HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Bar Council

Introduction

1. In response to the Joint Committee's Call for Evidence, this is the written evidence submitted on behalf of the General Council of the Bar on the Draft Constitutional Renewal Bill and on the Government White Paper entitled The Governance of Britain - Constitutional Renewal.

2. We confirm that we are also available to give oral evidence on what follows should the Joint Committee believe we could be of further assistance to it.

3. The Bar Council provides this evidence as part of its duty to be involved generally in the constitutional and legal issues of the day, to speak for and be concerned to protect and preserve the rule of law at all times, to endeavour to use its experience and legal expertise to care for the public good, and to offer such counsel as it can and as Parliament, Government, lawyers and the public rightly both expect and require. Our evidence is provided in that spirit and in our role as a key stakeholder in the justice system; and we hope we can bring a particular and specialised contribution to the Joint Committee's present deliberations.

4. The Bar Council represents over 14,000 barristers in England and Wales and whilst this evidence cannot be claimed necessarily to represent the individual views of each and every member of the Bar of England and Wales, it is also not merely the personal views of its two authors but is the evidence of the Bar Council as a representative body. This evidence has been derived from specific and careful reviews carried out by the Bar Council on the relevant constitutional issues which the Joint Committee is considering.

5. In particular, on publication in July last year of the Government's Green Paper, The Governance of Britain, the Bar Council established three working groups in order to provide meaningful and considered consultation responses to the Government's initial proposals. One working group was to address constitutional issues, the second to consider citizenship issues and the third to examine the role of the Attorney General. Distinguished barristers representing a full range of experience and different practices and including Silks and Juniors and academics (as well as a former Solicitor General) agreed to serve on the three working groups. The working groups were then charged with

investigating and researching the key issues. The Bar Council's evidence below therefore builds upon extensive internal consultation and considerations. It is founded on an engagement with, and a serious treatment of, the Government's proposals.

6. Thus, especially where we are necessarily and understandably constrained in coverage in this evidence, we would stress that what we say below (even where it is comparatively short or is confined to simple agreement) is the product of considerable underlying work and concentrated thought. Moreover, although properly limited in the length of what we are able to say, we have tried to cover and to give at least our conclusions on all the main parts of the White Paper.

7. In the natural way of things, we are perhaps more expansive where we have additional comments or points of principle or difference of view to explain than where we agree with the White Paper; but that should not be taken as suggesting our disagreements are any stronger than our agreements or that in either case we could not elaborate greatly. Where we have not been able to say as much as we could, we remain very happy to provide further evidence if that would be of assistance.

8. We do not, however, give evidence below on the following matters (although they are canvassed to some extent in the White Paper): Flag Flying, Reform of the Intelligence and Security Committee, Wider Review of the Royal Prerogative, Passports, the National Audit Office or Public and Church of England Appointments. We do not address these, in part because we note that the Joint Committee's Call for Evidence does not specifically seek evidence on those subjects, in part because the Government's own consideration of them remains in several cases at an early stage and in part because a number of them are in any event not areas on which the Bar Council would seek to offer a particular view. Having said that, we do also note that the Government envisages (in paragraph 246 of the White Paper) that the Joint Committee should be able in due course to contribute to the consultation process on the Wider Review of the Prerogative.

9. The Wider Review of the Prerogative (including also the review on Passports) is important in relation to considerations of the constitutional settlement and the rule of law and so, although not addressed here, is a matter in which the Bar Council does have both expertise and evidence which it could and would wish to offer to the Joint Committee at the relevant time.

10. We deal below with the issues in the order in which they are considered in the White Paper and in the Draft Bill (which, with the exception of the Civil Service issue, is the same as the order in the Call for Evidence).

Managing protest around Parliament

11. In relation to this heading and the first part of the White Paper, the Bar Council would emphasise that the right to peaceful protest is a fundamental one and an essential principle. The Bar

Council agrees with the Government's policy to repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005.

Attorney General

12. In answer to question 14 of the Call for Evidence, the Bar Council believes that, subject to a few qualifications, the Government's approach to the role of the Attorney General is broadly right. We expand on this and comment further below.

