

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

*SUBMISSION FROM COMMITTEE ON STANDARDS IN PUBLIC LIFE MEMORANDUM ON  
CIVIL SERVICE PROVISIONS*

## Background

1. The Committee on Standards in Public Life welcomes the provisions on the Civil Service set out in the draft Constitutional Renewal Bill. Since its establishment in 1994, the Committee has taken a close interest in both the substance and the legal basis of the role, governance and values of the civil service and the contribution these make to ensuring high standards in public life. This interest has been the subject of specific comment and recommendations in the First (1995), Sixth (2000) and Ninth (2003) Reports[1].

2. In both its Sixth and Ninth Reports the Committee recommended that consultation should begin on a Civil Service Act, and it responded to the consultation on the draft Bill of 2004. At that stage the Committee stated that it "Looked forward to speedy progress towards an Act of Parliament", and noted that this was not the first time there had been consultation on such legislation. The Committee therefore welcomes the renewed commitment to legislation in the Governance of Britain consultation document, and is particularly encouraged to see the current commitment to the Constitutional Renewal Bill in the Draft Legislative Programme 2008/09. We believe that early introduction of legislation based on the draft is overdue and should be the key aim at this stage.

## General

3. The Committee's view is that the draft Bill is pitched at broadly the right level - a relatively short piece of legislation which establishes the fundamental principles that underpin the Civil Service in a statute that can only be changed after parliamentary debate and approval.

4. Annex A lists the recommendations in the Committee's Ninth Report - its fullest statement about a Civil Service Act - and an indication of whether the recommendation is covered by the provisions of the draft Bill. The Committee does not necessarily remain committed to all its earlier recommendations, recognising that in certain aspects, the situation has changed materially since

2003. For example, in respect of the Civil Service Commissioners' power to initiate an investigation into a complaint about breach of the Code, the Committee is aware that the Commissioners themselves are no longer proposing the need for this power, that they feel adequate arrangements may in any case exist through consultation with the Head of the Civil Service over emerging concerns, and that a provision for additional Commission functions exists at clause 40 of the Bill if needed. In general however, the Committee believes that most of its recommendations from 2003 remain appropriate.

5. The bulk of the Committee's observations below concern those recommendations not covered in the draft Bill.

#### Committee Comments on Part 5 of the Draft Bill

##### Application

6. It is not clear why GCHQ, included in the 2004 draft, is now excluded.

##### Codes of Conduct

7. We can see no reason for the provisions needed to accommodate separate codes for civil servants who serve the Scottish Executive or Welsh Assembly (eg clause 30(2); 32(3)(b and c)). All three codes are identical - as they need to be, given the reserved status of the Civil Service - except for the statement of accountability in the first paragraph. The previous version of the code applied to all the administrations, and we would advocate a single introductory paragraph which makes clear any differences in accountability, not least because of the need for the arrangements in the devolved administrations to be fully understood in Whitehall. Given the importance of the code for setting standards throughout the UK civil service generally, and the need to avoid the impression of divergence on standards where none exists, we see a clear case for having a single document and simplifying the Bill accordingly.

8. We note the concerns expressed by the Public Administration Select Committee about the reduction, compared to 2004, in the scope of civil service duties on the face of the Bill. While this may to an extent reflect changes in the Civil Service Code itself (the 2006 version contains the four "core values" of integrity, honesty, impartiality and objectivity, but not other requirements relating to eg acting within the law or without maladministration), we agree that the Bill as currently drafted is at the bare minimum in terms of its coverage of even the core values. We agree with the Select Committee that, at least in the case of "impartiality", the use of a single word is inadequate and

ambiguous as between several different concepts in the Code[2]. We also note the Select Committee's suggestion that adequate expression in the Bill of the core values is sufficiently important to justify conversion of the Codes into affirmative Orders if it were not forthcoming (see also paragraph 10 below).

9. The Bill includes no provision requiring Ministers to uphold the impartiality of the Civil Service (as recommended in the Ninth Report) nor not to impede Civil Servants in their compliance with the Code (as included in the 2004 draft). The relevant recommendation in the Ninth Report derived from the Committee's concern that there should be an obligation on Ministers not to ask the Civil Service to undertake political tasks. We recognise that attempts to draft this into legislation have not been straight-forward, and we note that the Public Administration Select Committee Report on the current Bill agrees with the Government that the issue is best addressed at the political rather than the legal level. One of the problems, in practice, has been Government concerns that such a provision might impinge on the Ministerial Code, creating legal requirements around a hitherto administrative document. The Committee nevertheless believes that a legislative statement to uphold impartiality would go to the heart of securing the constitutional boundaries between Ministers, the Civil Service and special advisers, and suggests that this is an issue the Joint Committee might want to consider further. .

