making process. Departments should ensure that Cabinet Office are able to comment on draft orders and accompanying explanatory documents, preferably before they are sent to JCSI for pre-legislative scrutiny, but certainly before they are laid before Parliament. The Cabinet Office will also work with parliamentary clerks in departments to finalise laying dates for orders and ensure the flow of work sent to the scrutiny committees is well managed across Government.

In addition, Cabinet Office remains responsible for any cross-cutting work in relation to public bodies reform and for responding to queries in relation to the Act itself. It will also facilitate engagement with the devolved administrations. Cabinet Office contact details are listed at the end of this document. The central government sector principally consists of government departments, non-ministerial departments (NMDs), executive agencies and non-departmental public bodies (NDPBs).

2.4: Policy proposal: checklist

1. Is your policy proposal fully developed?
2. Is the Public Bodies Act the appropriate vehicle to deliver your policy?
3. Will your proposal adhere to the following restrictions in the Public Bodies Act?
 - Independence of public functions
 - Proportionality
 - Purpose
 - Necessary protection of rights and freedoms
 - Consent of devolved administrations
 - Restriction on creation of functions
 - Restriction on transfer and delegation of functions
 - Restriction on creation of criminal offences
4. Have you engaged with departments with an interest eg HM Treasury, and with territorial offices/devolved administrations if appropriate?

Chapter 3: Consultation

3.1: Government Consultation Principles

The Civil Service Reform Plan (July 2012) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process. As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where they are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

Full guidance on consultation and the *Consultation Principles* can be found on the Cabinet Office website, here:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

3.2: The consultation requirement in the Public Bodies Act.

While departments must be mindful of the above Consultation Principles, it is essential that they meet the statutory requirements set out in the Act. Section 10 of the Act requires consultation in relation to all proposals which require an order under sections 1 to 5. Section 11 stipulates that Ministers must include a summary of responses received during consultation as part of the explanatory document accompanying any draft order laid before Parliament. Section 10(1) lists the general categories of persons who are required to be consulted as part of this process.

Exactly who it is appropriate to consult will depend on the details of the proposal. In particular, where a body has no members, or an office is vacant, the requirement under section 10(1)(a) to consult the body or office-holder does not apply. This means the requirement to consult the body or office-holder does not apply to moribund bodies and offices, i.e. those with no members or office holders. However there may still be others e.g. industry stakeholders who should be consulted. This guidance should be read alongside the Government's Consultation Principles which sets out the principles to which departments should adhere during full public consultation.

The main features of the consultation requirement in the Public Bodies Act are as follows:

- a) **Consultation must include the proposal itself:** the consultation must focus on the purpose and effect of the proposal and include the question of whether respondents agree with the proposal in principle. Consultation should not solely ask how a proposal should be implemented, as this will not fulfil the requirement under section

10(1).

- b) **Consultation must take place with an ‘open mind’:** it must be open to a Minister to conclude that it is not appropriate to make an order under the Public Bodies Act, or to amend the proposal and the order before making it. This is reflected in section 10(2), which provides that where the Minister considers it appropriate to amend the whole, or part, of the proposal, further consultation should be undertaken as seems appropriate. Consulting with an ‘open mind’ requires that:
- i. consultation should be undertaken when proposals are still at a formative stage, meaning that there should be the potential that the consultation could change the policy
 - ii. sufficient explanation should be given for each policy option or proposal, so that consultees can intelligently consider and respond to them
 - iii. adequate time should be given for the consultation process (and orders cannot be laid before Parliament until at least 12 weeks after the consultation began)
 - iv. responses must be conscientiously taken into account when the ultimate decision is taken to proceed with an order under the Public Bodies Act.

- c) **A formal, written, public consultation is not required in all cases:** section 10 does not specify the nature of the consultation that is required, nor who should be consulted beyond the requirements set out in section 10(1). It is for Ministers in the relevant department to decide what type of consultation is appropriate in relation to any policy proposal, and proposals that require the powers in the Public Bodies Act are no different. The type of consultation will reflect the nature and impact of the proposed reform. In making this judgement, departments should seek the advice of their Departmental Consultation Co-ordinator.

A formal public consultation might, for example, be considered appropriate when:

- the body is involved in the protection of individual freedoms
- the body provides services to the public, the nature or delivery of which will be substantially altered by the scope of the reform
- the reform will have significant impact on business, or the environment.

Conversely, a more limited consultation that complies with section 10 may be considered appropriate when:

- the body has specialised functions and a limited user group
- the body is ‘moribund’ (no longer exercising its functions)
- the reform is limited in nature and will have little or no impact on users.

These categories are, however, purely illustrative and non-exhaustive, and there may be reasons for adopting a different approach to consultation in specific cases.

- d) **There is no set period for consultation:** section 11(3) stipulates that a draft order cannot be laid before Parliament until 12 weeks have elapsed following the beginning of consultation. Whether a formal, written, public consultation is undertaken or

whether it is more targeted, no minimum period for requesting responses is set out in the Public Bodies Act but adequate time must be given for consultees to consider proposals and respond. What is appropriate will depend on the exact nature of the proposals and parliamentary committees will want to be assured that the Government has conducted adequate consultation (complex or controversial proposals are likely to point towards allowing a longer period for comment). It is advisable to inform departmental select committees, who are likely to be scrutinising the draft order, when a consultation has begun.

- e) **Consultation in accordance with section 10 which took place before the commencement of the Public Bodies Act is sufficient:** subsection (3) of section 10 stipulates that consultation which pre-dated the commencement of this section of the Public Bodies Act - March 2012 - is sufficient to meet the requirement to consult (assuming that, in its totality, the consultation which took place in relation to a proposal which meets the requirements of the section). There is no time limit on this provision. However, departments should bear in mind that further consultation as seems appropriate is required if, following the results of a consultation, a Minister then opts to change all or part of the proposal.

The parliamentary committees responsible for scrutinising the orders will pay particular attention to the consultation process, its results and the way responses have been summarised by departments in the explanatory document. It will be important to explain the reason for the extent/type of consultation carried out in the explanatory document accompanying the order.

3.3: Parliamentary scrutiny of the consultation requirements.

The Secondary Legislation Scrutiny Committee in the Lords is charged with scrutinising all draft orders laid under the Public Bodies Act 2011. The committee will particularly scrutinise whether the statutory consultation requirements in sections 10 and 11 of the Act have been met and the effectiveness of the consultation and engagement with stakeholders. Before planning consultation and engagement activity it is advisable to read the Committee's Special Report (19th of Session 2012-13) on the Public Bodies Act 2011: One Year On, which can be found on the Committee's webpage here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/>

The Committee has pointed to Defra's orders relating to the British Waterways Board as a good example of engaging stakeholders in the development of policy. The explanatory document to that order, laid on 29 February 2012, can be found here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

3.4: What should the consultation include?

At a minimum, consultation must satisfy the requirement to consult those listed in section 10(1). Departments should provide clear information regarding the proposal which would be effected by the order, and invite views on the proposal itself. More information can be found in the Consultation Principles guidance, here:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

In deciding what additional information, documentation or questions a consultation should include, departments may wish to consider the following:

- a) **Consultation on implementation and successor arrangements:** the Public Bodies Act requires consultation on the ‘proposal’. Departments may also consider it appropriate to consult on how these proposals could be implemented or on successor arrangements where these will not form part of the order, such as where statutory functions are abolished in favour of a non-statutory solution. However, the consultation must cover the proposal to be effected by an order, including the question of whether or not to make such a reform.
- b) **Impact Assessments:** where a formal public consultation is taking place a “consultation stage impact assessment” should normally be published. A consultation stage impact assessment should contain the evidence as currently available to Government and should be used to elicit further evidence from consultees on the potential costs and benefits of policy options. More information on impact assessments can be found on the HM Treasury website here: http://www.hm-treasury.gov.uk/data_greenbook_impact_assessments.htm and on the BIS website here: <https://www.gov.uk/government/publications/impact-assessments-for-government-policies>

Where an impact assessment is not produced to accompany the consultation process, that is if a proposal has impacts below the threshold for impact assessments, departments should consider how best to make sure consultees are appropriately informed of the expected costs and benefits of the Government’s proposals, such as by including an estimate of the costs and savings in the consultation paper. Where an impact assessment is not produced to accompany the consultation process or the draft order, departments must consider how to demonstrate and quantify the impacts (both financial and broader impacts) of the reform to be delivered by the order and reflect this in the Explanatory Document. The Secondary Legislation Scrutiny Committee has reported the following in relation to this:

“The Committee expects that, where Departments judge that a full Impact Assessment would be disproportionate, in order to demonstrate compliance with the statutory tests, they should, as a minimum, include in the Explanatory Document a clear statement of the factors that have been included in their calculation of net savings. This should include any transitional costs and any costs from transferring duties into the public sector which might offset the initial estimate of money saved.”

The consultation process offers an opportunity to collate evidence on the likely impacts of the proposal which will add detail and context to the Minister’s decision to proceed with the reform.

For further information regarding impact assessment requirements and processes, departments should refer to the IA Toolkit: How to do an Impact Assessment produced by the Better Regulation Executive¹, and seek the advice of their Departmental Better Regulation Unit.

¹ Available at <https://www.gov.uk/government/publications/impact-assessments-how-to-guide>

- c) **Draft orders:** there is no requirement under the Public Bodies Act to consult on the draft order itself. The advantage of including a draft order, where one is available and has been approved by Parliamentary Counsel at the time of consultation, is that consultees will have a chance to comment on the precise formulation of the proposals; this may be beneficial if the proposal contains detailed technical changes to legislation.

However, as draft orders must be approved by Parliamentary Counsel, any advantage needs to be balanced against any need to complete time-sensitive reforms. Departments will also need to consider the impact of the inclusion of draft orders on the accessibility of the consultation – for example considering how to explain legislative drafting to a non-specialist audience.

3.5: Meaningful consultation

For a consultation to be meaningful it must meet the requirements set out in section 3.1 of this guidance. Therefore it must include consultation on the principle of the reform itself, and must be conducted with an open mind. This does not prevent a department from consulting on the basis of a preferred policy proposal, but does require that respondents have the opportunity to comment on the overall intent and to propose or support alternative courses of action, which must receive due consideration by Ministers. Consequently, it must also remain possible for Ministers to amend or withdraw their proposal as a result of the consultation process, and departments should plan to ensure that this is a viable option.

In order to provide assurance to respondents and to ensure that consultation is compliant with section 10, departments may wish to include the following statement in consultations, edited accordingly:

“The Government is minded to use the powers in the Public Bodies Act to implement the proposals outlined in this consultation in relation to [X]. The Public Bodies Act, requires that Ministers consult on their proposals before laying a draft order. (IF APPLICABLE: which supersedes any previous announcements of a confirmed policy position in relation to [X]). On that basis, the Minister invites comments on these proposals as measures that might be carried forward by an order under the Public Bodies Act, subject to the outcome of this consultation. All responses, including those which propose an alternative to the Government’s preferred option, will be given due consideration”.