Chief legal adviser

13. The Bar Council agrees with the view in paragraph 51 of the White Paper that the Attorney General should remain the Government's chief legal adviser, a Minister and a member of one of the Houses of Parliament. We believe that the maintenance of a Law Officer at the heart of government is essential in an increasingly legalistic and regulated world. We also hold that the role of legal adviser to the Government should not be separated from that of a Minister.

14. There are, however, limitations to the independence and to the legal expertise that any Attorney can bring to his/her advisory role. The Bar Council would therefore endorse paragraph 52 of the White Paper. In this regard, specialist, external, independent legal advice will often be required. We believe that it is, in part, the availability of recourse to external legal advice that enables the Attorney's advisory role to be fulfilled and that preserves the constitutionality of the role. Whilst, as the White Paper explains, there are key advantages to having the Attorney as a Minister rather than as a purely independent legal advisor, that is assisted immeasurably by the availability of supplementary independent legal input in appropriate cases and should necessarily continue to be so. The Bar Council will continue to work with the Attorney General and the CPS to ensure that the Treasury Counsel system remains one of the highest quality, is meritocratic and that recruitment to the rank is based on merit and is fair and diverse.

Oath

15. The Bar Council supports a new oath for the Attorney General (paragraph 55 of the White Paper) and the case for a new oath was eloquently made by Professor Jeffrey Jowell QC in his recent JUSTICE/Tom Sargant lecture. We agree the new oath should make clear that, when exercising public interest functions, the Attorney General's duty is to uphold the rule of law. We do not regard a new oath as merely cosmetic and believe it can have a powerful and formative effect in shaping the role of the Attorney, in articulating his/her duty and in upholding public confidence. In order to imbue the oath with a high level of sanctity, to publicise its character and to enshrine its weight and virtue, we would call for the new oath to be encapsulated in and required by primary legislation. Whilst the Government may well be correct that legislation is not technically needed to implement a new oath, legislation would, we think, be the most appropriate means of introducing it and in particular of giving it Parliament's full endorsement and expectation. This would be akin to the statutory oath of the Lord Chancellor and we do not think the Attorney General's oath should be accorded any lesser significance. Since the Government is proposing to legislate in relation to the Attorney General, special additional legislation would not be required and it would be a matter of

regret for that legislation not to include the new oath at its centre as a mark of constitutional renewal and commitment to the values in the new oath.

Accountability

16. The Bar Council further supports a new requirement for an Annual Report which the Attorney must lay before Parliament. For the reasons explained in paragraph 57 of the White Paper, we are not sure that a new and separate Select Committee should be established to scrutinise the Law Officers and we might expect that accountability will be more easily maintained by keeping the Law Officers within the remit of the Justice Committee and reporting to Parliamentary committees more widely whenever may be appropriate. But we also agree that this is a matter for Parliament.

Cabinet

17. We agree with the view (paragraphs 63 and 64 of the White Paper) that the Attorney General should attend Cabinet where legal advice needs to be given. We also share the view (in paragraph 63) that attendance at Cabinet need not be on a regular basis. It seems clear, as a matter of precedent, that from 1928 for nearly three-quarters of a century, the Attorney General was neither a member of nor regularly attended Cabinet. The practice of exclusion from Cabinet was changed when Lord Goldsmith QC began regularly to attend. We believe the rationale for the prior convention was sound and that it would better maintain the necessary objectivity and independence (and perception of independence) of the office. Nevertheless, since we accept that the Attorney will sometimes need to attend, when the Attorney should do so is clearly not something that can be easily externally regulated and it will generally have to be a matter for the Prime Minister (for which the Prime Minister can answer to Parliament) as to when he/she extends the invitation to the Attorney. That said, a restatement of the convention in the principle would be, we think, constitutionally beneficial.

