

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

EVIDENCE OF THE CIVIL SERVICE COMMISSIONERS

1. On 25 March 2008 the Government launched the White Paper "The Governance of Britain - Constitutional Renewal", accompanied by the draft Constitutional Renewal Bill and the Analysis of Consultations (on previous consultation exercises about the proposals for constitutional change which form the White Paper). The Government invited Parliament and others to consider and comment on the draft Bill, as well as the other proposals in the White Paper. This is the response of the Civil Service Commissioners to the proposals on the Civil Service.

Support for the draft Bill

2. The Commissioners have supported recent calls for a Civil Service Act, for example when giving evidence to the Committee on Standards in Public Life in May 2002 and to the Public Administration Select Committee in July 2003, and in February 2005 in response to the Government's consultation exercise on its draft Bill of November 2004. We believed, and continue to believe, that the constitutional position of the Civil Service and the core values which underpin its work are too important to be left to a Civil Service Order in Council and a Civil Service Code, both of which could be easily changed by a future Government without prior Parliamentary debate and scrutiny. Although the Civil Service exists to serve the Government of the day, it also exists to service successive administrations with equal commitment. To do this effectively, the Civil Service needs to be underpinned by a set of enduring values - honesty, impartiality, integrity, objectivity and selection on merit - and there should be no capability to change those values without the consent of Parliament. We therefore welcome the Government's renewed commitment, as set out in the White Paper, to those values and to setting them in statute. We hope that the draft Bill can be introduced as part of the legislative programme as soon as practicable.

3. In responding to the earlier proposals for a Civil Service Bill, the Commissioners took the view, as did Northcote and Trevelyan in 1854, that a short Bill should be sufficient to secure the core values. We believe Part 5 of the draft Bill meets this requirement. The Bill would:

- enshrine the core values of the Civil Service and selection on merit on the basis of fair and open competition

- require the Minister for the Civil Service to publish a Civil Service Code
- set up the Civil Service Commission:
 - a) to regulate recruitment to the Civil Service; including, through the publication of the "Recruitment Principles", the Commission's determination of what selection on merit on the basis of fair and open competition means and when exceptions to the principle may be allowed; and
 - b) to hear appeals under the Civil Service Code
- create the Commission as a corporate body so as to reinforce its independence from the government of the day
- provide for the Minister for the Civil Service and the Commission to agree to the Commission's taking on new roles
- formalise the current arrangement for Special Advisers.

4. We recognise that a balance has to be struck between setting the key principles and values on the face of the Bill and introducing too much detail (which might need to be changed as circumstances change) and that getting the balance right will be key to the success of the Act when it is implemented. We believe the draft Bill broadly strikes the right balance between principle and detail. For example, it enshrines the key principle that there should be a Civil Service Code based on the four core values, but does not put the Code itself on the face of the Bill. This provides flexibility to change the layout and detail of the Code in the light of experience, as the Government did in 2006 following a review of the 1996 Code by a joint working group of Permanent Secretaries and Commissioners. This revision has met with overwhelming approval, but if the Code had been on the face of an Act it might have been difficult to find Parliamentary time to make such changes.

Scope of the Bill

5. There are, though, a number of gaps in the coverage of the bill. These are:

- Promotion on merit. It is a generally accepted principle that civil servants are not only appointed on merit but also are promoted on merit. Indeed, the Civil Service Management Code says "department and agencies must ensure that all promotions and lateral transfers follow from considered decisions as to the fitness of individuals, on merit, to undertake the duties concerned". However, there is no external regulation of how the principle is applied in practice. We think an opportunity would be missed if the principle of promotion on merit and its regulation were not included in the Bill. We are not so concerned about the need to regulate individual lateral transfers, which are often used to broaden a civil servant's experience at the same level. The focus for regulation must be on entry to the Civil Service and promotion within it, particularly to senior posts where appointees have substantial influence.