Cabinet Office policy and legal colleagues are happy to offer further advice on these points as required. **However, it remains the responsibility of the relevant department to ensure that their consultation will comply with the requirements of section 10.**

3.6: Consultation with the devolved administrations

The Public Bodies Act is clear both about when the consent of the devolved administrations is required in relation to an order (section 9), and when the devolved administrations should otherwise be consulted in relation to an order (section 10 (1)(c-e)). In both circumstances, departments should consider how to engage with the devolved administrations when developing their consultation, as well as during and after the consultation period. It is likely to benefit the development and passage of your proposal if the devolved administrations are engaged at an early stage. Territorial Office officials and lawyers, and the Office of the Advocate General for Scotland, can assist departments in considering the application of the consent and consultation requirements. However, **it is ultimately for departments to form a view on the requirement**

for consent and the timing of consultation; for this reason it is strongly recommended that departments seek the view of department lawyers as early as possible, before going to territorial offices.

Departments will recognise that such engagement and consultation is and should be consistent with the best practice set out in official documents such as the Devolution Memorandum of Understanding², Devolution Guidance Notes³ and any relevant inter-governmental concordats.

Devolved administrations have their own internal procedures, timetables and sitting arrangements, and these factors will need to be taken into account when formulating the timetable for an order's passage. **Chapter 4 of this guidance contains further detail about the role of the devolved administrations in the order-making process, for those orders where consent is required under section 9 of the Act.**

Where the consultation requirement under section 10 (1)(c-e) does not apply because consent is required under section 9, there may still be an obligation to consult under section 63(1) of the Government of Wales Act and/or under Section 88(2) of the Scotland Act.

3.7: Clearance and publication

Departments are responsible for ensuring that their proposed consultation has appropriate internal clearances (for example through departmental lawyers, senior officials, and Ministers), and for securing Cabinet Committee clearance. For example, formal public consultations will often require clearance for the draft consultation document, attached documents (such as the consultation stage impact assessment and draft order, if applicable) and for the timing of the proposed consultation. **If in doubt, departments are advised to contact the Economic and Domestic Affairs Secretariat to confirm whether clearance is required, or refer to existing guidance on Cabinet Committee clearance.**

If you are planning to undertake a consultation process which includes the publication of a consultation stage impact assessment (see section 3.4), current guidance from the Better Regulation Executive states that the impact assessment will require clearance from both the Regulatory Policy Committee (RPC) and the Reducing Regulation Committee (RRC) and you should consult officials in the secretariats to these committees for further advice on the clearance process.

Departments should also check internally (and with other government departments) whether there are other forthcoming consultations on a similar issue, so that they can cross-refer coherently or be combined with the other proposed consultation if appropriate or possible. This is to ensure stakeholders are not consulted separately on similar or related matters, in line with the Consultation Principles which seek to minimize the burden on consultees. Where it is able to, Cabinet Office will facilitate this from its cross-government overview of the public bodies reform programme.

Formal public consultations may be accompanied by a press notice and possibly a Written Ministerial Statement in accordance with existing practice. Where the consultation takes a different form, departments should ensure that they consider how, and to whom, it is appropriate to publicise the proposal – for example by publishing proposals on a departmental

² <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>

³ <https://www.gov.uk/government/publications/devolution-guidance-notes>

website. This reflects a specific undertaking given by Lord Taylor of Holbeach during the passage of the Act:

“I am happy to give a very specific assurance that the guidance for use by officials on making orders under the Public Bodies Bill, to be published by the Cabinet Office, will include a specific reference that Departments ought to consider the most appropriate way of making a proposal publicly available.” (3rd Reading, Public Bodies Act, 9 May)⁴

Departments should also be aware that parliamentary committees may take an interest in how consultations were communicated, to assess whether and how those with a substantial interest in the proposals were given an opportunity to comment.

3.8: Dealing with responses and further consultation

All responses should be analysed carefully, using the expertise, experiences and views of respondents to develop a more effective and efficient policy. The focus should be on the evidence given by consultees to back up their arguments.

Under Section 11 of the Act a summary of responses received as part of the consultation should be included in the Explanatory Document laid before Parliament with the draft order. It is particularly important to detail the consultation with the body or bodies affected by the order and their response to the consultation.

As section 10, subsection (2) makes clear, it must be open for Ministers to change all or part of the proposal as a result of the consultation process. Whether such a change is appropriate will, of course, be a decision for Ministers, and may require Cabinet Committee clearance in some circumstances (departments should contact the Economic and Domestic Affairs Secretariat to ascertain whether this is required). Where a proposal is wholly or partially amended, section 10 requires further consultation on the amended proposal as appropriate. The scope and nature of this consultation will vary on a case-by-case basis (reflecting the nature of the original consultation, and the extent of the changes that resulted from it), and departments should seek advice accordingly, including from their Departmental Consultation Co-ordinator. Responses to any further consultation should be summarised within the Explanatory Document for the purposes of section 11, alongside the summary of responses to the original consultation.

It is good practice to publish, usually on your departmental website and in a single document, all responses to consultation where it is practical to do so. The Secondary Legislation Scrutiny Committee also states in its guidance for departments that:

*A link to the full analysis on the department’s website should be available **at the time the instrument is laid before Parliament**. And two collated copies of the full set of responses should be provided to the Committee for reference. Further copies may be required where the instrument is controversial.*

⁴ Available at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110509-0001.htm>

3.9: Consultation process: checklist

Before beginning a consultation process to comply with the requirement to consult under the Public Bodies Act, departments should ensure that they have taken the following actions, if appropriate:

1. Have you considered the Consultation Principles and agreed the approach to take to consultation (while ensuring compliance with consultation requirements in the Act)?
2. Has the consultation been cleared by departmental lawyers?
3. Does the consultation constitute a meaningful consultation on the proposal to be effected by the order? Is it “appropriate” (in form/length etc) to the proposed reform?
4. Have you identified who needs to be consulted as set out by the requirements of section 10 (1) (a-g)?
5. Have you informed the relevant parliamentary committees and Cabinet Office of your intentions to consult?
6. Does it include a consultation stage impact assessment (IA)? If not, have you considered how to ensure that consultees are adequately informed/consulted about the costs and benefits of the proposal?
7. If the consultation and/or any accompanying documentation require Cabinet Committee clearance, has this been secured?
8. Have you decided how to publicise the proposals, including consideration of whether to place a copy of any written consultation on your departmental website?

Chapter 4: Parliamentary Scrutiny:

Section A:

Preparing to Lay the Order and Related Documents

If, having completed the consultation and impact assessment processes, the Minister considers it appropriate, he or she may lay a draft order before Parliament. However, drafting the actual order is only one part of the wider process for laying the order and ensuring it meets Parliament's expectations during its period of scrutiny. This section explains the different elements that are required to facilitate the laying of an order. Section B examines the requirements for laying an order in the Devolved Administrations.

4.1: The order - Subject headings and titles

The subject headings for orders under the Public Bodies Act should include PUBLIC BODIES

To ensure consistency, and aid parliamentary committees, it is suggested that the title of public body orders should be in the following format:

Public Bodies [eg. Abolition of X Body] Order

However, titles are ultimately for departments to decide.

A model preamble is included for Departments at Annex B of this guidance.

4.2: The importance of the Explanatory Document

The requirement to produce an Explanatory Document is set out in section 11(2) of the Act.

Departments should ensure that the Explanatory Document is as robust and detailed as possible, as select committees have been actively using it as the primary justification for making an order. Before drafting your Explanatory Document it is advisable to read the Committee's Special Report (19th of Session 2012-13) on the Public Bodies Act 2011: One Year On, which can be found on the Committee's webpage here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/>

The Committee reported that the Explanatory Document accompanying the order abolishing the Child Maintenance Enforcement Commission contained a good explanation of the policy intention and how the statutory tests were met. The Explanatory Document to that order, laid on 23 April 2012, is at Annex E to this guidance and can also be found here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

4.3: Drafting the Explanatory Document

Sufficient time needs to be allowed to prepare a detailed document, ensuring clearance with lawyers and others with an interest in the department. A copy should also be sent to Cabinet Office who will normally provide comments within a week. In particular, the Explanatory Document should demonstrate:

- the full policy justification for the proposal which has led to the draft order, consistent with the “economy, efficiency, effectiveness, accountability” tests detailed below;
- how the statutory tests (section 8(1)) for the draft order and statutory consultation requirements (sections 10 and 11(3)) been met;
- what the impact of making the order is, particularly if an impact assessment has not been carried out;
- the mechanics for change, including any transition process and arrangements for future governance; and
- If a full, written public consultation was not carried out, why this decision was taken.

The following section explains each of the requirements in section 11(2) and how departments can meet them.

a) Introduce and give reasons for the order

This should explain why the Minister considers that the reform is necessary and the overall rationale for the reform or reforms. It should set out what it is that the Minister is hoping to achieve by making an order to amend existing legislation. It should explain the background to the decision to reform a particular body or group of bodies, and should also include a brief, explanation in plain English of the functions of the body or group of bodies as set out in the original statute and how this statute is changing to enable reform.

b) i) The purpose test in section 8(1)

In this part of the Explanatory Document, departments should explain how the order meets the overall purpose of improving the exercise of public functions. It should refer to the way in which efficiency, effectiveness, economy and accountability are affected by the reform (although the need to meet this requirement does not prevent departments from also discussing additional criteria through which the order may serve the purpose of improving the exercise of public functions). This part therefore calls upon departments to justify why the original decision was made and to set out the improvements that the Government expect to see as a result of the reform in question. In the case of abolitions, it is perfectly reasonable for a department to make the case that stopping a particular function may result in an improvement in the overall exercise of public functions, for example by focussing resources on more important functions or by simplifying the role of government for citizens. However, in doing so, the department will need to be able to clearly demonstrate why the particular function was unnecessary and how stopping it will ultimately improve the exercise of public functions.

In the context of section 8(1):

- “Efficiency” means the more efficient undertaking of public functions which, for example, may involve abolishing unnecessary functions.
- “Effectiveness” means the more effective provision of public functions which, for example, may include removing a burden that compromises the effectiveness of a public body;

- “Economy” simply means the reform or abolition of a body to deliver better value for money to the taxpayer. For example, this may mean ceasing a function altogether or it may mean changing the way a particular function (such as licensing or regulation) is funded.
- “Securing appropriate accountability to Ministers” for the exercise of public functions may mean securing direct accountability to Ministers as the elected and legitimate office holders who answer to Parliament by bringing particular functions back into the department, or it may mean changing the reporting requirements of a public body to increase its accountability, or it may mean moving functions further away from central government and increasing local accountability.