Disclosure of legal advice

18. The Bar Council considers that the legal advice of the Attorney General should be subject to legal advice privilege. Legal advice privilege is a crucial and constitutional right for any individual[1] and the justifications for privilege remain valid for government. As a result, the Attorney's legal advice should not be automatically subject to public disclosure (including for a decision on armed conflict); and we agree with the conclusion of paragraphs 66 to 69 of the White Paper. We would add that the privilege must belong to the government and not to the Attorney such that the government must always be entitled to waive its privilege at any time (just as an individual always can) without the Attorney General being able to prevent disclosure or to claim the privilege as his/her own. Where assurance on legality is likely to be a crucial underpinning to executive action in the international sphere (and here we are thinking particularly of a decision to commit British troops to military action), we think it unlikely that the question of legality would not be raised publicly and in Parliament such that government would have to address the question of legality publicly and would be unlikely to proceed without appropriate advice.

19. We would also add that a dishonest or disingenuous or inconsistent reference to or reliance on legal advice by government could well mean either that the privilege did not apply in the first place (since the relationship between legal adviser and government and the advice given must be bona fide for the privilege to apply) or lead to the waiver of the privilege (and legal mechanisms in these matters could repay further investigation).

Supervision of prosecuting authorities

20. As regards functions in relation to prosecuting authorities, the Bar Council fully agrees with paragraph 75 of the White Paper. In our view, the Attorney General as a Minister should continue to have overall responsibility for the CPS and other prosecuting authorities, for the Treasury Solicitor's Department and the Government Legal Service. We believe this is appropriate and necessary and that no other Minister would be appropriate for this role.

Individual prosecutions

21. The Bar Council agrees that the Attorney General should not have the power to direct a prosecuting authority to prosecute a particular case (paragraph 79 of the White Paper). The position on directions not to prosecute is, however, perhaps more complicated. We consider this first in relation to the national security exception proposed by the Government and then more widely.

22. As regards the suggested national security exception, we accept the Government's proposals in paragraphs 85 to 89 of the White Paper which seem to us well-balanced. We agree there should be provision for the (rare) need to stop a prosecution in the interests of national security; and the requirement for a report to Parliament on any occasion when the power is exercised seems to us an appropriate means of accountability and restraint.

23. What about the power to direct the non-prosecution of cases which do not concern national security? The White Paper proposes that this power be abolished, both in terms of the power to give a direction to a prosecuting authority and of the power to enter a nolle prosequi. So far as the exercise of such powers by the Attorney is concerned, the principle on which the Government bases this recommendation is understood by the Bar Council; but on balance we do not consider that alternative arrangements would work any better than those made for the Attorney General. We believe that the powers themselves (to stop prosecutions) are ones with constitutional value and that there should be an appropriate person with power to direct that a prosecution not be brought or be stopped. We have experience that suggests cases are sometimes pursued improperly or by over-zealous prosecutors which are not in the public interest or are disproportionate and we would note that there are some private prosecutions which should not have been brought. Judges may not always be able to halt such cases and, even if they could, some such cases ought anyway to have been stopped before they have advanced as far as a judge.

24. Such prosecutions should, we think, be able to be halted. The question is who should have that power. It cannot be a judge exercising a separate, non-trial supervisory function because such a supervisory jurisdiction is not known to English law and would confuse executive and judicial roles; it cannot be a political Minister who is not bound by the same public interest non-political requirements as the Attorney; and it cannot be the prosecuting authorities themselves (as the White Paper in effect recognises in paragraph 94) since that would be a nonsense where they had already decided to prosecute. That would appear to leave only two options: either a new position or the Attorney General.

25. As we have observed above, as a matter of strict principle, it can be argued that it should not be the Attorney. However, we are not aware of an occasion where there has been any criticism in recent times of the Attorney General's rarely exercised decision to enter a nolle prosequi and we do not generally consider there to be a problem. We therefore favour keeping the power with the Attorney General. We have considered whether there will be any real advantages in the creation of a new post. If a new post is to be created then the person appointed to that role could perform a number of defined roles, and might be a valuable addition, could be accountable to Parliament (perhaps through a Joint Committee) and would in principle be well-placed to direct the termination of prosecutions in the public interest. Yet, we consider that the Committee ought to bear in mind the fact that creation of such a post may muddy the waters rather than clarify them, and we doubt whether the supposed advantage justifies the cost of creation of such an office.