· The removal of GCHQ. This will mean that the principle of selection on merit and the core values of the Civil Service need not necessarily apply to the department and that civil servants working at GCHQ will no longer be able to raise concerns with the Commission. The Government's draft Bill of 2004 included GCHQ because the Government saw no "operational impediment to [its] inclusion". We do not know what has changed in the four years since then. The Commissioners have chaired a number of senior recruitment competitions at GCHQ and we monitor their compliance with the Commissioners' Recruitment Code for more junior appointments. Although the Commissioners have not heard any appeals from staff at GCHQ since the Civil Service Code was introduced, the facility exists for staff to raise matters with us. As this overall approach has worked well, we are not persuaded by the reasons for changing it. We recognise the wish to bring the security and intelligence services closer together. In our response to the 2004 draft we offered no views on whether or not the Security Service and the Secret Intelligence Service should be included within the scope of the Bill. We did, though, suggest that the Government should consider making both organisations subject to independent regulation. This remains our view.

· Appointments to the senior levels of the Diplomatic Service. These appointments are excluded from the requirement to select on merit on the basis of fair and open competition, and we note that on occasion former politicians have taken up such appointments. It is not clear to us why these appointments to the Civil Service are treated in a different way.

The role of the Commission

6. The powers of the Commission in the draft Bill are based on, and are similar to, those which the Commissioners currently hold under the Civil Service Order in Council 1995 (as amended). In respect of recruitment, these are the powers to interpret through a recruitment code what selection on merit on the basis of fair and open competition means, to permit exceptions to this principle within the framework set by the Order in Council, to audit departments and agencies' recruitment policies and practices to ensure compliance with the recruitment code. The Commissioners also have the authority to approve certain appointments before they are made, which they do for the most part by chairing the recruitment competition for them. In terms of the Civil Service Code, the Commissioners have the power to hear and determine appeals under the Code. The Commissioners are also required to issue an annual report accounting for their work in the previous year.

7. The draft Bill will give the Commission similar powers. The variations, which the Commissioners support, are:

· The Recruitment Principles - the Recruitment Principles will replace the Recruitment Code. The intention of both documents is the same, to publish a set of principles to be applied for the purposes of meeting the requirement of selection on merit on the basis of fair and open competition. However, the Commissioners are taking the opportunity of drawing up a set of Recruitment

Principles to revise the Recruitment Code in order to adopt a more concise approach. This is work in progress.

- The use of exceptions - under the Order in Council the Commissioners have the authority to permit the use of exceptions provided they fall within the framework set in the Order. Under the draft Bill the Commission will have more flexibility to determine the use of exceptions provided they meet the needs of the Civil Service. The Commissioners are taking the opportunity to review their approach to exceptions and their new thinking will be set out in the Recruitment Principles. The Commissioners would also like the Bill to confirm that they have the power to allow exceptions if they are necessary to enable the Civil Service to meet its obligations as a major employer in the United Kingdom.

It may be worth addressing the question: why should there be any exceptions to the principle of selection on merit on the basis of fair and open competition? The vast majority of appointments to the Civil Service are made on merit following fair and open competition. The Commissioners allow exceptions to meet genuine short-term business needs eg a short-term project of several months where the time and costs involved in an open competition can not be justified as they could if the appointment was permanent. We also allow individuals to join the Civil Service on secondment for up to two years on the understanding that they will return to their employer afterwards. And, recognising the Civil Service's responsibilities as a leading employer in the United Kingdom, we allow measures to help the unemployed or those with disabilities. As part of our compliance monitoring of departments and agencies, we ask them about the use of exceptions and who approves them, and in this way audit their use.

- Additional powers - the Government has asked the Commissioners on occasion to take on additional tasks. The draft Bill provides for the Minister of the Civil Service and the Commission to agree that the Commission shall take on additional functions. This will provide flexibility to meet changing circumstances without the need to amend the Bill itself. The Commissioners would expect the Minister to agree that the Commission should continue to undertake the additional tasks which currently fall to the Commissioners. These are:

- o advising departments on the promotion of the Civil Service Code and monitoring appeals within departments

- o approving all appointments at Permanent Secretary or Director General level (the so called "Top 200" appointments) whether they are made following open competition, internal competition or a managed move.

