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TAKEN BEFORE
JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

TUESDAY 10 JUNE 2008

MR JONATHAN BAUME and MR CHARLES COCHRANE

SIR CHRISTOPHER KELLY, SIR CHRISTOPHER FOSTER
and SIR RICHARD MOTTRAM

Evidence heard in Public

Questions 363 - 413

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Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill
on Tuesday 10 June 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L	Mr Christopher Chope
Campbell of Alloway, L	Mark Lazarowicz
Gibson of Market Rasen, B	Martin Linton
Hart of Chilton, L	Ian Lucas
MacLennan of Rogart, L	Fiona Mactaggart
Morgan, L	Sir George Young
Norton of Louth, L	
Plant of Highfield, L	
Tyler, L	

Memoranda submitted by First Division Association (FDA) and Commercial and Public and Commercial Services Union

Examination of Witnesses

Witnesses: **Mr Jonathan Baume**, General Secretary, First Division Association (FDA), and **Mr Charles Cochrane**, Secretary, Council of Civil Service Unions, and Director of Policy, Public and Commercial Services Union, gave evidence.

Chairman: Good afternoon. Can I welcome you to the Joint Committee and thank you for your attendance. I do apologise that we have kept you a few minutes, but I guess that as you have waited 150 years for the Bill another seven minutes is not too long. Could I at the very beginning say that members of the Committee have declared interests relating to the interests that may be discussed by this Committee and that information is on the web page if anyone wishes to see it. May I ask if there are any other declarations of interest that need to be made?

Lord Hart of Chilton: I suppose in the context of what we are going to discuss, I ought to declare the fact that I was a special adviser for nine years.

Lord Armstrong of Iliminster: I should disclose that I was Head of the Civil Service for six years.

Lord Maclellan of Rogart: I am a member of the Advisory Committee on Business Appointments.

Q363 Chairman: This all means that many members know a lot about this. Thank you very much. Could I ask the first question. Do you have concerns that ministers are failing to respect the political neutrality of the Civil Service? If so, are the provisions set out in the draft bill sufficient or do you think there is more that should be added?

Mr Baume: Good afternoon. Thank you for the invitation. Obviously this is a very distinguished gathering that we are a part of. From an FDA perspective, we are not particularly concerned at the moment that there is a lack of respect for the neutrality and impartiality of the Civil Service. That is not to say there are not occasional incidents where a civil servant might have felt a minister or a special adviser was pushing against boundaries but this is not an issue that we feel is a major one at the moment. There are broader issues, part of which I think are raised in the evidence, about the relationship between the Civil Service and ministers and the way the Civil Service has changed its nature over the years, the way in which policy is drawn up and brought together, and more subtle issues around the concept of what the Civil Service is there for. I get worried at times about an emphasis too much in public, perhaps, on the Civil Service somehow delivering, without recognising that a core part of the Civil Service role is to design policy that is, to use that phrase, “fit for purpose”: policy that can be made to work on the ground and takes into account the experience of practitioners in whatever the issue is. But that is a broader issue about the role and expectation of the Civil Service rather than the more narrowly focused one in the question

about the failure by ministers to respect the Civil Service. I do not think there is an immediate problem with this Government or previous governments around respect for the neutrality. The fact that there has been general cross-party support for the concept of a Civil Service Act, whatever the argument might be about particular provisions, is an indication that amongst ministers and MPs more generally there is an understanding that the political impartiality of the Civil Service is something that must continue to be respected.

Mr Cochrane: I am happy with this broad position that Jonathan has set out.

Q364 Lord Plant: As you know, clause 27 of the draft bill would confer on the Minister for the Civil Service a general power to manage the Civil Service, and it would cover, among other things, appointment, dismissal and the imposition of rules on civil servants. The Public Administration Committee said in their report, which was published just a few days ago, that the Government had clearly changed its mind since the earlier consultation document and that now there is this power to manage individual civil servants – or at least that is one way of reading the draft bill – whereas the previous consultation did not have that in it. Do you think it is appropriate that the Government should have this power?

Mr Cochrane: One of the failings that we see in the parts of the Bill dealing with the Civil Service – which is obviously where our major interest is – is that there are a lot of unanswered questions. We are all having to surmise what may be in the Government's mind and speculate on what the reality might be if the Bill is introduced. I think that is compounded by the problem that we will turn to later, the debate around who manages the Civil Service. It strikes us that you have to be very clear about what this thing called the Civil Service is that you are managing. It is one of the things that the Bill does not quite spell out. Also, I think there is an issue in relation to the difference between what is said in the draft bill, or even what is recognised as the current conventional constitutional position, and what is the day-to-day position. In reality, whilst we have a Minister for the Civil Service who is the Prime

Minister, it is probably fair to say – and this is no disrespect to the Prime Minister – it is not a major feature of his workload. It is currently delegated to the Cabinet Office and for day-to-day purposes undertaken by the Parliamentary Secretary in the Cabinet Office – who has made an excellent job of it. Even more so than that, because of the Civil Service (Management Functions) Act that went through Parliament in the early 1990s, the reality is that the bulk of the management the Civil Service, including matters such as pay determination, is delegated to departments. On one level, it is fairly easy to see, whatever may be suggested in the Bill, what is the real day-to-day impact it will have on that management of the Civil Service and, subject to any contrary evidence, our suspicion is that it will have a very little impact on the day-to-day reality of how the Civil Service is managed.

Mr Baume: At the heart of this Bill is an attempt to move the Civil Service away from the exercise of the royal prerogative and to give civil servants formal contracts of employment and the Civil Service formal legal status. Clearly these are quite difficult legal issues. On the one hand, civil servants remain servants of the Crown, which is a slightly opaque concept in itself. As Jonathan has mentioned, it is what defines a civil servant. The Civil Service Civil Service (Management Functions) Act is trying to bring some of this together. This Bill comes back to the (Management Functions) Act and somehow replicates it in this current legislation. One question the FDA has asked is: Is this what we should be doing, given that we are now starting to place the Civil Service on a different statutory footing and to give some servants clear contracts of employment? Certainly the FDA is unhappy. We welcomed the PASC report. That does not mean we agreed with every single recommendation, but we thought it was a very helpful report. We certainly would agree with PASC (paragraph 22) that this is a matter that needs further investigation. We are not clear why those powers to manage individual civil servants – rather than, perhaps, a generic responsibility for the management of the Civil Service in the round, as an organisation – should not rest with, say, the Head of the

Civil Service, currently Sir Gus O'Donnell, and his counterpart in the Diplomatic Service. That is not a matter that we have gone into a lot of legal research to clarify, but I think the question does require further investigation, because it may be that we are simply trying to put into statute a rather opaque concept of the royal prerogative rather than revisiting this issue of who employs and manages civil servants and where that power should rest. It may be that statutorily it does need to rest with the Prime Minister, but, in our view, it should in reality – and there must be a way of putting it into statute – rest with the Head of the Civil Service, who of course will delegate to individual departments and down management chains, as we do in any organisation.

Q365 Lord Plant: Do you share the Public Administration Committee's worry that conferring this power on ministers might conflict with issues of impartiality?

Mr Baume: We share the view that it should be investigated further. There are quite opaque legal issues at stake here and I think it does warrant further investigation.