Regarding the section on Economy

- The Secondary Legislation Scrutiny Committee has recommended⁵ that the Government provides a statement of the net savings arising from reforms to public bodies and offices under the Public Bodies Act 2011.
- It is strongly recommended that where appropriate departments provide an aggregate figure using the Cabinet Office’s existing methodology in order to provide the net reductions in administration spending within the current spending review period for public bodies. This uses the same methodology used by departments and the Cabinet Office to estimate the total reductions in the administration costs of all public bodies.

b) ii) Conditions in section 8(2)

In this part, the department must set out why the Minister considers that the order meets the conditions set out in section 8(2) of the Public Bodies Act. These conditions stipulate that an order must not remove any necessary protection nor prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. This should include a statement that the Minister considers that these conditions have been met, accompanied by supporting narrative that explains why the Minister arrived at that conclusion.

In the submission seeking Ministerial approval of the order and Explanatory Document, it is recommended that departments draw Ministers’ attention to this requirement, as they must confirm that this has been specifically considered. Private Offices should make sure there is a record of the Minister having confirmed that in her or his opinion the requirements in section 8(2) have been met.

c) Omnibus orders

This part only applies where departments have taken the decision to group a number of bodies and reforms within a single order. In such cases, departments must provide an adequate explanation of why they considered that this was appropriate. In some instances it will help Parliament to consider related reforms as part of a single order so reducing the burden of having to make many, closely related orders. The use of an omnibus order does not remove the need to explain the individual elements of the order. The Secondary Legislation Scrutiny Committee states in its guidance for departments that:

It can be helpful to produce a single Explanatory Document for a group of Public Bodies Orders with a common theme or a Public Bodies Order that deals with two or more similar institutions.

⁵ Secondary Legislation Scrutiny Committee 19th Report of session 2012, Special Report Public Bodies Act 2011: one year on <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/90/9002.htm>

*This prevents unnecessary duplication of common background and makes sure that the reader is aware of the links between instruments. **But you will need to demonstrate that each of the organisations satisfies each of the tests.** Where an “omnibus” Public Bodies Order deals with two or more unrelated organisations it is better to make the explanations sequentially as jumping between different scenarios can be confusing.*

d) Summary of consultation

In this section, departments should provide a summary of the representations received during consultation in relation to the reform. The purpose of this section is to provide parliamentarians with the evidence from consultees that has informed the Minister’s decision to proceed with a particular reform. Alongside the impact assessment (where appropriate) this section is a vital opportunity for departments to make clear their rationale for a particular reform or group of reforms. Parliamentary committees will take a particular interest in the consultation summary, and failure to adequately respond to this requirement increases the risk that the order will be delayed or reported against.

Departments should also set out how the consultation was undertaken, including why they considered a particular consultation format appropriate and proportionate for a particular reform.

It is good practice to publish, usually on your departmental website and in a single document, all responses to consultation where it is practical to do so. The Secondary Legislation Scrutiny Committee also states in its guidance for departments that:

*A link to the full analysis on the department’s website should be available **at the time the instrument is laid before Parliament.** And two collated copies of the full set of responses should be provided to the Committee for reference. Further copies may be required where the instrument is controversial.*

e) Proof of HM Treasury consent

Where an order changes the funding arrangements of a body or group of bodies, departments need to seek the formal consent of HM Treasury, as part of HM Treasury’s remit to protect financial propriety. All orders under section 4 of the Public Bodies Act will affect funding arrangements and so will be subject to the consent of HM Treasury. Orders that make consequential changes to the funding arrangements of a body or group of bodies are also subject to the consent of HM Treasury. Where HM Treasury consent is a statutory requirement, failure to obtain such consent in advance will result in changes to funding arrangements being classified as unlawful; retrospective approval cannot confer legality in such circumstances.

Spending teams will be able to give specific advice to departments about the practicalities of securing formal HM Treasury consent and departments should already have agreed their proposals with spending teams as part of the normal policy and financial management process. To assure the committees examining orders that departments have met this consent requirement, departments should obtain a formal letter of consent from their HM Treasury spending team contact. This letter does not need to be included with the Explanatory Document, but the document should make reference to the fact that consent has been obtained. The introduction or preamble to the draft order will also state this. In planning time should be factored in at the end of the process for securing HM Treasury consent on the order.

f) Relevant activity during the passage of the Act

Your Explanatory Document will need to mention any activity during the passage of the Act that related to the specific body mentioned in the order you are drafting - debates on a motion to remove the body from the Act, votes, Ministerial statements etc (with the Hansard references). Where the Minister gave an undertaking during debate to follow a particular course of action in relation to the particular body, your Explanatory Document should demonstrate how that undertaking has been fulfilled.

4.4: The impact assessment

It is important for the parliamentary committees that all draft orders are laid with impact assessments where these are required under the Better Regulation Executive guidance. Where a full impact assessment has been produced, departments should use it to consider the different options for reform and set out the evidence on which the decision was based. Where an impact assessment has not been produced, the Explanatory Document should fully cover the costs and benefits of reform in order to demonstrate that these have been fully assessed. See section 3.4(b) for more guidance on impact assessments.

Clearing an impact assessment before publication is a lengthy process. Current guidance from the Better Regulation Executive states that the impact assessment will require clearance from both the Regulatory Policy Committee (RPC) and the Reducing Regulation Committee (RRC) and you should consult officials in the secretariats to these committees for further advice on the clearance process.

4.5: Securing parliamentary time

The Cabinet Office can support departments in the process of securing parliamentary time by acting as the liaison between Parliament and department. Cabinet Office will oversee and resolve any difficulties arising from conflicting draft order laying timetables where this is required. The outputs of such liaison will be used by the Cabinet Office and parliamentary business managers to ensure that orders under the Public Bodies Act are scheduled as efficiently as possible.

Officials should engage with their departmental parliamentary branch and Cabinet Office as early as possible to start to discuss where public bodies orders will fit within their department's overall legislative workload. Departmental parliamentary branches may have their own arrangements for liaising with departmental select committees and alerting them to the expected forward programme of orders, including giving adequate notice of laying an order. **Departments should also let Cabinet Office know at least 2 weeks before an expected laying date.**

4.6: Clearances

1. Cabinet committees

Clearance from the Parliamentary Business and Legislation Cabinet Sub-Committee is not required for an order under the Public Bodies Act. Departments simply need to ensure that they have policy clearance from the Home Affairs Committee to implement the reforms that will be delivered by the order. Given that Home Affairs Committee clearance will have already been obtained prior to the naming of a public body in one of the schedules of the Act on Royal

Assent, in the vast majority of cases departments will not have to obtain further clearance prior to laying a draft order before Parliament.

The exceptions to this are:

- Where a Minister decides to substantively change his or her proposal as a result of representations received during consultation. In this case the department should seek policy clearance for the revised proposal from the Home Affairs Committee
- Where a Minister decides to substantively change his or her proposal as a result of representations from parliamentarians or committees of either House of Parliament, or resolutions of either House of Parliament received after a draft order is laid before Parliament. In this case the department should seek policy clearance for the revised proposal from the Home Affairs Committee
- Where a proposal modifies the funding arrangements of a body. In this case the department should seek the formal consent of HM Treasury (please see separate section at 4.3e)

Where departments are unsure, they should contact the Economic and Domestic Affairs Secretariat. Contact details are provided at annex A of this guidance.

2. Parliamentary Counsel

All draft orders must be cleared by Parliamentary Counsel before being laid or published. Departments should begin liaising with the Office of the Parliamentary Counsel at an early stage to inform them of the forthcoming order, to seek a timeline for clearance, and to discuss any particular drafting issues. This contact will be made through departmental legal branches. 12 weeks should be factored in for Parliamentary Counsel to vet orders, as is normal practice, although it is possible that they will be able to turn them around more quickly than that. They are particularly keen to have early sight of orders to merge bodies under section 2, as these are likely to be complex. Departments are advised to be prepared for the second stage of pre-laying scrutiny (with the Joint Committee on Statutory Instruments) to begin early, and to factor this into timetables. It is strongly recommended that departments ensure all draft orders – and Explanatory Documents – are sent to Cabinet Office for additional scrutiny.

3. The Joint Committee on Statutory Instruments

It is essential that advisers to the Joint Committee on Statutory Instruments (JCSI) are given the opportunity to scrutinise the draft before it is laid and to consider whether legal drafting points arise. This helps avoid the need for re-laying or for a change to the enhanced-affirmative procedure on merely technical grounds.⁶

Two weeks is the minimum period suggested to allow for the necessary turnaround (three is optimum), and the recommendation is therefore that an electronic copy of the draft order and Explanatory Document is sent to the JCSI lawyers as soon as possible – after Parliamentary Counsel scrutiny has ended - but at least two weeks, and preferably three weeks, before departments intend to lay a draft order. The Committee will consider an order at its first available meeting after it is received. The more time-critical a proposed order is, the more important it is to engage as early as possible with the committee.

⁶ The Joint Committee on Statutory Instruments provides some guidance on this: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/prescrutiny/prescrutiny-of-affirmatives/>

Please note that any documents sent to the JCSI in advance of laying are sent on the express understanding that they are drafts and subject to revision, and that they are for the Committee staff only and are not circulated to Committee members. They can therefore refer to embargoed information if need be.

4.7: Procedure for laying an order and Explanatory Document in the UK Parliament

Departments are responsible for laying the draft order and all the accompanying documents in both houses. Before an order and Explanatory Document are laid, Ministerial clearance to laying must be secured - Ministers should not sign the draft order at this stage. Only a draft of the order and Explanatory Document (including a full impact assessment where appropriate) are formally required to be laid but departments should also provide information regarding the consultation:

- a list of consultees (parliamentary committees often query if certain organisations have been consulted)
- a copy of all responses to the consultation, potentially to be included as an annex to the Explanatory Document (N.B. if departments have carried out a joint consultation on more than one body or order it is advisable to make early contact with the committees to agree whether the responses should be presented jointly or separately).

i. What documents to lay

In order to lay the proposed order on the specified date, the Departmental parliamentary branch will need to lay the order and Explanatory Document in the Commons Journal Office, the Lords Printed Paper Office, and the Secondary Legislation Scrutiny Committee. Bulk copies are also provided to the House of Commons Vote Office. In total the Departmental parliamentary branch will need to have:

- 22 draft Public Bodies Orders (the Lords and Commons committees will require 15)
- 22 Explanatory Documents (the Lords and Commons Committees will require 15)
- 2 copies of the Impact Assessment (if relevant)
- 2 lists of those consulted
- 2 full sets of responses

Hard copies of these documents should be delivered to Parliament at the same time that the Department lays the proposed order. At the point of laying, the department will also need to provide electronic copies of the final versions of the documentation to both the parliamentary committees and the Cabinet Office.