26. If such a public appointment were not to be pursued, it is a nice question where the balance lies between the principle that the Attorney should not make the decision and the residual value of the ability to stop prosecutions in appropriate cases; but on balance we favour retaining the power and in the Attorney General. Nevertheless, it may be that a requirement on the Attorney to report to Parliament on any occasion where the power was exercised would, in the same way as for national security cases, meet the objection to the Attorney's exercising the power. It may also be that there is a difference between a private direction not to pursue a particular prosecution and a nolle prosequi. To the extent that a nolle prosequi can be entered only after a prosecution has been commenced in open court, the entering of the nolle prosequi is done in public and so can be subject to scrutiny and the Attorney can be readily accountable to Parliament for it. We would advise (as the Government suggests is necessary in paragraph 94) that the ability to stop a prosecution and the continuing relevance of the nolle prosequi would benefit from further detailed consideration by the Government. We believe this should be clarified and be subject to consultation before and in time for the proposed legislation so as to be part of it.

Relations with prosecuting authorities

27. The Bar Council fully supports the protocol approach detailed in paragraph 81 of the White Paper, the measures in relation to the appointments of the Directors of the prosecuting authorities as set out in paragraph 82 of the White Paper and the approach in relation to other prosecuting authorities in paragraph 84 of the White Paper.

Consents to prosecute

28. In relation to consents to prosecutions, it seems to us that paragraph 91 of the White Paper correctly identifies the three categories into which existing consents should be placed. Given the Government's explanation that further work is needed to determine which offences should be placed in which category, we defer consideration of that question for the present time and say no more now than that the principle identified in paragraph 91 is the right one.

Other matters

29. We agree that no change is needed to the power to refer questions of unduly lenient sentences to the Court of Appeal (paragraph 95); and we also accept both that the Attorney will inevitably have a voice in formulation and implementation of criminal justice policy and the Government's conclusion in paragraph 97 of the White Paper.

30. Finally, we would note that the White Paper does not consider in any detail the role and powers of the Attorney in relation to civil justice matters and the duty to act in the public interest (such as, non-exhaustively, in matters affecting charities, in actions against vexatious litigants, in contempt of court matters, in intervening in civil proceedings where appropriate and in acting to protect Parliament's privileges). In our experience, the public interest functions of the office are operating satisfactorily and there is no real need for change. If the suggestion of a new law officer within Parliament were to be pursued, these functions could be transferred to that person. If that suggestion were not to be pursued, we would suggest that the relevant powers and duties should remain with the Attorney and could usefully be codified in legislation or be expressly preserved by a suitable saving provision (since we assume the Government has no intention to remove them). Given the cost implications of the creation of the new role, and the possibly limited benefits of it, on balance we come down on the side of keeping the powers with the Attorney but with statutory definition.

Judicial Appointments

31. Turning to judicial appointments, we believe and would emphasise as strongly as possible that the key and overriding consideration must be maintaining the highest quality judiciary possible. That is a basic and absolutely essential underpinning of our democracy, without which the whole edifice will crumble, both our fundamental liberties and our prosperity as a nation. A high quality judiciary requires first and foremost judges qualified intellectually, legally and in experience to decide (and give directions in) the cases before them correctly and rigorously according to the law and the facts. With that minimum requirement, judges must in addition have the ability, skills, temperament, empathy, understanding and disposition to be good judges. In short, merit must be the sole factor in the selection of judges as is required under the Constitutional Reform Act 2005 (and as it is emphasised to be for the Civil Service in paragraph 176 of the White Paper). Against that principle, we turn below to the specific proposals outlined in the White Paper.

32. We accept the Government's proposal in paragraph 114 in due course to remove the Lord Chancellor from the selection process for judicial appointments below the High Court, subject to the safeguards set out there. However, the JAC is still relatively new and we consider that some more time is required for the system properly to bed down.

33. We agree with the recommendation (paragraph 115) to remove the Prime Minister entirely from judicial appointments since the Prime Minister's involvement adds no benefit (other than its formality) and its existence could be seen to have potential for (even if not actual) political interference which is constitutionally unhelpful.

34. We can see advantages to the proposal in paragraph 116 for the inclusion in legislation of key principles for judicial appointment but only if they enshrine the principle of merit above all else as the essential bedrock of the judiciary and a free and fair society.