8. It is also worth noting that the Commissioners believe the opportunity should be taken in the draft Bill to give the Commission specific power to hear complaints that there has been a breach of the principle of selection on merit on the basis of fair and open competition or of the Recruitment Principles. The Commissioners currently hear complaints that there has been a breach of the Recruitment Code even though this is not specifically mentioned in the Civil Service Order in Council.

9. We also think it would be helpful if the Bill were to place the Commission's specific duties in relation to appointments within the broader context of upholding or maintaining the principle of selection on merit. The current Order in Council does this. It would enable the Commission to continue to be able to comment on matters related to but not necessarily directly covered by their statutory duties.

10. The draft Bill does however appear to introduce the potential for confusion in Clause 27. Notwithstanding the provisions on appointments elsewhere in the Bill aimed at ensuring an impartial Civil Service able to serve successive administrations, this clause appears to give the Prime Minister (and the Foreign Secretary in relation to the diplomatic service) the right to appoint and dismiss civil servants. We assume this is not the intention of the clause but would welcome clarification about its purpose and likely effect.

The right to initiate and carry out investigations under the Civil Service Code.

11. There is one issue on which the Commissioners have yet to reach a firm view: the right of the Commissioners to initiate and carry out investigations under the Civil Service Code without first receiving an appeal from a civil servant. We argued for this in response to the 2004 Bill. We did so because we felt too few civil servants were aware of the Code and the implications for their work. We were also concerned that civil servants might be constrained from pursuing issues for fear of the impact on their careers. We therefore had limited confidence in a mechanism which relied on individual civil servants taking the initiative.

12. We have reflected on this for the following reasons:

- following the re-launch of the Code in 2006, civil servants are undoubtedly now more aware of the core values of the Civil Service and the Code's provisions for raising issues under it

- we have worked with departments and agencies on the promotion of the Code, though there is clearly more to be done

- we will be working with departments and agencies to ensure that the processes they have in place for handling appeals are user-friendly.

13. Taking these factors into account, we expect the number of appeals to go up, and we have seen early signs that this is happening. We take the view that it must be better if civil servants feel able to raise issues in departments and with us, which should help to prevent things going wrong in the first place, than for us to look at problems afterwards.

14. We also remain concerned - as we were in 2004 - that if the Commissioners had the formal power to initiate inquiries under the Code, we would be swamped by disgruntled customers of the departments and agencies, members of the public or the media asking for investigations, many of which would turn out not to be Code matters. There would be a risk that the Commission would be diverted from its core tasks. We also note and have sympathy with the view expressed by the Rt Hon Ed Miliband MP, when giving evidence to the Public Administration Select Committee (PASC) on 29 April 2008, that this "cottage industry" might lead to the politicisation of the Commissioners' role. The resource implications would also be significant.

15. We do, though, recognise there will be occasions in which it would be right for the Commission to carry out an investigation, if there were prima facie evidence of a significant breach of the Code. We, therefore, think that the approach suggested by the PASC in their report on the draft Bill that, in addition to the duty to consider complaints from civil servants, the Commission should have the discretion to investigate matters in other circumstances, might offer the right balance. We envisage that the Commission would want to exercise that discretion only in cases where the burden of suspicion was substantial.

Special Advisers

16. The draft Bill reflects the current approach towards Special Advisers. It:

- excepts Special Advisers from the principle of selection on merit on the grounds that they are personal appointees of Ministers and in view of the personal and temporary nature of their work

- excepts them from the provisions of impartiality and objectivity, thus recognising their allegiance to the Governing party and that they are not expected to retain the confidence of future governments of a different political complexion
- confirms that no Special Adviser will have executive powers over civil servants.

17. The Commission supports this approach. We agree in particular that Special Advisers should not be selected on merit on the basis of fair and open competition given the nature of their personal relationship with the appointing Minister and the fact that their appointment lasts only as long as the appointment of the Minister.