Q366 Chairman: If it was someone other than the Prime Minister, should it be some other minister?

Mr Baume: No. It is a question of moving it from a minister to a permanent official that is the issue; recognising, of course, then that there is the question of who employs the Head of the Civil Service. It is the idea that the power to appoint and dismiss, et cetera – putting to one side for the moment the Commission's role in all that – should rest with a permanent official, not with a minister.

Q367 Chairman: But if it were to remain with a minister, would it be better that it was someone other than the Prime Minister, who, as you say, has too many other responsibilities.

Mr Baume: The Prime Minister is going to delegate it anyway, in reality.

Q368 Chairman: The suggestion I thought you were making was that for the Prime Minister it is all very peripheral to his mainstream concerns. Would it not be in the interests of the Civil Service to have a minister who was essentially in charge of the Civil Service and that was his main job.

Mr Cochrane: One of the things we would welcome as, if you like, a representative of the people who are employed by the Government or the Crown, is some clarity and continuity. We have had the present position of the Prime Minister effectively as the Minister for the Civil Service for longer than Jonathan and I can remember – and that is quite a considerable time – but below that we have had a very wide variety of ministers having the day-to-day responsibility. Currently it is the Parliamentary Secretary in the Cabinet Office, but at various times it has been Lords Privy Seal, ministers in the Treasury, people who have been in the Cabinet. It has even been someone who was an unpaid Parliamentary Secretary at one time, which does not strike us at all as a satisfactory position. Whatever answer we come up with, I agree very much with what Jonathan said, I think it should be a permanent official. It should be much clearer at what level ministerial responsibility rests and what the relationship is with the Prime Minister who has the full responsibility. In the very ad hoc arrangement that we have now, for the moment it rests in the Cabinet Office, but going back over 20 to 25 years it has rested in a number of other manifestations.

Q369 Lord Campbell of Alloway: You say that this has to be investigated; that it has to be considered; this is something for discussion. What is your proposal? I do not understand.

Mr Baume: In a nutshell, the proposal is that the powers, as they are defined in the Bill around appointments, et cetera, should rest with a permanent official, the Head of the Civil Service or the Head of the Diplomatic Service. But I recognise that this is a complicated legal matter and to get to that point would need further legal research. Certainly we are not

satisfied in the way that PASC were not satisfied with what appears on the face of the Bill and the justifications we have heard so far.

Q370 Lord Campbell of Alloway: What is the point you are trying to get at?

Mr Baume: That it should not be vested in ministers to have the legal power to appoint or dismiss civil servants.

Q371 Lord Campbell of Alloway: Would you agree that in pressing that you have to be very careful not to kill the objective by intricate statutory provision. Do you understand what I am putting to you?

Mr Baume: I do indeed, which is why I recognise that this is a matter that certainly some legal minds who understand the intricacies of this would need to consider further. Given that we expect it will be several months before the Bill is finally tabled before Parliament, there is time over the summer and autumn to investigate this particular issue in greater depth, so that all of us are clear what the implications and practical aspects of this will be. At the moment, it looks unusual that we will put into statute a power for a politician in effect to hire and fire civil servants, even if at the moment the practicalities are that they are normally matters delegated to officials but through ministers.

Mr Cochrane: We would also echo what you said in the introduction. We are very conscious that it has taken 150 years to get to this point. As we said in our evidence that we submitted yesterday, we have no certainty that there will ever be another opportunity, if we have to wait 150 years for it, so it is hugely important that we get this right. As Jonathan said, some of these are horrendously complicated issues which people have been trying to get their heads around for the last 150 years, and we do not want to end up with a once-and-for-all piece of legislation that either gets it wrong or creates a problem for us in the future. If the Bill is to move forward, there needs to be a lot more discussion outside of that, before the Bill

is laid, to make sure that we have got it right and it is one that then would have the support of people who work for government.

Q372 Lord Armstrong of Ilminster: If the power conferred on the Minister for the Civil Service is a general power to manage the Civil Service, including, among other things, appointment and dismissal, I suppose that that implies that the Minister is accountable for the exercise of that power, even if the power is exercised by delegation via somebody else, possibly not a minister but a senior official. Is it a danger that this would lead to parliamentary questioning about the appointment and dismissal of individual civil servants? If so, in your view is that a desirable state to be in?

Mr Baume: From our point of view, it is important that the accountability of the Civil Service is through ministers; that is, the accountability of the Civil Service as an organisation and the actions of departments. This is why this issue, as you have rightly pointed out, can be quite complicated. From my perspective, the accountability for the behaviour of individual civil servants should be through the Head of the Civil Service. The Head of the Civil Service takes responsibility for the actions of individual civil servants, whilst ministers take responsibility for the actions of the organisation. There is a difference between the concept of the Civil Service as a collective organisation working to serve ministers, which can, as an organisation, make mistakes or may need to explain how it has influenced particular issues, and the actions of an individual working within that. I am General Secretary of a trade union but in a sense I am the employer of 25 staff. My Executive Committee in a sense is accountable for the actions of the organisation, the FDA; I am accountable if a member of my staff makes a mistake or there is something wrong. That is an employment relationship that is not uncommon in any organisation, public or private. This issue of the Civil Service accountability, I appreciate, is quite a fraught one – and it has come up in recent months around problems which have emerged into the public domain in the Civil Service. The Head

of the Civil Service should remain accountable for the behaviour of civil servants, delegated across individual departments. Ministers are responsible and accountable for the actions of government (of which the Civil Service is a core part of the Executive, a core part of the government) as a wider collective body. I do not know if that helps, Lord Armstrong. I would not want to see ministers themselves having to account for the behaviour of an individual civil servant or the hiring or firing of an individual civil servant. I think that would be wrong and it is not a position in which ministers, I think, would want to be in in the future. This is again why this issue is worthy of some further explanation and legal thought. It may be that it is right, it may be that this is where we settle, but certainly we would want to be more confident than we are at the moment that the drafting as it stands is the right approach.

Mr Cochrane: It is also important to remember in the discussion, when we are talking about the accountability potentially of ministers to Parliament for individual civil servants, that there are still well over half a million civil servants. There are probably something like 100 different units, what we would call bargaining units, into which the Civil Service is broken down. At the risk of being slightly facetious, you could almost see Parliament grinding to a halt in trying to deal with a whole host of individual issues around that. There is quite a complex point there. It is important in the discussions, when we are talking about the Civil Service, always to be aware that we are not just talking about Whitehall or the SCS, or the *Yes, Minister* parody – something which we dislike intensely – but we are talking about people – 530,000 is the latest figure – in every town and city, in a huge range of specialisms. It is part of the problem with the Bill, in trying to address something called the Civil Service, that the Civil Service is such a wide issue.

Q373 Lord MacLennan of Rogart: I would like to ask the witnesses some questions about their views on the role of Parliament itself and its relationship to the Civil Service. We have had, as you probably know, evidence which has been contrasting about the power of

Parliament to oversee the management, perhaps through supervision of the codes in their operation. Do you have a view about that?