35. The Bar Council supports the earlier and quicker carrying out of medical checks in the judicial appointments process (proposed in paragraph 117). The streamlining of this aspect of the process would, we believe, be very welcome including to potential applicants.

36. We agree with paragraphs 118 to 120. We support removing the obligation on the Lord Chief Justice to consult the Lord Chancellor in relation to the listed relatively minor adjustments for existing judicial office holders; and the Bar Council likewise supports the ability of the JAC to take preliminary steps, but in consultation with the judiciary, in a selection process before a formal Vacancy Notice is received.

37. As regards the "new considerations" set out from paragraph 122 of the White Paper, the Bar Council notes the existing powers of the Lord Chancellor as set out in paragraph 123.

38. The Bar Council regards these powers as sufficient and is opposed to a new power of the Lord Chancellor to set targets and to direct the JAC in certain matters over and above the powers already present in the Constitutional Reform Act 2005. A power to direct that the process is run efficiently and on a regular basis is one thing (and not one with which we would argue). However, the proposed power would go further and could mark an unwarranted intrusion into the independence of judicial appointments and could undermine the very reasons for the establishment of the JAC in the first place. There is, moreover, a real danger in a power to direct appointments from certain groups since this would attack both the independence and the quality of the judiciary and the ability to attract the best candidates.

39. The proposal in its widest form is not justifiable and could lead to the weakening of the quality of the judiciary. As soon as the appointment system is known or perceived not to be based on merit, the judiciary will be significantly weaker in its quality and in the respect it commands. Thus, the Government's fears, expressed in paragraph 127 of the White Paper, are well-founded and require

greater weight than currently accorded by the Government. We do not accept that the undesirability and danger inherent in the Government's proposal can be sufficiently ameliorated by consultation with the Lord Chief Justice or by being general rather than specific to any individual appointment. Beyond setting the principles for appointment in legislation, the Lord Chancellor must not in principle exert direct influence in the way that is mooted and the potential aggregation of power back to the Lord Chancellor cannot be dressed as a means of upholding the independence of the judiciary when it would undermine it.

40. Given the Government's necessary caution, which we welcome and commend, on this issue in paragraph 129 of the White Paper, we would urge the Joint Committee to state a principled objection to the consultation question raised by the Government.

41. In the absence of specific proposals, we do not comment on the delegation of the Lord Chancellor's functions to junior ministers or senior officials (paragraph 131) save to note that, in principle and because of the importance of the judiciary, we are generally opposed to delegation of the Lord Chancellor's functions in this particular regard.

42. As to a potential role for Parliament in terms of confirmation hearings for judicial appointments, that would plainly be destructive and inappropriate. We share the views of the consultation responses in this regard. We do, at the same time, see considerable value in the proposal (paragraph 133) for an annual joint meeting of the Justice Affairs Committee and the House of Lords Constitution Committee for consideration of the judicial appointments process; and we would support this innovation if Parliament thought it desirable to introduce it.

43. We would have endorsed the proposal (paragraph 134) for a JAC panel representing potential applicants had there been a need. However, we do not think there is a need as there are now well established groups which deal with these issues. The JAC has established a Diversity Forum, a Liaison Group and a Research Group. It is best to allow these to work rather than to change them now. We do not believe the JAC itself needs alteration in its size or composition (paragraphs 135 and 136). If (contrary to our view) a JAC panel were created, it would, as we understand it, be subsidiary to the Commissioners and so its creation would not alter the need for suitable representation on the JAC itself. In any event, the Government's recognition that the JAC Board provides a wide and diverse range of high-level skills and experience is important. Similarly, the JAC is a young body and it is too early for major alterations of it. We do not believe a case has been made out for change to the JAC's size at the present time. The combination of Commissioners appointed from the professions (not as delegates) with the Groups which we describe above is likely to work well.

44. The Bar Council supports as sensible the proposals in paragraphs 137 and 138 of the White Paper on statutory salary protection for certain tribunal judges and on deployment of serving judicial holders for some judicial posts by the Senior President of Tribunals without the JAC.

45. We are not entirely clear what the Government has in mind in relation to the reappointment of JAC Commissioners (paragraph 139) and so do not comment on this for now.