Where orders require the consent of the devolved administrations under Section 9, copies of the documents listed above should be sent to the relevant administrations. It is strongly recommended that departments liaise with the relevant administrations in order to agree the timetable for laying.

If any amendments are required once an order is laid it is recommended that departments speak to parliamentary branch as quickly as possible. Departments who have laid orders using the Act have strongly suggested that early communication with clerks is advisable.

If for any reason a department wishes to withdraw a proposed order after it has been laid, officials should inform their parliamentary branch urgently as they are the ones who must make the withdrawal. This is achieved by laying formal letters before Parliament informing the

Commons Journal Office, the Lords Printed Paper Office, the two relevant committees and the House of Commons Vote Office that the order should be withdrawn.

ii. Give notice

Due to the time pressures on the various parliamentary committees, recess dates, and, acting on feedback from the parliamentary clerks, it is strongly advised that all dates for proposed order laying are provided to Cabinet Office at the earliest opportunity. Some departments also have agreements with departmental committees to give specific notice (e.g. 30 days) of laying an order and may also send the draft Explanatory Document to clerks of the committees at the same time.

Cabinet Office will work with parliamentary clerks and department parliamentary branches to secure a suitable laying date. This process will allow the Cabinet Office to control the flow of orders, thereby mitigating the risk that committees opt for the enhanced affirmative procedure simply because of an influx of public bodies orders.

If there is to be an announcement accompanying the laying of the order, officials should check with their Press branches/ Strategic Communications Unit in No. 10 that this will not conflict with other Government announcements. Departmental press offices will be able to advise on the best way to make contact with No10.

iii. Publicity

After a department has laid a proposed order, it will be published on the Legislation website under the sub-heading "Draft Statutory Instruments" <http://www.legislation.gov.uk/ukdsi>. Where appropriate, departments should also publish proposed orders and Explanatory Documents on their own departmental website.

Where a department has not undertaken a full public consultation, but has consulted specific individual or groups, it may be good stakeholder management to inform those consulted that a draft order has been laid. Departments should consider whether it would also be beneficial to release a press notice.

Section B:

Devolved Administration Scrutiny

4.8: Procedure with devolved administrations

Please first see section 3.6 of this guidance regarding establishing whether consent of devolved administrations is required.

Each devolved administration will have internal procedures and scrutiny arrangements by which they consent to an order. Where the consent of a devolved legislature is required it will be the devolved administration that leads this process. Officials should work with both departmental lawyers and lawyers from the concerned territorial office to form a view over whether consent is required. Sharing draft orders at the earliest possible stage will also allow time for devolved administration officials and lawyers to comment, and begin preparation with their own Ministers and legislatures for consent. Departments can expect officials in devolved administrations to engage under the terms of existing concordats and Memoranda of Understanding, and act in confidence as required. Contact details for officials leading on the consent process in the devolved administrations and recess dates for devolved administrations are provided at annex A.

There are a number of key steps that are shared across devolved administrations:

- Departmental officials will need to correspond with devolved administration officials as early as possible on the proposal to make an order. This should include contact with policy officials to get overall agreement to the provisions in the order.
- Departments must obtain the views of the devolved administration on whether there is a need to seek consent and then, informed by relevant legal advisors within the UK Government and Territorial Offices, determine whether their orders trigger the consent provisions set out in section 9 of the Act. Where consent is required it must be formally requested. This may be through an exchange of Ministerial letters, but territorial offices will be able to advise on particular cases.
- A memorandum to consent (a consent motion in the National Assembly for Wales) will then need to be drafted and lodged in the devolved legislatures by devolved administration officials and lawyers. Time will need to be factored in to take account of the administrative procedures that must be followed by the devolved administration to support the seeking of consent and, in particular, the time required for scrutiny of the relevant order by the devolved legislature. Memorandums or motions for consent should be lodged after or at the same time as the draft order is laid in Westminster. This will ensure that the devolved administrations have access to all the final documentation (see section 4.7 above) associated with the order, and avoid any potential criticism that the devolved legislatures are scrutinising UK-wide draft orders in advance of their being formally laid at Westminster.

More specific details are explained below. **It is important to note that the recess dates for devolved legislatures do not necessarily coincide with recess dates for the UK Parliament and this should be accounted for in your timetabling for laying orders.**

Scotland

Section 9 of the Public Bodies Act explains that the consent of the Scottish Parliament is required for an order to make provision which would be within the legislative competence of the Scottish Parliament, or which modifies the functions of the Scottish Ministers.

Departments will wish to consider the views of Scottish Government officials and take advice from the Office of the Advocate General for Scotland on whether consent is required under section 9 of the Act.

Annex C sets out the steps that departments must follow if consent is required.

Scottish Parliament scrutiny of an order should run in parallel to scrutiny at the UK Parliament. Whilst each scrutiny process could be completed in advance of the other, it is important to note that the Order cannot be made at Westminster until the Scottish Parliament has signalled its consent.

The Scottish Government would inform the UK Government whether the Scottish Parliament has resolved to consent to a draft Order.

Wales

Policy proposals that make provision which would be within the legislative competence of the National Assembly for Wales requires its consent; likewise a proposal that modifies the functions of the Welsh Ministers, First Minister of Wales or Counsel General for Wales, would require the consent of the Welsh Ministers. It is possible that both circumstances could arise.

Annex C sets out the steps that departments must follow if consent is required.

Scrutiny of draft Orders is carried out by the Constitutional and Legislative Affairs Committee. The Committee has 35 days in which to report, with the debate taking place no earlier than 40 days after the Order was laid.

Welsh language provision:

Orders under the Act should not amend Schedule 6 to the Welsh Language (Wales) Measure 2011.

Where orders under the Act are reforming bodies which are listed in orders under Section 6 of the Welsh Language Act 1993 and have adopted Welsh language schemes under that Act, departments will need to discuss with the Wales Office and Welsh Government what, if any, provision should be made in light of the details of the proposal.

Northern Ireland

The consent of the Northern Ireland Assembly is required for an order that makes provision which would be within the legislative competence of the Assembly. The consent of the Assembly is also required for orders that make provision which modifies the functions of the First Minister and deputy First Minister, a Northern Ireland Minister, the Attorney General for Northern Ireland, a Northern Ireland Department, or a person exercising public functions in relation to a transferred matter (within the meaning of the Northern Ireland Act 1998).

Following official-level interaction, the UK Minister will need to inform the relevant Northern Ireland Minister of the intention to proceed with an order and ask for the Assembly's consent to be obtained. The Northern Ireland Minister will then begin the process for tabling a consent motion in the Northern Ireland Assembly. This process should take at least four weeks.

4.9: Preparing to lay a Draft Order and related documents: Checklist

1. Have you drafted a robust and thorough Explanatory Document, and cleared it with all interested colleagues in your department?
2. Have you agreed and communicated a target laying date with Cabinet Office and your Parliamentary Branch?
3. If necessary, have you got collective Home Affairs Committee agreement to the latest policy proposal to be delivered by the statutory instrument?
4. If applicable, have you started the process for securing the consent of the devolved administration/s for the order and informed Cabinet Office?
5. Has the draft order been cleared by Parliamentary Counsel?
6. Have you discussed the order and explanatory document in draft form with officials from the Joint Committee on Statutory Instruments (JCSI) prior to laying the draft order (they will require at least a two week turnaround)?
7. Have you responded to any comments/recommendations raised by the JCSI?
8. Have you copied draft order and Explanatory Document to Cabinet Office Reform Team?
9. Have you obtained Ministerial agreement to laying the draft order and accompanying documents in Parliament?
10. Have you prepared a press notice (if necessary) for the laying date and checked with Strategic Communications Unit in No.10 regarding timing?
11. Have you prepared all the supporting material ready for laying (list of consultees and responses etc)?
12. Have you prepared copies of the final impact assessment – if relevant – to send to the House libraries?
13. Have you sent electronic copies of all documents to both committees?
14. Have you made arrangements, if required, for laying the order with the devolved administrations?

Chapter 5: Parliamentary Scrutiny: Post Laying Process

5.1: The scrutiny process for Public Bodies Orders

The procedure by which an order is scrutinised by Parliament is detailed in section 11 of the Public Bodies Act and in the diagram at section 5.5. Key points to be aware of are:

- Orders will be considered by three Committees; the Joint Committee on Statutory Instruments (JCSI), the Secondary Legislation Scrutiny Committee (SLSC) in the House of Lords and the relevant departmental select committee in the House of Commons, such as the Justice Select Committee for MoJ draft orders.
- The JCSI carries out pre-scrutiny of draft affirmative orders before they are laid. This process can help to avoid difficulties about powers, drafting, etc. arising at a later stage, and assists both the department and the Committee in minimising any delay in the passage of an instrument.
- The JCSI does not consider the merits of a statutory instrument, only that a Minister's powers are being carried out in accordance with the provision of the enabling Act. It may, like other committees, seek further information and/or written memoranda. In practice, if the JCSI lawyers have approved the order before it is laid by the Minister, the order should be cleared by JCSI relatively quickly, however officials should check with the JCSI on individual orders laid.
- All orders under the PUBLIC BODIES ACT 2011 are subject to a minimum scrutiny period of 40 days; this may be extended to 60 days if a committee or resolution of either house triggers the enhanced affirmative procedure.
- If the enhanced affirmative procedure is not triggered during the 30-day period, a further 10 days must elapse before the draft order can be approved by an affirmative resolution of each House (a total scrutiny period of 40 days).
- While departmental select committees do not usually report on public bodies orders, the SLSC will scrutinise and report on every order.
- Scrutiny will be followed by debate in both houses. These will generally be in Delegated Legislation Committee in the Commons and in Grand Committee in the Lords.
- Debates will determine whether the order has been "considered" by the committee. They will be followed 2-5 days later by formal approval motions on the floor of each house.

5.2: The enhanced scrutiny processes: 40 days or 60 days?

Once an order has been laid there is a 30-day period in which the enhanced affirmative procedure (the 60 day period) may be selected. This procedure can be triggered on the recommendation of a committee of either House responsible for reporting on the draft order, or by a resolution of either House.

Where information in the Explanatory Document is deemed to be insufficient, the Committee will initially approach the official named as the contact point in each Explanatory Document by phone or e-mail to seek further detail. If the Committee is still not satisfied with the explanation provided the Committee may write formally or ask for oral evidence from either officials or the Minister, at this point the 60 days scrutiny period may be triggered.