Mr Cochrane: To follow on from what I was trying to say just now: if Parliament were to do that and get much more involved in the approval of codes, it is quite difficult to see where that would end. Currently there are at least three codes which apply to the Civil Service. There is the Civil Service Code itself; the Recruitment Code, which is used by the commissioners; and a document called the Civil Service Management Code, which, for want of a better description, is something like the Civil Service staff handbook. If the concept was that any changes to those had to be approved by Parliament – which is a very complex process – it brings an entirely new dimension to the traditional discussions that take place between the Civil Service unions and Civil Service management about pay and conditions, and would take us to a model which is much closer to that such as in Germany, where, of course, the civil service has a very different statutory basis from what it has in this country. On the other hand, Parliament already has some quite significant degrees of scrutiny over things such as changes to the Civil Service pension scheme, which are all dealt with by what I believe are called negative resolutions under the terms of the 1972 Superannuation Act, and they all have to be approved in that way. The role of PASC in recent years has devoted a lot of time to Civil Service issues and I think it is one that we have all applauded and welcomed. We have not always agreed with their conclusions but I think that degree of scrutiny has proved to be right.

Q374 Lord MacLennan of Rogart: You have no principal opposition to direct parliamentary oversight. You are not saying that has to be through a minister.

Mr Baume: It has to be through a minister.

Q375 Lord MacLennan of Rogart: You are saying the oversight has to be through a minister.

Mr Baume: The Civil Service Code and the Civil Service Management Code are contractual terms for civil servants and are issues on which we, in effect, negotiate. The role therefore of Parliament is an oversight but not a directive and final decision-taking oversight. I think the codes have to be ones that are finally agreed within the Civil Service – and that, in practice, coming back to the earlier discussion, means through the government of the day – but I think changes particularly to the Civil Service Code – because the Management Code is a terms and conditions handbook – are ones that should be subject, as they were a couple of years ago, to wide consultation, including public consultation, but the final decisions, because they are contractual terms, have to be taken by ministers at that point. What is important is that on the face of the Bill are the key principles that must be incorporated within such codes, but the fine print, if you want, are matters that should be left within the Civil Service after, of course, wide consultation, including with the Public Administration Select Committee or other select committees and with committees of the House of Lords that it is felt would be appropriate.

Lord Campbell of Alloway: On the code it is so terribly important to get to grips with exactly what you are saying. Is this code a code of guidance which you are putting forward, devised by the Civil Service, which has no legal efficacy but is in fact administered by the Head of the Civil Service without access to courts of law, because I think – and I am not quite sure – you do not have access now to the courts of law for a breach of whatever code you are doing. Could you deal with this. Could you explain what it is you are proposing.

Chairman: To get that clear, I think Lord Campbell is asking about the status of the current Civil Service Code and whether or not a Civil Service Code appended to an Act would for the first time establish some legal liability. I suspect the answer may be yes, but you may wish to comment.

Q376 Lord Campbell of Alloway: Thank you very much.

Mr Cochrane: I suppose we both ought to start off with the premise that neither of us are lawyers, so we bow to those who are. The Civil Service Code as such – which is, for want of a better phrase, a code of conduct – has no statutory basis at the moment and is something that was introduced after a lot of pressure and campaigning by some of our predecessors about 15 years ago. Generally, I think all of us have accepted that it would be better if it had a statutory basis. The Civil Service Recruitment Code, which is also one of these, is a document that is produced by the Civil Service Commissioners under the powers they have. I assume it would follow, if the provisions in the suggested Bill were to put the Civil Service Commissioners on a statutory basis, that their Recruitment Code would become in some ways a statutory document. I do not believe that any of the proposals that are before us today say much about the Civil Service Management Code as such. I do not think there is a suggestion that that would become a statutory document and our view would be that we would not want that to become a statutory document in that sense – because it forms part of civil servants’ contractual terms, to put it in an oversimplified way. It is one of these complications which is brought about by having three different things called codes, and a real potential for confusion.

Mr Baume: The Civil Service Code of 20 or so paragraphs is part of the contractual terms of the civil servant. In that sense, were a civil servant to breach the terms of that code, they would be subject to disciplinary action within the Civil Service by the Civil Service as their employer and, therefore, in a sense it has a legal status in that context. I think the FDA said it would be reluctant to see the code attached to the Bill, simply because, for example, it has been amended three times in the past ten years, in an uncontentious way but with consultation – partly, as I said, as a consequence of the devolved assemblies in Scotland, Wales and Northern Ireland – but it does have a power within the Civil Service upon civil servants because it is part of their contract of employment. Therefore, because it would be perhaps

inflexible to have it on the face of the Bill, having broad principles on the face of the Bill is very important indeed, recognising that the wording around those principles is something that should be, in our view, kept as a matter within the Civil Service, with the role of the Civil Service commissioners. Baroness Prashar steered through the last rewriting of the code in a very successful and very popular way. She made it much more user-friendly as a document. Does that clarify the point that was being asked.

Chairman: I think that does. Thank you.

Q377 Lord Tyler: To continue with the parliamentary oversight issue, I wonder whether you agree with the PASC committee report (paragraph 66) when they refer to the way in which a prime minister can make changes to the machinery of government. This is the architecture of Whitehall dramatically changed one Friday afternoon in the middle of a recess, when he abolished one department, created another, et cetera – which of course not only has a great deal of importance for your members but also can have a very disruptive effect on the whole machinery of government. The committee said such changes “can be disruptive and costly” yet is something which prime ministers “can and do make without any form of parliamentary check”.

Mr Cochrane: You are absolutely right, with the passage of years and with the break-up of what would be seen as centralised Civil Service bargaining, so that we now have different pay and service conditions in different government departments and even within some government departments, the implications of machinery of government changes are far more profound now on our members than they would have been 20 years ago. Twenty years ago, apart from trying to remember what the new name of your department was, in effect you just carried on. Now we have a position where in relation to some of the machinery of government changes that took place last year, departments are still trying to work through some of the implications of the terms and conditions. Also, again to be slightly facetious,

I think the Government may be running out of names and acronyms for new departments. On the other hand it has always been such. Perhaps governments do it more often than they used to but they have always had this power to do it. Whilst, from our point of view, we would quite welcome a period of stability to let the current departments continue and to develop, whether that is a power that this Government or any other government would want to give up, I have some reservations about. But I am sure if you asked the individual civil servants working there they would say, "Please leave us alone."

Mr Baume: Charles has picked up on the terms and conditions issues – and there are lots of HR issues that emerge out of all of this – but people should not underestimate the amount of time, people, resources that are needed to reorganise a department. Certainly the FDA view is not so much that this is not a power that should remain with government – and I did not fully understand what PASC were arguing in paragraph 67 – but it is the way you do it. Successful reorganisations of departments are those that take place with sufficient planning. I have never for the life of me seen why, if a government wishes to split up a department, merge a department, do a reorganisation, this is a matter that cannot be thought through some months in advance, to give everybody time to work through the implication and possibly consult for a limited period before you make the change. One of the most successful machinery of government changes was setting up Jobcentre Plus, which brought together parts of the old Department of Social Security and the old Employment Department, which is where my personal roots lay, and that worked because 18 months was spent in putting together a new organisation, employing over 100,000 people, reconciling IT systems, different methods of dealing with the public, the flows in and out of money. All of these things take place behind the scenes and are very, very time-consuming and have an impact on the ability of government to give a quality service to the general public, or to more narrow groups, depending on the policy framework in the department. It is spending the time to plan

ahead, maybe even thinking about the proper business case, rather than making these off-the-cuff announcements when the Permanent Secretary finds out six hours before the Prime Minister stands up in the House and makes the announcement.