46. We would accept the Government's recommendation in paragraph 140 of the White Paper on providing confidential information from the appointments process to the police for the purposes of investigating crime.

Treaties

47. The Bar Council broadly supports the Government's approach to Parliamentary involvement in treaty ratification. Putting the Ponsonby Rule on a statutory footing would be a positive and beneficial reform; and the giving of legal effect to a negative vote would be a principled step in accord with Parliament's democratic role and authority. Thus, subject to a couple of points below, the Bar Council agrees with the Government's proposals.

48. As a first comment, we would note that international treaties do not always require ratification as a separate step and the Government's proposals do not extend to such treaties where no ratification is required. Such treaties are entered under prerogative and have force without ratification. It is an interesting question, not covered by the White Paper, whether the prerogative to enter into treaties should be further controlled (and the Government's authority limited) so that treaties could not be agreed by Government without being or unless subject to further subsequent ratification (with an exception for the sorts of treaties excepted for good reason in paragraphs 161 and 162 of the White Paper). We do not offer a view on this question here beyond observing that it may be worthy of wider consideration and further investigation.

49. Apart from that observation, we also wonder whether 21 days is sufficient time for busy Parliamentarians to consider, review, investigate, research and debate a treaty in order to mount a reasoned and considered opposition to any proposed ratification (where that might be justified). We think that, even if 21 days were to be adopted as the standard period, it should be capable of extension if Parliament requests additional time. The need for this was recognised to some extent in paragraph 152 of the White Paper but does not appear to have found expression in the Draft Bill. We would have thought that it should.

50. In relation to exceptional cases where the Secretary of State decides it is necessary to pursue ratification without Parliamentary approval, a number of potential safeguards are mentioned in paragraphs 159 and 160 of the White Paper but not all of these safeguards are included in the Draft Bill. Clause 22(3) of the Draft Bill provides for steps that the Secretary of State must take to inform Parliament after the treaty has been ratified (as to which it might be thought that they should include an oral statement to the House); but clause 22 does not appear to provide expressly for mechanisms to consult Parliament by an alternative more raid means. Whilst the White Paper (paragraph 160)

suggests that the Secretary of State would not be precluded from consulting Parliament by alternative means if they are practically available, this appears not to be a positive requirement.

51. The Draft Bill would more adequately control the power if it made it a mandatory requirement on the Secretary of State (as a condition of ratifying a treaty without following the Parliamentary procedure) (a) to consider informing and consulting Parliament on a different, shorter timetable from the standard 21 days, (b) to make an oral announcement to Parliament or to lay a written statement in advance and at the earliest opportunity explaining the exceptional circumstances and the steps to be taken to consult Parliament on a faster basis, (c) to consult Opposition leaders and others as may be appropriate during a recess and/or (d) to certify in sworn writing the reasons why it is an exceptional case that requires ratification without the usual Parliamentary approval. In other words, the Bill could usefully provide for the sort of measures discussed in paragraphs 159 and 160 of the White Paper and make them mandatory. At present, the intentions of paragraph 160 appear not to be fully reflected in the Draft Bill, which could be strengthened in this regard to accord with the underlying purpose and principle of the statutory approach to treaty ratification.

52. Finally on treaties, we agree with paragraphs 164 and 165 of the White Paper that the means of Parliamentary scrutiny are important to consider if the proposed new legislation is to be meaningful in practice. We believe an institutional innovation within Parliament will be important and necessary if ratification regulation is to work properly. Whilst we agree that this is a procedural matter for Parliament, it is important that each treaty put before Parliament is given scrutiny and that institutional mechanisms are in place to ensure this is done.

Civil Service

53. The Bar Council supports putting the Civil Service on a statutory footing and enunciating in legislation its core values and duties. There can be no argument against appointment on merit on the basis of fair and open competition (paragraphs 176 and 178 of the White Paper). Likewise, on paragraph 184, there can be no argument against the key principles of impartiality, integrity, honesty and objectivity (although we are not sure why those principles are paired rather than separately stated in clause 32(4) of the Draft Bill and we might have thought that those values could have been stated as the core values of the Civil Service as the starting point of the relevant Part of the Bill rather than only as part of the proposed new Civil Service Code). We also fully support the introduction of the proposed new Codes.