10. An alternative approach could be to adopt the Committee's Ninth Report recommendation, that the codes for both civil servants and special advisers should be promulgated by means of affirmative order. We recognise that this approach would reduce the flexibility with which the Codes could be changed. But we believe that the general argument in favour of certainty and Parliamentary accountability has been accepted in principle anyway by the Government in its acceptance of the need to move the management of the Civil Service from a prerogative to a statutory basis.

#### Appointments , Status & Powers of the Civil Service Commission

11. Apart from the lack of a Commission power to initiate investigations into breaches of the code (see paragraph 4 above), clauses 34 - 37 and the relevant schedule are generally in line with the Committee's recommendations. We support the Select Committee's proposed compromise designed to enable the Commission to initiate investigations of suspected breaches of the Code through a discretionary power, although it is possible that even this could require significant additional resource to filter and assess complaints, of the kind that concerned the First Civil Service Commissioner.

12. We note the provision for the Commission to approve exceptions to the fair and open competition requirements where these are "justified by the needs of the civil service". While we understand that similar wording already exists in the recruitment code (and that the Ninth Report acknowledged exceptions to selection on merit in its recommendations), use of this power would

clearly require rigorous justification and monitoring. We would also raise the question of whether it is in fact the "needs of the civil service" which are relevant in justifying exceptions, or whether the test should be justification "in the public interest".

## Special Advisers

13. The Committee is disappointed with the treatment of special advisers in the Bill. In particular:

Ø The provisions fall short of the Ninth Report's clear recommendation - and even, to some extent, of the 2004 draft - in containing nothing about limitations on the role of special advisers. We assume the intention is to rely on the provisions of the relevant code, but this calls into question the status of that code and the fact that neither it nor any changes to it will have direct Parliamentary oversight. We do not therefore see the approach in the current draft as justifying the assertion in the Governance of Britain consultation paper, that the revocation of Article 3(3) of the Order "will be made permanent in the forthcoming legislation."

Ø The draft Bill does not set a limit on the number of special advisers, nor does it provide for any limit to be set or amended by Parliament (indeed, it effectively removes current Scottish and Welsh limits set out in the relevant Orders in Council). The Government argues that the issues raised by the development of special advisers are not susceptible to resolution by the setting of upper limits on their numbers. While the Committee accepts that control over functions and responsibilities is a more directly fundamental issue than the setting of specific numbers, at present the draft Bill attempts neither. If the Bill is to be virtually silent on the crucial issue of permitted and prescribed functions, then it can be argued that the need for crude numerical limits to be written into either the primary or secondary legislation becomes that much greater.

Committee on Standards in Public Life

June 2008

ANNEX A

COMMITTEE ON STANDARDS IN PUBLIC LIFE - NINTH REPORT RECOMMENDATIONS  
AGAINST PROVISIONS OF PART 5, DRAFT CONSTITUTIONAL RENEWAL BILL

RECOMMENDATION

There should be a short Act to cover the Civil Service and special advisers.

In particular, this should:

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(a) define the status of the Civil Service

√

(b) include a statutory obligation on ministers to uphold the impartiality of the Civil Service

(c) set out the responsibility of the Civil Service Commissioners for ensuring that the principle of selection on merit is properly applied, together with the ability to make exceptions from that principle

√

(d) set out the Civil Service core values, including the overriding principle of selection on merit

√

(e) grant powers for the Civil Service Commissioners to investigate, on their own initiative, and to report on the operation of the Civil Service recruitment as it concerns the application of the principle of selection on merit

In part

(f) provide for the First Civil Service Commissioner to be appointed after consultation with opposition leaders

√

(g) define the status of special advisers as a category of government servant distinct from the Civil Service

√

(h) state what special advisers cannot do

(i) include power for the Civil Service Code and the Code of Conduct for special advisers to be given effect as statutory instruments requiring the approval of both House of Parliament and amendable by the same procedure

(j) state the total number of special advisers, with an upper limit subject to alteration by resolution approved by both Houses of Parliament

(k) provide for two special adviser posts in the Prime Minister's Office with "executive powers"  
n/a

(l) define special advisers with executive powers by derogation from the restrictions on what other special advisers can do  
n/a

(m) require an annual statement to Parliament on paid and unpaid special advisers  
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[1] Respectively Cm2850-I (May 1995), Cm 4557-I (January 2000) and Cm 5775 (April 2003).

[2] In the current Civil Service Code, "Impartiality" refers variously to political impartiality; serving the public impartially; and reflecting a commitment to equality and diversity.