Q378 Lord Tyler: But he does not make an announcement to the House. That is the point.

Mr Baume: He just makes it.

Q379 Lord Tyler: Yes. It just happened and it happened in the middle of the recess. The select committee was particularly concerned that there was no parliamentary oversight in that particular action of government.

Mr Baume: I think that is a matter in a sense for Parliament. From our point of view, we want a process that is well managed and is thought through in advance, rather than trying to work through the implications once the announcement has been made, which is too often the position, with governments of all parties, that we find ourselves in.

Chairman: I am afraid one or two of our colleagues have to go at 2.30. It is not a discourtesy to our witnesses but the House of Common sits at that time. I am going to call Martin Linton out of turn to ask his question.

Q380 Martin Linton: That is very kind of you, Chairman. I want to ask about impartiality, which has been mentioned once or twice, and the part of the Bill that talks about civil servants' integrity, honesty, objectivity and impartiality. It then goes on to say that special advisers do not need to have the latter two qualities, objectivity and impartiality. Impartiality by itself means nothing unless you say what someone is being impartial towards. Should it not really be political impartiality?

Mr Baume: It is political impartiality. I would have said that the political impartiality is that the Civil Service serves with – to use of Sir Gus O'Donnell's phrase – passion, pride,

professionalism, pace for the elected government of the day. It is there to serve the government of the day; it is not a neutral body between government and opposition. But if the government of the day changes – and we saw this happening in Scotland, for example, last May with Labour to the Socialist National Party – it serves, with exactly the same level of commitment, professionalism, et cetera, an incoming party; in other words, it is there to serve the government of the day and it is part of the government – therefore it is not neutral or impartial in a sense between government and opposition parties – but it serves the government of whatever political colour with exactly the same zeal and professionalism, et cetera. That is what we are talking about. It is the political impartiality and an ability to serve different governments and, therefore, an obligation on individual civil servants to be able and willing to serve parties of different colours, whatever their own private personal political colour.

Q381 Martin Linton: Obviously it is important for the Civil Service as a whole to work for whichever party is in government. If a particular civil servant were to say that he was against selection in education and he would not work for a government that wanted to reintroduce it, should that person not be a civil servant?

Mr Baume: In my view, no. That person should not be a civil servant. You have to have the ability to be able to work through whatever policy the government of the day would put forward. All civil servants have private political beliefs, of course. They are people working in a political part of the environment – they are probably more political in that sense than many members of the general public – but they have to be able to use that professional ability to help formulate and deliver policies of whatever government is elected. It will mean that on one day you are setting up a particular policy and a week later you might be dismantling that policy. That comes with the job. Most civil servants are very proud of being able to do that. It is why they are there. It is not about campaigners and lobbyists and zealots, if you want, in that.

Q382 Martin Linton: The Civil Service Code defines impartiality as “acting solely according to the merits of the case”. Surely special advisers would act according to the merits of the case and it is a bit of an insult to special advisers to suggest that they do not.

Mr Baume: Special advisers are there because they believe in the programme of the political party in office and they are there to serve the individual minister. Let us be blunt: special advisers serve ministers, not the government. Civil servants are there to serve the government of the day; special advisers are there to serve their individual minister. In the real world they work for their minister. If that means the interests of their minister are different from the interest of government, they are there to serve the interests of their minister.

Q383 Chairman: The question that is really being asked is: Is there a distinction between political impartiality and some other form of impartiality as to the issue itself? I do not mean we could not care what the outcome was, obviously, but an impartiality that is wider than simply political impartiality. The code does seem to distinguish between those two at the present time. Is that a proper distinction or do you see a distinction between those two?

Mr Cochrane: I think there are two impartialities, if that makes sense. There is the political impartiality which Jonathan referred to and which is extremely important, but there is also the impartiality of civil servants in dealing with their casework, if you like. For the civil servants who are sitting behind the desk in a Jobcentre, it is just as important that not only are they politically impartial but they are impartial in their day-to-day dealings with the public. The question is perhaps more about what are the qualities of special advisers. We are reasonably comfortable with what is being said about civil servants.

Q384 Martin Linton: This law proposes to make a distinction between the code as it applies to civil servants and advisers. It does not apply to special advisers but it does apply to civil servants. Clearly special advisers do try to act on the right side of the case; so do

ministers; so do governments. They may have a different perception of the merits of the case, but they still believe in the merits of the case. Otherwise they would not do it. It implies somehow that they have some exterior loyalty to some foreign ideology or something, but surely that is not the case.

Mr Cochrane: I am sure you are right. We are sitting here today trying to comment on the Bill as it impacts on our members and our civil servants. Jonathan and I do have an interest in special advisers and in many cases very much welcome the work they do, but that is, if you like, not the role we are sitting here to discuss. It is a slight way of ducking the question.

Martin Linton: It is raised by the back door.

Chairman: I think we have to move on to special advisers a bit later.

Q385 Lord Plant: I have a supplementary about Whitehall reorganisation. I am intrigued in terms of the sort of timescale of these things. From where you sit, how would you judge something like the reorganisation of something like the Department of Education when the new Prime Minister came in last year. How long did it take for that kind of reorganisation to settle down and for things to get going in a focused way again? I am not asking you for the merits of the reorganisation but how long did it take to work?

Mr Cochrane: The short answer is that it is still unresolved and there is still work taking place in the former Education Department to deal with the consequences of the machinery of government changes last year. I think it would be fair to say that the merger of Inland Revenue and Customs & Excise, which was known about in advance and worked to for a considerable time, has largely been implemented. One can draw conclusions from that, picking up on Jonathan's point. Some planning of the business case must be a better way of doing it than a snap decision overnight and then trying to deal with the consequences for government. At the end of the day, the departments are there to provide a service to the public. If they are then having to devote resources into a catch-up process about trying to fit

in with new names and new responsibilities and new ministers, it cannot be the best way of doing it.

Mr Baume: The Treasury certainly in recent years has not allowed any additional funding to be devoted to managing the reorganisation of departments, so the departments which end up merging, apart from all the businesses of splitting budgets and other quite complicated matters, do not have any extra money available to manage that process. All of the time and energy that is spent rebuilding a department, or merging or dismantling or whatever is done, has to be found within the resources that were previously made available for its administration and spending programme. That is money diverted from other work. I would say that it generally takes about two years to manage a machinery of government change.

Q386 Lord Norton of Louth: This question is really to do with the role of the Civil Service Commission, particularly as to whether it should have the power to initiate investigations of its own. We have received rather different evidence on that. The Commissioner herself is rather sitting on the fence. The FDA submission to us endorses the Public Administration Select Committee's recommendation that it should have the power to initiate inquiries. Would you like to justify the recommendations or think it through. What would be the resource implications for the Commission if it had that capacity?