- If the 60 days scrutiny period is triggered, the Minister must have regard to any recommendations from the House or Committees. This may result in the Minister

responding to the recommendations during the course of debates or in extreme cases, revising and re-laying the draft order.

- A list of orders considered by the SLSC - and whether the 40 or 60 day scrutiny period applied - can be found on their website, here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

5.3: Working with committees and responding to committee reports

A good Explanatory Document should be sufficient for the parliamentary committees to scrutinise a draft order, and, as explained in section 4.3, there may be circumstances where departments will wish to include additional material with their Explanatory Document to ensure this, before it is requested by committee staff. If committee officials require further information, they will contact the departmental official named in the Explanatory Document directly, by writing, phone or email. It is the officials' responsibility to supply this direct to the committees, cleared by departmental lawyers and copied to parliamentary branches. There is no specified format for this further information and a letter or email will normally suffice. It is worth being aware that this information may then be published alongside the Committee report, or used within the Committee's report, so consider carefully how responses are phrased. Committees may also write formally to Ministers requesting more information or oral evidence from departmental officials or Ministers. Examples of where the SLSC took oral evidence, including from Ministers, are the Draft Inland Waterways Advisory Council (Abolition) Order 2012 and the Draft British Waterways Board (Transfer of Functions) Order 2012. The SLSC's report following the taking of oral evidence and the oral evidence transcript can be found here:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

If the enhanced affirmative procedure is selected then the Minister must have regard to any representations made during the 60-day period. Representations may be made in the form of resolutions of either House of Parliament or recommendations of a committee of either House charged with reporting on a draft order. The Minister may respond at the despatch box during debate, or through a Written Ministerial Statement laid prior to debate.

However, the Minister may choose to lay a revised draft order with material changes, in which case the order must be accompanied by a statement giving a summary of the changes proposed. A revised order will be subject to further scrutiny by the Joint Committee on Statutory Instruments, the Secondary Legislation Scrutiny Committee in the House of Lords and departmental select committees (this does not extend the 60 day scrutiny period but the Order may not be approved until the JCSI has reported on it).

5.4: Parliamentary debate and approval

House of Commons

Departmental parliamentary branch will decide with the Whips Offices whether the debate takes place on the floor of the House or in Delegated Legislation Committee (DLC). Only particularly controversial orders will be considered directly on the floor of the House. As at April 2013, no Public Bodies Order debates had been on the floor of either House.

Members of the DLC are selected by the Selection Committee, who meet every Wednesday. At the Committee, it is the responsibility of the Minister to move the motion ‘to consider the order’ with a short speech, followed by questions and a vote on the motion. A transcript from a DLC debate on a Public Bodies Order is available here:

<http://www.publications.parliament.uk/pa/cm201213/cmgeneral/deleg4/120910/120910s01.htm>

The House is unable to amend the order, it can only express or deny its approval following debate. It is important that the Minister has a thorough briefing that, in particular, picks up on issues that have been raised or recommendations that have been made during the earlier consideration of the draft order by scrutiny committees, particularly the SLSC.

Following consideration by the DLC, the order needs to be formally approved on the floor of the House which normally takes place 2-5 weeks after the debate. It usually takes place at close of business and is known as ‘approval forthwith’, the motion is put and then passed on the floor of the House. This is usually a formality but if any MP objects at this stage, then the order goes to deferred division which takes place on a Wednesday.

A transcript of motions put on the floor of the House and approved, without debate or division, is available here:

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120912/debtext/120912-0004.htm>

As of April 2013 no draft order under the Public Bodies Act has received objections at the approval motion stage.

House of Lords⁷

The order will usually be debated in Grand Committee on a motion to “consider” the order, but will have to return to the floor of the House for a formal decision on an approval motion. It is equally important for a Minister in the Lords to have a thorough briefing for debate on the order.

The House of Lords does not have the power to amend delegated legislation. However, opposition to an affirmative instrument may be expressed in the House of Lords in a number of ways:

- An amendment to the approval motion that would withhold the agreement of the House
- An amendment or separate motion which calls upon the Government to take a specific action, but which will not prevent approval of the order, even if passed
- An amendment or separate motion which invites the House to record a particular point of view regarding the order, but does not call on the Government to take a specific action

The Hansard transcript of the debate in Grand Committee on the order to abolish Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board can be found here: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120718-gc0001.htm>

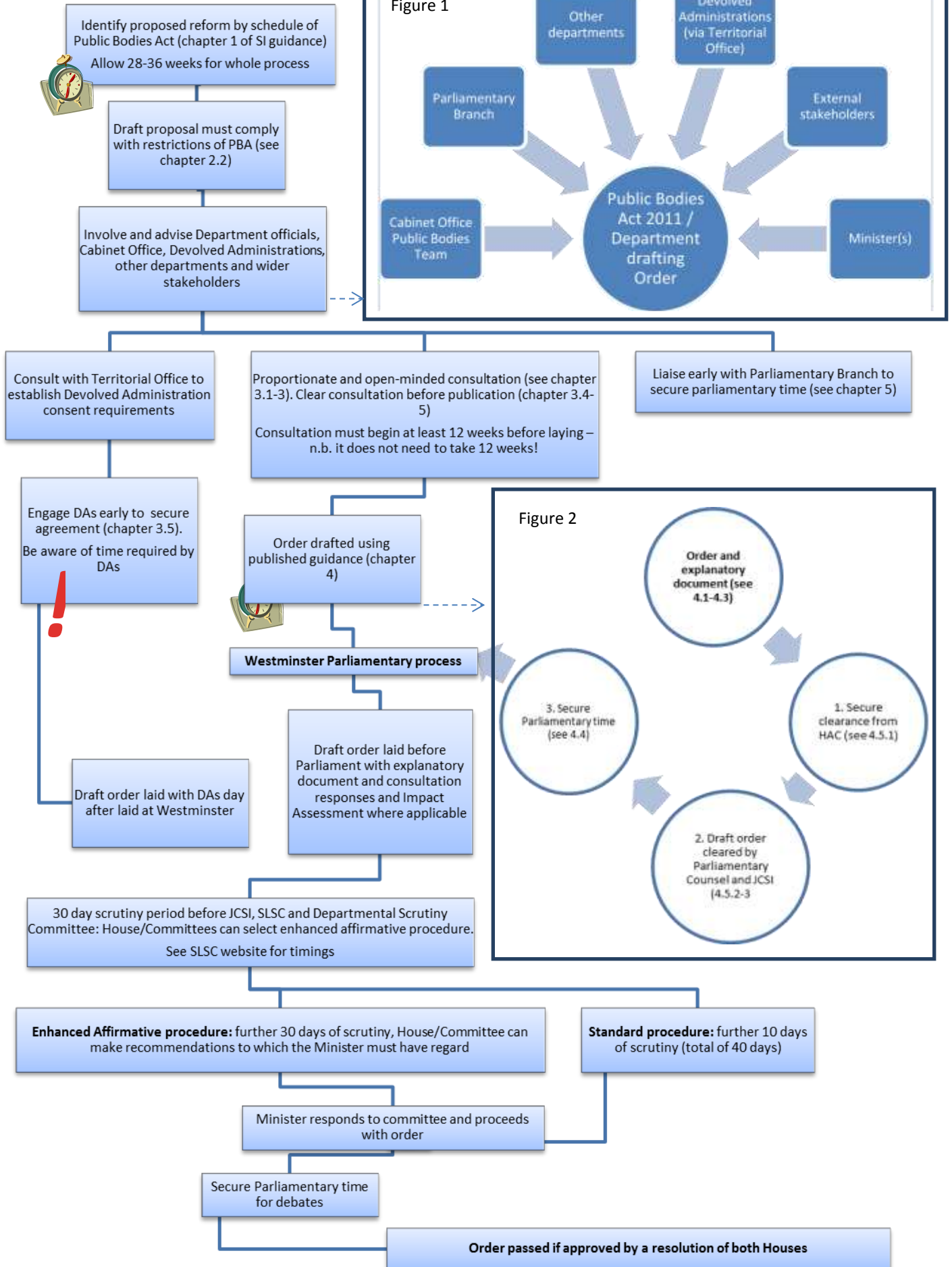
The Hansard transcript of the motion to approve the same order on the floor of the House of Lords can be found here:

<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120723-0001.htm>

⁷ Please refer to chapter 10 of the House of Lords’ Companion to the Standing Orders at <http://www.publications.parliament.uk/pa/ld/ldcomp/compos2010/compos.pdf>

5.5: Flow Chart: Developing & laying a statutory instrument under the Public Bodies Act

Consult Cabinet Office to resolve difficulties arising at any stage



Annex A: Contact Details and Reports

Public Bodies Reform Team

publicbodiesreform@cabinet-office.gsi.gov.uk

Economic and Domestic Affairs Secretariat

Legislation Secretariat:

0207 276 0135 / 0242 / 0326

EDS Desk Officer (for policy issues):

0207 276 1072

Devolved Administration UK Order Coordinators

Scotland: 0131 556 8400

Al Gibson, 0131 244 5560, Al.Gibson@scotland.gsi.gov.uk

Ally Winford, 0131 244 5549, Alasdair.Winford@scotland.gsi.gov.uk

Wales: 0300 0603300

Jacqui Hounsell, 029 2082 6826, jacqui.hounsell@wales.gsi.gov.uk

Northern Ireland: 028 9052 8400

Deirdre Griffith, 028 9037 8056, Deirdre.Griffith@ofmdfmni.gsi.gov.uk

Territorial Offices

Scotland Office: 020 7270 6754

Andrew Winsor, 0207 270 6756, Andrew.Winsor@scotlandoffice.gsi.gov.uk

Office of the Advocate General (for Scotland): 0131 244 0359

Greg Thomson, 0131 244 1527, Greg.Thomson@advocategeneral.gsi.gov.uk

Wales Office: 029 2092 4220

Jeff Lloyd, 029 20924210, Jeff.Lloyd@walesoffice.gsi.gov.uk

Northern Ireland Office: 020 7210 6446

David Coleman, 02072106576, David.Coleman@nio.x.gsi.gov.uk

Parliamentary Committees

Joint Committee on Statutory Instruments:

0207 219 2026 / 2830

jcsi@parliament.uk

Orders under Sections 1 – 5 of the Public Bodies Act 2011 – JCSI Guidance:



JCSI Orders under
Section 1-5 of the PB

House of Lords Secondary Legislation Scrutiny Committee:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/>

0207 219 8821

seclegscrutiny@parliament.uk

Secondary Legislation Scrutiny Committee Clerks

Jane White, 020-7219 8822, whiteja@parliament.uk

Paul Bristow, 020-7219 8823, bristowpn@parliament.uk

Published Reports on Public Bodies Orders:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/public-bodies-orders/public-bodies-orders-considered/>