54. We would address briefly only one further aspect of the Government's proposals on the Civil Service, which is the approach to Special Advisers. Where almost every aspect of public life is (rightly) governed by merit and open and fair competition, the discrepancy in the position of Special Advisers is stark. The Government's position has an air of special pleading in that in other areas of public life funded by the taxpayer it would not be suggested that the normal standards should not be applied to them; and it is highly questionable whether in principle the executive should be subject to a special carve-out from the correct approach which governs every other element of state administration.

55. The notion that non-objective, non-impartial, non-merit-appointed, unelected persons should sit at the heart of government because of personal friendship and allegiance sits uneasily with the principles underlying the White Paper and the Draft Bill. Indeed, the White Paper brings the point into clear relief and is to be welcomed for that reason. Whilst the Bar Council recognises the reality of Special Advisers, the White Paper raises serious questions as to the compatibility of Special Advisers with the governing principles. To the extent that Special Advisers are an inevitable corollary of the party system, then their special status which derogates from the principles of merit and independence may suggest that they should be funded by their party rather than the taxpayer. We raise this only because of the discrepancy that appears on the face of the White Paper and, having raised it, we would wish to leave it as a matter for the Joint Committee to consider. Finally, however, we should state that we agree with paragraph 193 of the White Paper since principle clearly dictates that Special Advisers cannot have executive powers.

War Powers

56. The Bar Council naturally recognises that a decision to go to war is amongst the most important decisions that a state can ever make. We therefore agree with the principle that in a democracy it should be subject to due and proper consideration by Parliament where possible and we would note that the White Paper's treatment of this complex subject is balanced and considered. Beyond that, the Bar Council's principal interest in relation to war powers is in considerations of legality of approach.

57. In this regard, given the often asymmetric nature of modern warfare and given that we would have thought that operational reasons would require secrecy more often than not, we believe that important questions may arise as to (a) appropriate protections for and legal responsibilities of the military should the Prime Minister seek to order military action without Parliamentary approval; (b) the role and involvement of the military in any decision by the Prime Minister not to obtain prior Parliamentary approval; (c) the position where the Prime Minister and the military disagree as to the need for Parliamentary approval; (d) the necessary information to be given to Parliament and any necessary certifications to be given by the Prime Minister where advance approval has not been sought (where greater assurance may be needed for Parliament than where advance approval has been sought); (e) the legal position of the Prime Minister where he or she has wrongly failed to seek Parliamentary approval in abuse of the conditions that allow military action without such approval; and/or (f) the legal position of the Prime Minister and military commanders where any such decision without Parliamentary approval commits troops in breach of international law.

58. These are complex and sensitive matters which cannot be adequately covered in the present evidence and which to some extent go beyond the considerations in the White Paper. We therefore do not try to do them justice in this paper. However, where the Government is proposing a new approval mechanism, the widest possible consequences of that mechanism (especially in fact where it is not used) may require further consideration and clarification. It may be that a certification system (requiring certificates from the Prime Minister and/or the military) would give credence to the new approach where Parliamentary approval is not sought in advance and it may be in any event

that wider codification than is presently proposed would be of assistance for the system of Parliamentary approval to work most effectively and with the utmost clarity. We would of course be happy to expand on this if that would be helpful.

The Law Commission

59. As a final comment and although not mentioned in the White Paper itself, the Lord Chancellor's oral statement to the House of Commons publishing the White Paper included a commitment to introduce a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's intentions regarding outstanding Law Commission recommendations. We would commend this initiative. The Law Commission's work is intended to be non-political and to improve the working of the law from a technical perspective and in accordance with principle. Its work has unfortunately often been overlooked by successive Governments such that it has not come sufficiently before Parliament. We would hope the Joint Committee may wish to add this discrete but important matter into its consideration.

Oral evidence

60. If it would be of assistance to the Joint Committee, we would reiterate that we would be very happy to give oral evidence to explain and amplify the Bar Council's position.

16th June 2008

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[1] R v Derby Magistrates' Court, Ex parte B [1996] AC 487.