Mr Baume: I am smiling because I think that is one where we internally have also been hesitating. I have personally spoken to the Civil Service Commissioner and I know where her reservations have come from, but obviously she will be giving evidence and can explain all of that. We also have some doubts because we certainly do not see it as the role of the Commission to be spending most of its time involved in investigations. We are also aware that, if the power is there, people will try to use it for party political reasons. That is just the way the world is, that people will put in a complaint. We have seen it over the behaviour of MPs in other contexts, where investigations have been be launched. We think that there

ought to be a power there, because the need might arise, but it should be used on a very circumspect basis. I think in the end it must be a matter for the Commission, perhaps in consultation with the Head of the Civil Service, because, clearly, it could be a matter that ministers may not wish to see investigated but there may be a legitimate concern. I think the Civil Service has a role there – as the Head of the Civil Service rather than perhaps as Cabinet Secretary – to give a view on that. In a sense, the constraints around the Commission are the resources made available to it. Its budget is fairly small in real terms and most of that is spent on day-to-day work, on recruitment/appointment work. In a sense, if that budget is kept reasonably tight, then the constraint is there simply because the Commission would not have the time or the resources to mount such investigations. As a provision, however, it seems to make sense that that provision is there for the Commission in certain special circumstances which only they can determine. In terms of third party complaints, I know there is an issue in general. Do civil servants complain to the Commission? My answer to that question would be no, because it is quite a major step to take. The FDA have argued over many years that the Commission should be able to take complaints from third parties; for example, from the individual's trade union, because they might not wish to make a direct approach themselves. Several members may come into us and say, "Something is going wrong here" but none of them, as individuals, wish to make a formal complaint. We would see ourselves as part of that circumspect power. The Commission should be able to listen to what we have to say and, if they really feel there is an issue, have the power to investigate, but it should be something that is used exceptionally rather than generally.

Mr Cochrane: One of the areas where would like to see the Commission perhaps have a greater role is in relation to recruitment and auditing the implementation of the Civil Service Recruitment Code, because we now have an extremely delegated recruitment system in the

Civil Service and it would be reassuring for all of us if someone were able to take a slightly more hands-on oversight of that process.

Chairman: Lord Morgan, you are going to ask a question about definitions.

Q387 Lord Morgan: Yes. The definitions we have considered so far exclude people in the security services and GCHQ, so they would not have the same provisions applied over recruitment or over appointments procedures or whatever. What do you think about that?

Mr Cochrane: The specific exclusions which the Government have listed in the Bill are, from memory, the Security Service, the Secret Intelligence Service, GCHQ, the Northern Ireland Civil Service, and the Northern Ireland Court Service. It is an interesting bunch and it is very difficult to find out what the common thread is between them. The status of the Security Service and the Secret Intelligence Service is quite well known. It is different with the status of GCHQ, which is for all intents and purposes a Civil Service department. Its staff are civil servants and members of the Home Civil Service, whereas the security services are not. It is also fair to say that the Northern Ireland Civil Service and the Northern Ireland Court Service are, by their nature, not the same as the other three organisations. It is a very strange mix and I think it would have been much more helpful if the Government had been a bit more upfront in the Bill about what the specific arguments for excluding all the five bodies were. I have speculated about this and I think the reasons may well be all entirely logical. To take perhaps one of the more simple ones: the reason for excluding the Northern Ireland Civil Service seems to me tied up with the whole issue of government in Northern Ireland and matters for them but I think it would have been helpful if the Bill had spelt out the reasons, so that we were all clear rather than at the moment us all having to speculate about why we think it is. Also, in the spirit of the changes that have taken place to the running of the various security services since the 1990, openness about the reason for this is something that everyone would welcome. The second point I would like to mention is that there is

a wider issue for that definition in the Bill, in that, unlike the draft bill produced a few years ago, which attempted to define what Civil Service was and attempted to set out certain bodies which were not part of it – which was a difficult task in itself – this Bill does not, apart from those five exclusions, really help us in defining who the Civil Service are to which the Bill will apply. In the evidence that PCS and Prospect (two of the other Civil Service unions) submitted yesterday, we tried to explore this in much more depth, partly because we think there are all sorts of anomalies. For example, what is the difference between a civil servant and a Crown servant? Is a servant of the Crown different from a Crown servant? They are all phrases that are used in various legislation. There is even the phrase “in Crown employment”. I can speculate on what the difference is but if we have this once-and-for-all opportunity to have the Bill, it does strike us that it should be very clear. We have referred in our evidence to a recent case that went to the Employment Tribunal which involved the Adult Learning Inspectorate. We had always assumed that was a non-departmental public body, but for the purpose of the Employment Tribunal decided that those people were “in Crown employment”. That leads us on to something which, again, we have said in our evidence. If people are in Crown employment – going back to Jonathan’s point about conventional or normal contractual terms – there are all sorts of employment law anomalies which do not apply to people who are covered by those categories. I was going to say it is a real dog’s breakfast, but I am sure that is not the sort of language one should use here. It is a very confusing situation. It is one of these things that is hugely important to us. Let us have some clarity in the Bill so that everyone knows what they are. It is hugely important to our members to be clear about what they are – if they are a civil servant, what does it mean? – and to have clarity about the law, and, hopefully, in terms of employment law, to be put on the same basis as everyone else.

Chairman: I think probably you have given us the ideas that we need to ask the Minister about when the Minister comes. Thank you for that. Perhaps we could move on.

Q388 Lord Plant: This is a question about appointment on merit. As you know, the Bill states the principle that “A person’s selection must be on merit on the basis of fair and open competition” and then it does list certain exceptions to that: “(a) an appointment made directly by the Queen; (b) a diplomatic appointment as a head of mission or as Governor of an overseas territory; (c) an appointment as special adviser; and (d) a selection excepted by the recruitment principles.” The select committee and others have said that this list of exceptions needs greater justification. Furthermore, if they can be justified, should, for example, a selection excepted by the recruitment principles be made by the Civil Service commissioners rather than by the Government, if there is to be a move away from purely meritocratic principles.

Mr Baume: Working through that list in clause 34(3) of the Bill, there are particular appointments by Her Majesty and that is not something we would want to intervene in. Surely we share the view of PASC that there is no reason why any member of the Diplomatic Service should not be appointed by a normal process. That does not mean that there will not be people from outside the Diplomatic Services. Both Conservative and Labour Governments have appointed on occasions politicians to diplomatic roles, and it may be that those appointments are perfectly appropriate but they should be made through fair and open competition and not as a political act. Therefore we do not think there should be any exception from fair and open competition for the Diplomatic Service. Special advisers are, of course, appointed individually by ministers. Again, that is the principle of special advisers, and we would not seek to argue with that. As to (d), the selection from the exception there, I have heard the argument made that there are certain jobs and short term appointments where it might be appropriate for that to happen – and if you listen to the argument colleagues from

the Cabinet Office, for example, will make there is some merit in that. However, this is very broadly drafted and the explanatory notes do not leave you much the wiser about what is in reality intended here. Therefore, I think their conclusion would be that there might be a case – I think there probably is a case – for having some exceptions to the normal rules but these need to be quite tightly constrained. Two points: firstly, they should be made by the Commission, not by the government – it should be for the Commission to determine a good case has been made why this post or a small number of posts should be exempted for these reasons; secondly, they should be transparent. We should know through the annual report or through some other mechanism, but certainly on a timely basis, why exceptions have been made, what was the argument in that particular case; just as we have a report, of course about appointments that are made through the normal channels. So, just in conclusion, no appointments should be excepted, I think, from the Diplomatic Service. If an ex-minister is capable for a diplomatic post there is no reason why they should not compete for that post in the normal way. Secondly, the Civil Service exceptions – yes, there may be a case but it should be explained and it should be extremely transparent and managed through the Commission itself.