Cabinet Office

Ransome Kolaru, 020 7271 1470, ransome.kolaru@cabinet-office.gsi.gov.uk

Public Bodies Act 2011 Statutory Instruments Management Peer Network Group

Sue Goligher, 020 7238 6607, Sue.Goligher@defra.gsi.gov.uk

Lee Howse, 020 3334 6298, lee.howse@justice.gsi.gov.uk

Annex B: Best Practice Principles (from the Experience of MoJ)

| Drafting and pre-scrutiny | |
|---|--|
| Key Actions | Best practice principles |
| <ul style="list-style-type: none"> • Instructions to lawyers • Lawyers produce first draft of order • Order revised based on policy need and comments • Final order agreed to be sent externally • Send draft to Parliamentary Counsel • Lawyers revise based on Parliamentary Counsel comments • Parliamentary branch send order goes to JCSI | <ul style="list-style-type: none"> • Meet early with policy officials, sponsors and lawyers to agree direction of the order. What must the order achieve? • Agree milestones for drafting: first draft, meeting to revise, likely pitfalls. Start project plan setting out key timings through until making the Order. • Set regular meetings to discuss progress of order – avoids order being forgotten. If appropriate, continue to meet with staff from the body in question. • Alert Parliamentary Counsel as early as possible that an order is coming • Engage with your parliamentary branch early to ensure they are in touch with JCSI • Ensure a date for laying is agreed as soon as possible; this will allow parliamentary branch and Comms colleagues to prepare • Engage early with clerks of select committees to let them know policy intentions – especially important for departmental select committees |

Explanatory Document

| Milestone | Best practice principles |
|---|---|
| <ul style="list-style-type: none"> • Produce first draft of ED • Send to all internal stakeholders for comment • Revise and finalise • Parliamentary branch sends to JCSI (with order) • Lay in Parliament along with order and up to date impact assessment (if required) | <ul style="list-style-type: none"> • Ensure division of labour over the ED is clear: who is leading? • Use previous examples of PBA Explanatory Documents for consistency – take it very seriously! • Read 19th report by Secondary Legislation Scrutiny Committee on scrutiny of bodies under the PBA 2011 and pay attention to what they're seeking – above and beyond a normal EM - responding is burdensome. • Be robust over your evidence base – it's not all about facts and figures. • Leave plenty of time to produce EDs (lawyers and officials): select committees are scrutinising very tightly. Read, read and re-read. |

Devolved administrations

| Milestone | Best practice Principles |
|---|---|
| <ul style="list-style-type: none"> • Contact Wales/Scotland/Northern Ireland offices to gain views over whether consent is needed • Based on this, make contact with the relevant devolved administration(s) to alert them that an order is coming • Engage with policy opposites in devolved governments and gain consent to proceed • Share order with territorial offices and devolved administrations • Ministerial letters (if relevant) seeking consent to seek consent of Parliament/Assembly • Depending on Ministerial consent, collective agreement sought • Order/consent motions/memorandum is laid in relevant Parliament/Assembly • Order debated and consent given | <ul style="list-style-type: none"> • Make early contact with territorial offices and be their friend! • Give territorial offices sight of any major communication in advance: they are best placed to gauge reception • Engage meaningfully with devolved administrations – they are not an obstacle, but an extra layer of scrutiny • Territorial office and devolved administration views on consent can be challenged where appropriate. • Share timetable with devolved governments as soon as possible – you will need to coordinate laying dates – and ensure their timetable is also clear |

Laying order

| Milestone | Best practice principles |
|--|---|
| <ul style="list-style-type: none"> • Agree a date to lay and inform parliamentary branch and Cabinet Office colleagues so they can inform Parliament. • Submission to Minister: approval of order and ED • Gather documentation together and give to parliamentary branch • Order is laid in Westminster • Order is laid in relevant devolved administrations (if consent is required) • Relevant select committee reports | <ul style="list-style-type: none"> • Ensure devolved colleagues are informed when a laying date has been secured • Include in submission a note to consider the requirements in s.8 of the Act – the Minister may have to defend this in Parliament – and draw attention at this stage to any parliamentary handling issues • Spend more time than you think necessary to put documents in order: more is more. Use CO guidance, paying particular attention to the ED, consultation documents and impact assessments. If a transfer scheme is involved, consider whether to lay at the same time or deposit for info in the House Library. • Make early contact with: a) your web team early to put consultation responses online, b) your better regulation team to ensure your final IA is deposited in the IA library if necessary, and c) your comms team to issue a press release. • If a select committee reports or asks follow-up questions, make every effort to respond quickly and in full; this may make all the difference with your timetable • Begin to prepare for parliamentary debates, planning for the shortest timetable to ensure you can't be caught out. • Plan for both long and short scrutiny periods, paying attention to all recess dates. Ensure the end of the scrutiny period is clear between all parties. |

Annex C: Devolved Administration

Consent Requirements

Consent Requirements in the Scottish Parliament

Section 9 of the Public Bodies Act explains that the consent of the Scottish Parliament is required for an order to make provision which would be within the legislative competence of the Scottish Parliament if it were contained within an Act of that Parliament, or which modifies the functions of the Scottish Ministers.

It is therefore vital to begin engaging with Scottish Government officials at the earliest possible stage of policy development to establish the best way to implement your proposals and to identify whether the favoured approach triggers a requirement to seek consent from the Scottish Parliament. Departments will wish to consider the views of Scottish Government officials and take advice from the Office of the Advocate General for Scotland on whether consent is required under section 9 of the Act.

If consent is required a letter will need to be sent from the UK Minister to the relevant Scottish Minister seeking their 'in-principle' agreement to seek the consent of the Scottish Parliament. This letter should include details of why the consent requirement is triggered, including specific details of the relevant provisions. If the lead Scottish Minister is willing to signal 'in principle' consent to such a move then Scottish Government officials would then take steps to obtain collective agreement of the Scottish Ministers (such matters must be approved by the Scottish Cabinet Sub Committee on Legislation). If collective agreement is obtained, then the Scottish Government would lodge a relevant Consent Memorandum (incorporating a copy of the draft Order, its accompanying documentation and a draft motion) in the Scottish Parliament, but only after the draft order in question has been laid at Westminster.

The Memorandum would be considered by Scottish Parliamentary Committees (the Subordinate Legislation Committee and the relevant Subject Committee) and the Subject Committee would then publish a Report offering its views on whether the Parliament should consent to the Order. The Parliament would then debate a motion on whether to signify its consent. Although there is no formal deadline stipulated in the Scottish Parliament's standing orders, this scrutiny process can on average take between six and eight weeks, dependent on the degree of complexity and extent of controversy attached to any individual proposal. Scottish Parliamentary scrutiny of an order should run in parallel to scrutiny at the UK Parliament. Whilst each scrutiny process could be completed in advance of the other, it is important to note that the Order cannot be made at Westminster until the Scottish Parliament has signalled its consent.

The Scottish Government would inform the UK Government whether the Scottish Parliament has resolved to consent to a draft Order.

Consent Requirements in the Welsh Assembly

The consent of the National Assembly for Wales is required for an order that makes provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly. To the extent that an order contains provision not within the legislative competence of the Assembly but which nevertheless modifies the functions of the Welsh Ministers, First Minister of Wales or Counsel General for Wales, or could be made by any of those persons, then the consent of the Welsh Ministers will be required. It is possible that both circumstances could arise in respect of one order, in which case both the Assembly's and Welsh Ministers' consent would be required.

It is important that Welsh Government officials are engaged as early as possible. Where the consent of the Welsh Ministers is required, this can be achieved through correspondence between the UK Minister and the relevant Welsh Minister.

Where consent of the National Assembly for Wales is required, agreement must be reached with the Welsh Ministers (in effect through the relevant Minister) to promote a consent motion in the National Assembly. In such cases both the draft order and a motion to consent will be laid before the National Assembly by the relevant Welsh Minister. Once laid, draft Orders are referred to the Assembly's Constitutional and Legislative Affairs Committee (CLA) for consideration. The Committee has 35 days in which to report, with the debate taking place no earlier than 40 days after the Order was laid (albeit where scrutiny of that order in Parliament is extended to the 60 day period, the CLA may also extend its scrutiny period). In planning timings for obtaining necessary consent it should be noted that the Assembly sits in plenary on Tuesday and Wednesday afternoons. In addition, Assembly recess dates may not necessarily coincide with Parliamentary recess dates.

Welsh Language Provision

Orders under the Act should not amend Schedule 6 to the Welsh Language (Wales) Measure 2011.

Where orders under the Act are reforming bodies which are listed in orders made under section 6 of the Welsh Language Act 1993 departments will need to discuss with the Wales Office and Welsh Government what, if any, provision should be made in light of the details of the proposal. Consideration will need to be made as to what practical arrangements may be required to ensure that Welsh language services currently provided by bodies whose functions are being transferred elsewhere are not lost as a result of the transfer. This could include having to amend the Welsh language schemes of bodies receiving functions.

Annex D: Model Preamble

Draft Order laid before Parliament under section 11 of the Public Bodies Act 2011, for approval by resolution of each House of Parliament after the expiry of the 40-day period referred to in section 11(4) of that Act.

DRAFT STATUTORY INSTRUMENTS

201[2] No.

PUBLIC BODIES

The Public Bodies ([insert details of title]) Order [year]

Made - - - - - ***

Coming into force - - - - - ***

[The Secretary of State/Minister [for][insert name]] makes the following Order in exercise of the powers conferred by sections [1(1), (2)/ 2(1), (3)/ 3(1)/ 4(1)/ 5(1)/ 6(1), (2), (3), (5)/ 23(1)(a) and 35(2)] of the Public Bodies Act 2011⁽⁸⁾ (“the Act”).

[The consent of the Treasury has been obtained in accordance with section 4(2) [6(4)] of the Act.]

For the purposes of section 8 of the Act, the Secretary of State/Minister considers that—

- this Order serves the purpose referred to in section 8(1) of the Act; and
- the conditions in section 8(2)(a) and (b) of the Act are satisfied.

[The consent of the [Scottish Parliament/Northern Ireland Assembly/National Assembly for Wales/Welsh Ministers] has been obtained in accordance with [section 9(1), (3), (6), (7)] of the Act.]

The Secretary of State/Minister has consulted in accordance with section 10 of the Act.

[The Secretary of State has consulted the Scottish Ministers in accordance with section 88(2) of the Scotland Act 1998⁽⁹⁾ and the Welsh Ministers in accordance with section 63(1) of the Government of Wales Act 2006⁽¹⁰⁾.]

[The consent of [charity/person not otherwise exercising public functions] has been obtained in accordance with section 21(1)(a)/(b) of the Act.]