18. We have argued since 1997, when the provision was introduced, that no Special Adviser should have executive powers. We therefore welcome the confirmation provided by the draft Bill that the Prime Minister's decision in 2007 to remove such powers will be enshrined in statute. We further argued in relation to the 2004 draft Bill that Special Advisers should not be able to commission work from civil servants. We continue to take that view. Allowing Special Advisers to commission work from civil servants confuses the line of accountability: Special Advisers are there to add political comment, not to run the department. Any commissioning of work should be done by the Minister's private office. We therefore support the proposal by PASC that that the role of Special Advisers could be clarified still further in the legislation by making it clear that they should not be able to authorise expenditure, nor exercise either management functions or statutory powers.

19. In line with the Government's thinking over the last few years, the Bill does not propose a cap on the number of Special Advisers. The Commissioners have supported this approach and continue to do so, believing it to be more important that the boundary between the work of civil servants and that of Special Advisers is clear. To this end, we have supported the changes the Government has made to the model contract for Special Advisers and their Code. It is why we believe the removal of executive powers to be so important. We also recognise the temptations provided by a cap: it would have to be higher than the current number of Special Advisers to allow for some flexibility; and there would be pressure to appoint Special Advisers up to the number allowed by the cap. We do, though, acknowledge a lacuna: a future government would be free to appoint as many Special Advisers as it wished, subject only to Parliamentary and public concerns. We also recognise that in terms of the influence a Special Adviser can exert, a more apposite comparison in purely numerical terms is not necessarily between 70 or so Special Advisers and the 4,000 or so members of the Senior Civil Service but between the 70 or so Special Advisers and the Top 200 or, possibly, Top 600 civil servants. We do not propose an answer, though we note the suggestion from others that, at the start of an Administration, Parliament should agree the number of Special Advisers that can be appointed.

Setting up the Commission

20. The draft Bill proposes setting up the Commission as a corporate body so as to demonstrate its independence from the government of the day. We understand the Commission will take the form

of an executive Non Departmental Public Body sponsored by the Cabinet Office. We recognise that there is no such thing as complete independence and generally support the Government's proposals. However the issue of independence is crucial to how the Commission will in future be perceived, and are attracted to the approach which PASC has mentioned in their report of a specific legislative provision to safeguard the Commission from Government interference in the exercise of its functions. We are content with the proposals for the appointment of the First and other Commissioners on single terms of up to five years, though we would like the schedule to state explicitly that Commissioners are selected on merit on the basis of fair and open competition, which would further underpin their independence, and to recognise that the First Commissioner currently has a much greater role in the appointment of the other Commissioners than is allowed for in the draft Bill.

21. We would also like the draft Bill to make provision for the payment of pensions and compensation for loss of office to all Commissioners and not just the First Commissioner. Although we have no intention of asking the Minister for the Civil Service to extend these provisions to the current Commissioners who are part-time, paid on a fee basis and have a portfolio of other interests, it is possible that the nature of the Commissioners may change over time, and we should allow for such flexibility now. If, for example, we were to move to having fewer Commissioners who worked on a more full-time basis than now, it would seem equitable to change their terms and conditions of service to reflect this.

22. A key aspect of the Commission's independence will be the provision of sufficient funding to enable it to meet its responsibilities effectively. The draft Bill provides for the Minister of the Civil Service to pay to the Commission the sums he determines as appropriate to enable it to carry out its functions. Undoubtedly, the First Commissioner will comment publicly if she thinks the Commission has not been given sufficient funding. However, it would help to emphasise the Commission's independence if the First Commissioner was required by the draft Bill to report annually on the adequacy of the funding.

23. The Commissioners are currently discussing these matters with the Cabinet Office.

Conclusion

24. The Commissioners welcome the publication of the draft Bill and the scrutiny provided by both PASC and the Joint Committee. We support the provisions in the draft Bill which affect the Civil Service and look forward to its early introduction into Parliament. We do, however, believe there are ways in which the draft can be improved and the opportunity should be taken to do this. We stand ready to discuss our views further with the Government and with Parliament.

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