Q389 Chairman: Do you agree with that?

Mr Cochrane: Yes, but could I add two quick points? I think it is important that we are all clear quite what these exceptions might be and what the consequences are, because I have heard it suggested that what some people would like to see is a change from what we have at the moment, where the Civil Service, to use the old speak, runs a competition with an opening date, an advertisement and a closing date, and then all the applicants who have applied by the closing date are then considered and put into order. Moving to a system whereby the competition would open, people would apply and the first suitable one would then be appointed, which is a fairly significant change from where we are now, may well be the right

answer – I doubt, personally – but I think we need to be clear if that is one of the proposals. The second consequence is that there is an issue at the moment about what happens when people are appointed in good faith on their part to the Civil Service and it subsequently transpires that it is in contravention of the rules and currently those appointments are regarded as null and void, which is perhaps right in a legal sense but it is disastrous for the individual – and we include this in our evidence – and I think some provision needs to be included here that if through no fault of their own, if for an individual the appointment is null and void then there is a way of trying to find a fair remedy for that.

Q390 Sir George Young: The final question on special advisers. We have read what the FDA said in evidence, which is that the current wording in the Bill, which refers to them “assisting ministers”, is inadequate or at least incomplete. I have also seen what PASC said in their report, which is this: “It needs to be absolutely clear in primary legislation that no special advisers should be able to authorise expenditure, or to exercise either management functions or statutory powers.” Would you go along with that, that there should be something on the face of the Bill restricting what a special adviser can do?

Mr Baume: The short answer: absolutely, yes. I share the view of PASC. I will not go through the FDA’s evidence again because obviously you have read it, Sir George, and looked at it, but we need to define much more clearly the role of special advisers, making the point that the FDA certainly has been very supportive of the role of special advisers – we have special advisers in membership. But it is important that their role is clearly defined on the face of the Bill, given that they are such an important exception to the normal rules, and we would endorse the PASC view that there needs to be that included within that role, around not just the management of the all the civil servants but also authorisation of expenditure, etcetera, for which the Permanent Secretary and Accounting Officer would otherwise be responsible.

Q391 Sir George Young: Perhaps the next question can be equally robustly answered. Should there be a cap on the number of special advisers?

Mr Baume: Not as robustly answered. A very, very difficult problem; in terms of the FDA we are a bit split on this matter. I understand Sir Robin Mountfield's concerns which he expressed very eloquently before PASC, and certainly in Scotland there is a cap on the numbers of special advisers in the Bill – I have forgotten the name now – that sets up the Scottish Parliament and the Scottish Government. If you set a cap you will end up with a norm; if you set 100 you will end up with 100 special advisers. If you set a budgetary constraint special advisers will work for £20,000 a year because they just want to work for a couple of years in central government, etcetera. It is a very difficult one. We do not have the answer to that. To date, to be fair, I do not think there has been a problem with numbers – whether it is Labour or Conservative actually the numbers have rarely varied round about Number 10. Cabinet Ministers under successive Prime Ministers have generally been allocated two special advisers, maybe the odd part-time person or the unpaid adviser because we do not come out of public purse. It has actually been in Number 10 where there has been an expansion of numbers or a contraction, but even then you might be talking about between 30 and 40 people rather than between 30 and 300 people. But clearly there is the ability at the moment for a future Prime Minister to decide to appoint 1000 special advisers from the public purse, and if you have a strong majority in Parliament you would not be challenged on that in the reality, and trying to find a reasonable way – I tend to feel that somehow commonsense between the parties dictates that this is not a route that one particular Government will want to go down to set precedents.

Q392 Chairman: So the answer is maybe?

Mr Baume: The answer is maybe, and I think we need to think through – I think there is an obligation to try and think through – a satisfactory parliamentary oversight of the system of

special advisers for everybody's benefit, because it is money from public funds. I am sorry to prevaricate on this but it is a very difficult one to answer.

Chairman: I do apologise as well because we are really short of time now

Q393 Mr Chope: It has been suggested by some that we should recognise special advisers are political advisers, call them such and fund them in the same way as we do in Opposition out of the short money, and then that would stop the public confusion which there is at the moment. Do you agree with that?

Mr Baume: The only slight caveat to that – because I generally agree with the sentiment of it – is that there has been a separate debate about the management of special advisers, who is responsible, how could the special advisers fit via the powers of the Permanent Secretary, and trying to get that balance right of the Permanent Secretary having an ability and an oversight to special advisers, or should the special advisers be solely responsible to the minister and managed entirely by the minister? Because special advisers are temporary civil servants, a special category of civil servant, therefore you have to have the definitions right and you have to have a chain of management internally that operates effectively so that special advisers are part of a broader Civil Service machine, whilst recognising their special status. So you could have an afternoon seminar – in fact we have had afternoon seminars – on the role of special advisers, but just to get those nuances that we do not get lost in the broader issues I think for the face of the Bill certainly defining the powers very rigorously would be important, but maybe there is the space for a separate discussion on how we actually confirm their status because they are a valuable part of the system, as long as it works effectively, which, to be fair, most of the time it does.

Fiona Mactaggart: You have talked a lot about impartiality in relation to political impartiality but there is another impartiality principle, I think, which is the principle that public powers should not be used to further the private purposes of those who are entrusted

with it, and is there something that we need to put in this Bill to prevent the abuse of public power, as I think has been illustrated by a report released by the Public Accounts Committee today. Is this something that should be in this Bill to prevent that kind of abuse of public power by civil servants or former civil servants?

Q394 Chairman: Have you never thought about it?

Mr Cochrane: No, I have quite often; I am trying to think of the short answer to the question! Part of the answer is the point I made earlier, that if there is a problem – *if* there is a problem – it relates to a very small part of the Civil Service and the overwhelming half a million in the Civil Service are never going to be in that situation, nor should they be. But I think it is also much more about a much greater scrutiny of what, for a shorthand, I would call the privatisation process, and I think that is where the real answer to this lies. With hindsight – and hindsight is a wonderful thing – that issue could have been foreseen and I think it could have been controlled, and perhaps there is a role for Parliament in taking a much greater view over these proposals around outsourcing and contracting out, which could have prevented that problem happening.

Q395 Fiona Mactaggart: I cannot see how Parliament could have dealt with some of the commercial confidentiality issues that were coming up.

Mr Baume: Commercial confidentiality is certainly something that we have argued about for a long time. Successive governments have said there is no reason to employ commercial confidentiality for the most part, but then successive governments then choose to blanket almost anything that they do not wish to have scrutinised with commercial confidentiality. Much greater transparency and far less use of commercial confidentiality I think would be a boon for government in the round. I think we have all felt concerned – the National Audit Office Report this morning, I have not read it yet but I have read the newspaper reports and

the news coverage and there are issues around the Foreign Office international development body as well, which have well publicised. I do not want to get into the detail of all of that. But there is also a role for the National Audit Office and Select Committees in scrutinising the ongoing work of departments rather than scrutinising retrospectively the activities of departments. I do not think there is a big problem out there but I think there is an issue about the scrutiny of these complex decisions around privatisation, or whatever, of trading funds and things like that, that actually should be subject to much greater continuing scrutiny than we receive, and a general view that commercial confidentiality is overused far too much in government to mask what should be legitimate scrutiny by Parliament or other bodies of actually what is taking place. It is not a party political thing; I think successive governments have used that facility far too much.