[The consent of [charity] has been obtained in accordance with section 23(4) of the Act.]

A draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

⁽⁸⁾ 2011 c.24
⁽⁹⁾ 1998 c.46
⁽¹⁰⁾ 2006 c.32

Annex E: Example Explanatory Document Laid Under the Public Bodies Act 2011

EXPLANATORY DOCUMENT TO THE PUBLIC BODIES (CHILD MAINTENANCE AND ENFORCEMENT COMMISSION: ABOLITION AND TRANSFER OF FUNCTIONS) ORDER 2012

2012 No.

1. This explanatory document has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

To abolish the Child Maintenance and Enforcement Commission (CMEC) and transfer its functions to the Secretary of State for Work and Pensions as part of the Government's public bodies reform programme.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

4.1 The Government are proposing to use the powers in the Public Bodies Act 2011 ('the Act') to abolish CMEC as a non-departmental public body and transfer its functions to the Secretary of State for Work and Pensions.

4.2 CMEC was established by the Child Maintenance and Other Payments Act 2008 ('the 2008 Act') and has responsibilities relating to child maintenance in Great Britain. Its primary objective is to maximise the number of effective child maintenance arrangements in place for children who live apart from one or both of their parents. Parents may make arrangements collaboratively, through voluntary family-based arrangements, through the courts or through the statutory schemes.

4.3 CMEC is responsible for the statutory maintenance service, currently delivered by its operational arm, the Child Support Agency (CSA). It is also responsible, via contract, for Child Maintenance Options, which provides free, impartial information and support to enable parents to identify and set up the most suitable maintenance arrangement for their circumstances. The Commission also acts to promote the financial responsibility parents have for their children even when they no longer live with them.

4.4 The proposal to abolish CMEC was announced as part of the Public Bodies Bill Review (14 October 2010), in which the Government proposed to increase radically the accountability and transparency of all public bodies. As part of that proposal, CMEC would be

abolished and the Secretary of State for Work and Pensions would exercise its functions, thereby bringing the delivery of child maintenance strategic and operational policy under more direct Ministerial control.

4.5 CMEC does not meet any of the three criteria set out by the Minister for the Cabinet Office in the Public Bodies Bill Review which determined whether a body or function should be delivered at arm's length from Ministers. These criteria test whether a body:

- Performs a technical function;
- Requires political impartiality; or
- Needs to act independently to establish facts.

4.6 CMEC is not a technical or fact gathering body that needs independence, nor does it require political impartiality to discharge its responsibilities. CMEC performs an administrative function and provides services which should be managed within Government.

4.7 Given that CMEC satisfies none of the three tests, and Ministers believe that they should be directly accountable for delivering and reforming the statutory child maintenance system, it has therefore been concluded that CMEC's functions do not need to be carried out by a non-departmental public body. By removing CMEC's separate Board and Chief Executive, and with the head of the business reporting directly to the Permanent Secretary, Ministers and Parliament will have more direct control, accountability and responsibility for the system, and be more directly able to manage any changes to it.

5. Territorial Extent and Application

This instrument extends to Great Britain.

6. European Convention on Human Rights

The Minister for Disabled People, Maria Miller, has made the following statement regarding human rights:

"In my view the provisions of the Public Bodies (Child Maintenance and Enforcement Commission: Abolition and Transfer of Functions) Order 2012 are compatible with the Convention rights".

7. Policy Background

Activity during legislative passage

Public Bodies Act 2011

7.1 In debate during the passage of the Act, the Minister for Welfare Reform, Lord Freud, explained that:

"The change in status for CMEC from a non-departmental public body to an executive agency within the DWP is driven by the coalition Government's desire to have greater accountability for the hugely important issue of child maintenance. We feel that it is important to strengthen

Ministerial accountability when the Government are considering the role that the child maintenance system can play in their overall commitment to support shared parenting and promote parental responsibility.”

7.2 On 12 September 2011, DWP announced (see press release: <http://www.dwp.gov.uk/newsroom/press-releases/2011/sep-2011/dwp106-11.shtml>) its intention to bring day-to-day operations of its existing executive agencies (Jobcentre Plus and the Pensions, Disability and Carers Service) under the leadership of a single Chief Operating Officer as part of restructuring to make the Department more efficient and streamline its management. On 1 October 2011 Jobcentre Plus and the Pensions, Disability and Carers Service ceased to have executive agency status.

7.3 In light of these decisions, the staff and operations of CMEC will not be transferred into the Department as an executive agency. Instead there will be a separate operational business unit within the Department, reporting directly to the Permanent Secretary. This will enable the efficiencies and opportunities for direct accountability that the Department's recent reorganisation has created to be fully realised.

Welfare Reform Act 2012

7.4 In debates during the passage of the Welfare Reform Act 2012, an amendment was tabled which sought to impose an overriding objective on the Secretary of State in applying the provisions of the Child Support Act 1991. It also sought to ensure bi-annual reporting by the Secretary of State to Parliament on the progress of achieving this overriding objective. However these changes were unnecessary and the amendment was rejected.

7.5 The Secretary of State does not require objectives or duties to promote child maintenance in order to do so, and neither does he require duties to issue guidance and information to be able to do so. The statutory objectives that CMEC has and its duty to promote child maintenance and to issue guidance and information are not transferred to the Secretary of State by the Order.

7.6 The Secretary of State already has sufficient powers to ensure that the Department maximises the number of effective child maintenance arrangements and sufficient powers to provide information. Assurances were provided during the debate that the Secretary of State will have these objectives in mind and, as part of the process for managing the transfer, will consider the measurement and reporting of success.

7.7. However, what is being transferred to the Secretary of State are CMEC's functions.

7.8 There is no intention to change the services currently delivered by CMEC when its functions are transferred. The promotion of child maintenance, the provision of information and guidance and the delivery of the statutory service will all continue.

7.9 In terms of policy background, the Government want to encourage parents to make family-based arrangements, where possible, as they believe that such arrangements are more likely to be enduring, result in ongoing financial support and be better for parents and children. With the right support, more children will be able to benefit from effective maintenance arrangements but this support can be difficult to access.

7.10 That is why an expert steering group, comprised of experts from the voluntary and community sector and academia, have been asked to advise on improving the co-ordination of existing support for separating and separated families.

7.11 As family support is a devolved matter, reporting in many of these areas at a Great Britain level will not be the sole responsibility of the Secretary of State. Officials continue to work with counterparts in the devolved administrations as they look at implications for support services for separated families in their respective jurisdictions.

7.12 The Department will continue to publish the quarterly summary of statistics which currently details the performance of the Child Support Agency and will publish details of key contracts and spend in line with the transparency agenda, and in line with other parts of the Department.

7.13 In order to measure and gather information about maintenance arrangements outside the statutory service, the Department will be including a series of questions about child maintenance in the large-scale Economic and Social Research Council led survey, "Understanding Society". More information can be found on this at:

<http://www.understandingsociety.org.uk/default.aspx>

What is being done and why?

7.14 In line with the requirements of the Act, a Minister may only make an Order under section 1 of the Act abolishing a body if the Minister considers that the Order serves the purpose of improving the exercise of public functions. In considering this, the Minister must have regard to efficiency, effectiveness, economy, and securing appropriate accountability to Ministers.

7.15 This has been considered. The key to this change is that CMEC has responsibilities relating to child maintenance, an issue which affects many families, and the Government feel it is right that Ministers should be directly responsible and accountable for this important work.

7.16 In particular to note are that:

- **Efficiencies** to be realised in support areas by not duplicating enabler functions such as HR and finance, and by child maintenance services being squarely part of the wider Department and benefiting from the scale and expertise this brings;
- **Effectiveness** will be improved as Ministers will be more directly able to influence service delivery and any changes to that, including addressing issues that impede the effective delivery of high quality services or the implementation of new policies and systems;
- Small **economies** will be achieved as some activity is stopped (not producing separate annual accounts and not requiring a Board should save for example approximately £0.5 million per annum). As the duplication of functions are addressed, further savings can be expected to be realised; and

- Most significantly more appropriate **accountability** to Ministers will be achieved by the delivery of child maintenance services being directly under their accountability and responsibility. There will no longer be a separate, legal board between Ministers and those managing the delivery of the service.

7.17 Since 2008, the issue of child maintenance has been at arms length to Ministers; however the Government believe that accountability and decision making responsibility for child maintenance should sit with Ministers. As explained above, the 2010 review of public bodies concluded that there was no reason, based on the Government's three tests, for these functions to remain at arms length.

7.18 The Government therefore plan to abolish CMEC as a non-departmental public body, and transfer its functions to the Secretary of State for Work and Pensions. This will secure appropriate accountability to Ministers for the exercise of public functions by establishing direct accountability to and through them as the elected and legitimate office holders who answer to Parliament for performance in this area and for the ongoing reform of the child maintenance system.

7.19 In accordance with section 8(2) of the Act, it can be confirmed that these changes will not alter or remove any necessary protection nor do they prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. This change is around the administration of child maintenance and bringing the responsibility for this work directly under Ministerial responsibility.

7.20 In addition, article 4 of the Order makes provision for continuity of the exercise of the functions being transferred. This ensures that the transfer of functions to the Secretary of State will have no effect on the validity of anything done by, or in relation to, the Commission before the transfer.

What will take the place of CMEC?

7.21 The Secretary of State for Work and Pensions will become responsible for the delivery of child maintenance and for ensuring that any change programmes are implemented.

7.22 CMEC will be abolished and no longer exist as a separate legal organisation.

7.23 Staff will transfer from CMEC to DWP under the Cabinet Office Statement of Practice (COSOP) rules, and the transfer will be treated as a Machinery of Government change from one department to another department. This is because CMEC is a Crown body and therefore exercises its functions on behalf of the Crown. Staff will retain their civil servant status, and staff terms and conditions will be protected at the point of transfer.

7.24 Noel Shanahan (current CMEC Commissioner and Chief Executive) will become head of the operational business unit, reporting to DWP's Permanent Secretary and become a member of the DWP Executive Team. The business itself will be called the Child Maintenance Group. The impact of abolition on delivery staff, who form by far the largest part of CMEC's workforce,

will be minimal. The enabler functions, such as finance and HR, over a period of time will be separated and integrated into the corresponding DWP teams in terms of line management.

7.25 CMEC is part-way through a major project to reform the system of child maintenance, where the first part of delivery is due to start in 2012. This involves a major new IT system to support a new statutory child maintenance service, which will affect all CMEC's current and future clients. Hence, Noel Shanahan will remain the senior responsible officer for the change programme, and the staff working to deliver this will remain under his management in order to retain continuity in this important area.

7.26 As such it is proposed that initially no major changes are made to how operational staff currently within CMEC are organised, nor how the business is run, although the enabler functions will be managed separately and support the business in the same way as other operational areas within the Department.