Q396 Lord MacLennan of Rogart: Two questions about the terms of employment of civil servants in the Bill. Should the Bill recognise and provide for circumstances in which the obligation of civil servants to serve ministers as their employers may have to be modified by a wider obligation to serve Parliament or the public? The kind of circumstance in which it might come up would be where a Select Committee was seeking answers to factual questions, which arguably the government would not necessarily wish to disclose. Not a matter of policy but a matter of fact. That is the first question. The second, on the terms, is related to Fiona Mactaggart's in a slightly different way: should the initial contract recognise that following the termination of employment in the Civil Service there may be jobs which are unsuitable and which should not be acceptable and should not be capable of being accepted after the Civil Service has ceased in that role?

Mr Baume: Just picking up that latter point, because I am conscious I did not fully answer Fiona Mactaggart's question. Just in the business appointment rules issue, I think there needs to be a rigorous system of the business appointment rules that do actually say there are certain

roles that it is not appropriate for civil servants to go into, and it has to be balanced – particularly when the Civil Service is shedding jobs, as we are at the moment, and people may find themselves having to find new employment at the age of 50, and if you have spent a number of years working in a particular area of expertise inevitably your expertise is in that field, and therefore it needs to be a commonsense application of those rules. None the less, I think it is in the public interest and the interests of the Civil Service that there is a rigorous process of vetting future appointments for more senior people, as long as that is handled fairly and with sensitivities to people's personal situations. I think that is already in place – and we can argue about fine-tuning the system – so I do not think it is anything that needs to be picked up in the Bill itself, but I think it is something that should continue to be a rigorous process of the exiting, if you want, of civil servants – it could be post retirement – just as I think it is entirely appropriate that there is a system of vetting memoirs, diaries, etcetera, of civil servants who leave public office. I think these are proper mechanisms to have in place.

Mr Cochrane: If I may add, I think that there is a very technical answer to that which I think is a disconnect between the business appointment rules and TUPE transfers, which if you really want me to I can do you a note on, because there is a bit of a problem about the connecting thing, that people are not opting to go but theoretically they are being transferred to a new employer, which is different to someone applying for a job. But it is quite a technical point. The other part of the question is I think there are two answers about the employer point. One is a contractual one and we very much hope that the Bill will make it crystal clear for ever more – perhaps that is a slightly over ambitious statement – that the employer of civil servants is the Crown, full-stop, and there is no ambiguity about that. I think it is into that but it would just be nice to see an absolutely straightforward statement because at the moment there is quite a bit of confusion about it and it is confusion that has got involved in court cases and so forth, and it does go back very much to the machinery of

government point again. If we are going to have constant machinery of government changes then it needs to be even clearer that the ultimate employer is the Crown. I think there is a second point, which is perhaps a more philosophical but equally important one, about whose the responsibilities are and is the responsibility solely for the minister, how much is the responsibility to Parliament, and increasingly with the partnership working in which the Civil Service is involved now how will partnerships fit into that? An early example of that was government offices which had been set up and I think generally worked very well indeed, but in theory the people are still all responsible to their individual Secretaries of State, which is not the best way of running things, and actually even before you start getting involved in outside agencies as well as in partnership operations. So I think some more clarity about that in trying to encapsulate that into words would probably be helpful, provided that it does not lead to more confusion from where we started.

Mr Baume: Just a final point.

Q397 Chairman: On the final point, yes.

Mr Baume: Just on accountabilities. This is an issue that we have been looking at for perhaps 20 years or so. Certainly the FDA view is that civil servants work for the elected government for their appropriate minister, etcetera, and the wording is set out in the Code. But we have always recognised that on the one hand there are some individual civil servants who have a wider role to Parliament as accounting officers or duties as lawyers – a third of FDA members are lawyers in different guises, prosecution or government legal service – or statisticians who have responsibilities under wider codes, the Statistics Commission, and bodies like that. So there are those wider accountabilities. But the Civil Service does have in existence an accountability and a responsibility, if you want, to Parliament over and above its day to day obligations to the government of the day, because the Civil Service is there not only to serve the government of the day but also to be in a fit state to serve future

governments after general elections year by year, and that wider accountability is less straightforward in terms of its definition, but it is one factor why we think a Civil Service Bill is appropriate, because Parliament has an interest in the continuing future of the Civil Service and the Civil Service that is, to use that phrase again, fit for purpose and able, following a general election, to come in and serve a future government. Enshrining that in legislation is difficult but it is something that is I think very important in understanding actually why we are here arguing about the detail of that part of the overall Bill that relates to the Civil Service.

Chairman: Thank you very much indeed. Thank you for coming along. We are so sorry it went over a bit but we are grateful for all that you have said.

**Memoranda submitted by the Committee on Standards in Public Life
and Better Government Initiative**

Examination of Witnesses

Witnesses: **Sir Christopher Kelly**, Chair, Committee on Standards in Public Life, **Sir Christopher Foster**, Chairman and **Sir Richard Mottram**, Better Government Initiative, gave evidence.

Chairman: Good afternoon and can we welcome you to the Joint Committee and in particular today the discussion of the proposed Civil Service Bill. Can I also apologise right now for (a) keeping you for such a long time and (b) then to tell you that as a result of other colleagues' parliamentary duties we may be short of a quorum in about 20 minutes from now, and the consequence of that is that we are going to briefly ask you as much as we may and at the end what we have not asked you, we would be grateful if you would be good enough to respond in writing. But let us start anyway. Lord Tyler.

Q398 Lord Tyler: Do you have particular concerns that ministerial or special adviser behaviour either in the past when you were all very distinguished members of the Civil Service, or more recently, has failed to respect the political neutrality of the Civil Service? And do you think that there is a legislative opportunity with the current Draft Bill or do you think that would not be appropriate to try and deal with that, assuming you think there is a problem?

Sir Christopher Kelly: Although you are looking to me I would defer to Richard for more recent experience of ministerial advisers.

Sir Richard Mottram: If we take those two questions, on the first question what I do not think is the case – certainly in my experience – is that ministers are actively seeking to undermine the political impartiality of the Civil Service. So I do not have experience of many

examples of that happening. What I think has been happening – and perhaps to an increasing extent – is that ministers give relatively less weight to the contribution of the Civil Service in the formulation of policy and in advising generally and that the balance of knowledge and expertise inside government has shifted away from the Civil Service. So I think the issue is whether that is or is not a desirable development – and obviously as a former civil servant I would have views about this, which the Committee might not share – but I certainly think that there has been a change and that the weight and the influence of the Civil Service has been reducing, particularly in the centre of government, and personally I think that is a pity. On the second of your questions, I think the answer is legislation is a good idea if it is good legislation. So if the legislation itself gives support to and makes stronger some of these aspects then it is a good idea. I personally do not believe that this Bill in its present form is particularly strong legislation in that sense.