7.27 The details are currently being planned. Initial work is concentrating on the practical things that need to be done when an organisation is abolished and its functions transferred to another.

7.28 Thereafter, it is expected to see efficiencies as functions are merged, but at this stage plans have not been fully developed or costed. More detailed work will be undertaken in a second stage, but as the plan is to bring CMEC into the Department without major changes (as set out above), sizeable savings initially beyond those associated with not having a separate CMEC Board and accounts (around £0.5 million per annum) are not envisaged and that these savings may be offset by costs of the change (such as changes to resource management systems).

7.29 Operational front-line staff delivering the statutory child maintenance service will see little or no change, and they will report into the Department as a business unit, enabling that unit to focus solely on the effective implementation and administration of an efficient and effective child maintenance service. Whilst, like all parts of government, all parts of the business will be expected to find efficiency savings, this would have happened without the abolition and transfer. Any additional savings brought about by this particular change will be around back room functions, not front line delivery.

7.30 Accounts will be produced for CMEC for the period from the start of the financial year to the point of abolition. Noel Shanahan as the Accounting Officer during this period will work with and advise the DWP Permanent Secretary as the new Accounting Officer following abolition to agree these accounts before sending to the Comptroller and Auditor General and laying before Parliament. Thereafter, as part of DWP, separate accounts will not be necessary and will be reported upon as part of DWPs accounts.

The Order

7.31 This Order abolishes CMEC and transfers its functions to the Secretary of State.

7.32 It also transfers to the Secretary of State any property, rights or liabilities of CMEC, or to which CMEC is subject, on the transfer date.

7.33 The Order ensures anything that is done or in the process of being done by CMEC on the transfer date will be treated as done by the Secretary of State when CMEC's functions are transferred. It also provides that the Secretary of State will be liable for anything CMEC has done in the exercise of its functions. The Order does not deal with the transfer of CMEC's staff to the Secretary of State as CMEC's staff are civil servants and will transfer as described in paragraph 7.24 above.

7.34 It also ensures that if any documentation is issued which refers to CMEC after its abolition, the document will not be invalidated as a result. This is to allow a cross over period before the IT systems used in relation to child maintenance are changed so that in the intervening period documentation can be issued in the name of CMEC but still have legal effect. Article 5 ensures any documentation issued in its name before its abolition is still valid.

7.35 The Schedule to the Order makes a number of consequential, incidental and supplementary amendments to legislation which are required as a result of the abolition of CMEC and the transfer of its functions to the Secretary of State. The majority of the changes made in the Schedule to the Order are textual amendments that simply replace any references to the Commission with a reference to the Secretary of State.

7.36 In addition to those textual changes, the draft [to the] Order published with the consultation included the omission and re-enactment of several provisions from the 2008 Act in the Child Support Act 1991. However, as some of these provisions have very recently been substantively amended and [heavily] debated in both Houses of Parliament, it has been decided to leave the provisions in the 2008 Act.

7.37 The Schedule to the Order also amends the Secretary of State's existing information sharing gateways to include child maintenance, for reasons of coherence, rather than retain separate gateways for child maintenance in the 2008 Act.

8. Consultation outcome

8.1 A public consultation covering the Government using the powers in the (then) Public Bodies Bill to abolish the Child Maintenance and Enforcement Commission (CMEC) as a non-departmental public body, and transfer of its functions to the Secretary of State for Work and Pensions was conducted between 10 October 2011 and 3 January 2012.

8.2 Eleven responses to the consultation were received, a rate which indicates that this is not a contentious change. Five respondents were broadly in agreement with the proposals although some made additional points. Three respondents clearly disagreed with the proposed changes, with the remainder not offering comments or being concerned with the consultation process rather than its substance.

8.3 The chief concerns raised by the respondents were the extent to which, and rigour with which, CMEC's current objectives will be pursued and how its activities will be reported upon given its change of status. Ministers have made clear that their principal driver in seeking to bring CMEC's functions back into government is so that they may exercise more direct control

over the discharge of statutory child maintenance functions and that robust reporting mechanisms will be put in place to support this.

8.4 Concern was also expressed that the consultation document provided no information regarding the exact future structure of CMEC and its reporting lines to DWP. At that time these matters were still under consideration, but since the consultation document was published decisions have been reached in this area as explained in paragraphs 7.21 to 7.29 above.

8.5 Concern was further expressed as to whether there was sufficient evidence to provide justification for this change, and if the change would provide value for money for the taxpayer and be in the best interests of parents. Also some stakeholders expressed concern that there was a risk of a temporary decline in performance if a big change to staff working in the organisation were to be made. The movement to DWP will not directly affect parents as there is no change in policy directly attached to it. As explained in paragraph 7.26 above, the way that CMEC will be transferred into DWP is being done so that this change will not destabilise the organisation or risk the successful implementation of the new child maintenance arrangements and without further changes to reporting structures or responsibilities in child maintenance operations, at least until the new statutory scheme has commenced and is judged to be functioning well. This means that some of the benefits of moving CMEC into DWP will, therefore, not be seen immediately as the transition will be managed carefully to avoid disruption. However in the longer term value for money and efficiency will improve as duplication is eliminated and as Ministers have more direct control over the delivery and development of services in this area.

8.6 Another response related to a requirement under the Child Maintenance and Other Payments Act 2008 that the Secretary of State review the status of CMEC as a Crown Body as soon as practicable after three years. Stakeholders suggested that this review should be abandoned. Given the proposal to abolish CMEC this suggestion was accepted and there will be no reason to undertake this review.

8.7 Two further responses were considered but were rejected. One was confused about the interaction of the benefits system and child maintenance in relation to fraud referrals, basing their opinion on outdated information from a time when child maintenance could affect the receipt of benefits.

8.8 The second, about transferring the work to the courts, assumed that delivery of child maintenance is the entirety of everything the Commission does and that the CSA would fit within a court context. This is far from the case. CMEC's functions include the promotion of the financial responsibility that parents have to their children and to provide information and support to parents on their child maintenance options. These functions would not sit easily with the court system, and it may be that the court system would not have the powers or resources to fulfil them. More importantly, the Government's aim is to provide parents with the support they need to make family-based arrangements and to move them away from potentially confrontational situations. Encouraging parents to have recourse to the courts is unlikely to promote family-based arrangements and shared parenting. It is also likely to increase how long it takes for effective child maintenance arrangements to be put in place and increase the burden, both financial and administrative, on the Court Service.

8.9 All responses were fully considered. Having done so, no changes to the proposed abolition were necessary.

8.10 Further information relating to the consultation responses can be found in the annex.

9. Guidance

The nature of this order, ie the abolition of CMEC and the transfer of its functions to the Secretary of State for Work and Pensions, makes it unnecessary to publish Guidance in relation to it. The change will not affect the delivery of services.

10. Impact

10.1 This Order abolishes CMEC and effectively transfers its functions to the Department for Work and Pensions. The services delivered are not altered by this change, simply the way the service is managed. It will have no impact on businesses or civil society organisations. This Order has only a negligible impact on the public sector, namely a small number of CMEC and Departmental corporate staff.

10.2 The transfer of CMEC's business to the Department can be achieved at minimal one-off cost (less than £1m, which will be absorbed). These costs include things such as IT changes. In the medium term there are efficiencies to be achieved in reducing duplication, as well as enabling more direct Ministerial control of major reforms that will provide a better service to parents for the benefit of their children.

10.3 The initial savings will be largely around matters such as no longer having to produce separate accounts for CMEC (from 2013/14), saving c£0.2m pa and no longer having a separate Board, hence saving on salaries and expenses currently paid to the Chair and non-executive members (c£0.3m pa).

10.4 However, the business will be integrated more fully into the Department over the medium term, with a view to removing duplication and enhancing accountability, and hence realising more savings going forward.

10.5 A full impact assessment has not been published for this order.

11. Regulating small businesses

11.1 The legislation does not apply to small businesses.

12. Monitoring and review

12.1 A benefits realisation review will be undertaken following abolition and after new structures have been embedded during 2013/14.

12.2 DWP Ministers will be accountable to Parliament for the way that they fulfil their responsibility for their child maintenance role.

13. Contact

Darren Woolfenden, Business Partner for CMEC Sponsorship at the Department for Work and Pensions (Darren.Woolfenden@DWP.gsi.gov.uk or 020 7449 5505)

The consultation:

<http://www.dwp.gov.uk/docs/cmec-abolition-consult.pdf>

The published response to the consultation:

<http://www.dwp.gov.uk/docs/cmec-abolition-consultation-response.pdf>

Analysis of the responses:

CMEC consultation responses

The Consultation

The consultation was aimed primarily at those organisations that have a professional relationship with the Child Maintenance and Enforcement Commission, although all views were welcomed.

These organisations were alerted by e-mail and meetings offered to a number of those to discuss the consultation proposals in more detail:

- 4Children
- Action for Children
- Barnardo's
- Centre for Separated Families
- Centre for Social Justice
- Child Poverty Action Group
- Children Need Families
- Children's Society
- Citizens Advice
- Citizens Advice Scotland
- CIVITAS
- The Faculty of Advocates
- Families Need Fathers
- Families Need Fathers Scotland
- The Family Parenting Institute
- Family Links
- Fatherhood Institute
- Fife Gingerbread
- Fyfe Ireland Solicitors
- Gingerbread
- The Institute of Payroll Professionals
- Law Society
- Law Society Scotland
- The low Income Tax Reform Group
- MATCH
- Mumsnet

- NACSA
- National Family Mediation
- One Parent Families Scotland
- One Plus One
- Policy Exchange
- Refuge
- Relate
- Relationship Scotland
- Resolution
- Deidre Sanders
- ScoopAid
- Tavistock Centre for Couple Relationship
- University of York
- Working with Men

Communications to both CEMC and DWP staff were issued on 10 October 2011.

The consultation ran from **10 October 2011 to 3 January 2012** and was made available on line at

<http://www.dwp.gov.uk/consultations/2011/cmec-abolition.shtml>

The breakdown of responses

The following table provides a breakdown of the responses received.

| Breakdown of responses | Number received |
|--|-----------------|
| External organisations | 9 |
| Members of the public | 0 |
| Child Maintenance and Enforcement Commission staff | 0 |
| Department of Work and Pensions staff | 1 |
| Ministry of Justice staff | 1 |
| Total | 11 |

Of the responses

5 respondents agreed/welcomed the change although most had additional concerns (001 / 005 / 008 / 009 / 010)

3 disagreed or asked for reconsideration (006 / 007 / 011)

1 nil response (002)

1 response re the consultation process not the actual proposal (004)

1 alternative proposal *could* be classed as a disagree (003)