Sir Christopher Foster: I agree absolutely but may I just add two points from our own written evidence to you where we recommend: “A duty of ministers, also in the Ministerial Code at present, ‘to give fair consideration and due weight to informed and impartial advice from civil servants’ as well as from other sources and to ensure that opportunity is to provide that advice.” That is the duty which directly relates to one of the points that Richard Mottram made. We also talk about political impartiality by saying, “A duty of civil servants to serve the government of the day, but also to behave in such a way as to be able to secure the confidence of a future administration of a different political persuasion.” Those are the sorts of things which we have in mind as being very germane to this particular issue.

Sir Christopher Kelly: I have very little to add to what Richard and Christopher have said. My direct experience of this is much less recent than Richard’s. Certainly there were concerns about this that the Committee on Standards in Public Life published in its ninth report, which is now three or four years ago. As to whether legislative provisions have any

drawbacks, it is as Richard said – good legislation does not. I think part of the problem of course is that if you fix something in concrete it becomes less flexible; if, on the other hand, you rely on generalities then it becomes less useful as a guide to behaviour.

Q399 Lord Norton: Following up on the point about protecting impartiality. It may be there has not been a problem in terms of ministers trying to erode the impartiality of the Civil Service but there may be a case for at least ensuring it is protected in the future. The Better Government Initiative of course in their evidence recommends there should be a statutory duty on ministers to have regard to that impartiality. So perhaps we could start with Sir Christopher Foster, since he put in that evidence, what difference do you think that would make in practice and is there not a problem if you enshrined that in legislation you are then creating problems in terms of whether it is justiceability or not?

Sir Christopher Foster: The first point is I think we do believe that this is such an important issue, and so important for the future not only for the Civil Service but of government, that we recommend that. We do not pretend to be experts on justiceability. I am sure you will be getting evidence from elsewhere. As we understand it, the procedures at the present moment are justiceable in the sense that as procedures they can be examined under Judicial Review. But less clear, perhaps, is to what difference this particular change would make. I do not know if either of my colleagues have any thoughts on this.

Sir Christopher Kelly: I suspect that the effect of a statutory duty by itself would be largely symbolic, which does not mean to say that it is not an important piece of symbolism, but it would be largely symbolic. I think you need to look at the package as a package as a whole. If there was no legislative underpinning for this very crucial aspect of the codes and if the codes themselves were not even subject to affirmative order then I think one would begin to worry about whether the underpinning was strong as you would want it to be. So I think you would need to look at this as part of the overall checks and balances and not just in isolation.

Q400 Ian Lucas: Sir Richard, I just want to pick you up on one point you referred to. You said that there had been a shift away from taking advice from the Civil Service.

Sir Richard Mottram: Yes.

Q401 Ian Lucas: To whom?

Sir Richard Mottram: I think to a combination of special advisers and others. I certainly do not think that this is a trend that is wholly undesirable – I was not suggesting that, because as those of us who were civil servants have said on many, many occasions we do not claim in any way that the Civil Service should have a monopoly of advising ministers. So these are all balance questions. What I was saying was that over the last 30 to 40 years there has been a developing trend towards giving more weight to the role of special advisers and that has speeded up, and I think a question for the Committee is how far they wish that trend to continue or not to continue and what safeguards, if any, there are in the Bill as drafted that would prevent that trend actually, if the government so decided, speeding up.

Q402 Ian Lucas: By “others” do you mean think-tanks?

Sir Richard Mottram: Yes, think-tanks, consultants, all sorts of people. As I say, I am not arguing that that is undesirable.

Chairman: I am going to call on Lord Campbell now. He asked that we should circulate beforehand the note of Lord Butler, and I think you have had the opportunity to see that. Lord Campbell, perhaps you would be happy to ask your questions?

Q403 Lord Campbell of Alloway: I hope you have had an opportunity to look at the note?

Sir Richard Mottram: Yes.

Q404 Lord Campbell of Alloway: First of all – and nobody has dealt with this so far today – we have heard quite a lot about special advisers but nobody has dealt with the problem. Do

you agree with Lord Butler's view that a change in the status of political advisers should be so that they are no longer civil servants but are financed by the extension of "short" money through the government party; that this would have the additional effect of limiting their number. I will leave experts for the moment because you get into a tangle if you try to deal with those at the same time. Special political advisers, what are your views, sir?

Sir Richard Mottram: I think the point that Lord Butler is making – and I think he does differentiate himself really between special advisers and what we might call expert advisers, and I will come to them in a second – is that if, as I think most people would think, a civil servant is defined actually by the way in which he or she is recruited and by the values that he or she is expected to uphold, then special advisers do not look much like a civil servant. I think the reason why they have been treated as civil servants – although you would have to ask government witnesses this, and I am not a government witness, obviously – is because for all sorts of administrative reasons it is quite convenient to treat them as a category of civil servant, and that is to do with how they are paid and all the rules that govern their conduct. But I think what Lord Butler is saying is that at the very highest level of description special advisers do not look like civil servants and perhaps it would be helpful if we got away from the confusion of treating them as though they were. Coming on to expert advisers, under the Bill the Civil Service Commission could itself, if it felt it appropriate, actually give exemptions to expert advisers so that they could be recruited as civil servants on a temporary basis within the framework of the Bill and within the framework of the Civil Service Commission's rules. So going down Lord Butler's route would not mean that it was impossible for government to appoint expert advisers without a limit to do with special advisers. The third point, what Lord Butler is obviously seeking to do through this – and I am not here to speak for him, he is rather more grand than me – is to cap the number of special advisers, and obviously the Committee has no doubt been looking at that and other

Committees have looked at this – I know the Public Administration Select Committee has looked at this and argued probably against a cap. What I would say is I think that the merit of this is quite an elegant and interesting idea. It would probably create some bureaucratic difficulty. What I think the Committee has to ask itself is if it does not go down this sort of route, under the framework of the Bill as drafted there is in my view nothing which would prevent a future government – I am not suggesting either the present government or a future government has this in mind – virtually reversing the ratio of civil servants and special advisers and politicising every senior job in government. This is not prohibited under the Bill as drafted. I think that is my concern; this is one way of avoiding that. It is quite an elegant way of doing it; others think it is inappropriate to limit the number of special advisers.

Sir Christopher Foster: Perhaps I could just add one point to that because in the BGI we did discuss this, we had the benefit of knowing what Lord Butler was going to write to you, and in general we do support it. The particular mechanism, whether it is a financial ceiling or whatever ceiling, is much more arguable, but there should be some effective ceiling of that kind we thought was appropriate.

Sir Christopher Kelly: I do not have the advantage of having had a discussion with the Committee on Standards in Public Life on these issues as Better Government Initiative clearly has, so this would be a personal view. I think the Lord Butler proposal in effect is recognising reality; the question is are the bureaucratic implications of doing that a price worth paying to make concrete what everyone recognises to be the case? What is clear to me, which is a slightly different point, is that whereas the Governance of Britain paper said it wanted to make the position of special advisers and the relationship with civil servants permanent in the forthcoming legislation – I think are the words they used – actually the Bill does not seem to achieve that end.

Q405 Lord MacLennan of Rogart: This Committee has received varying advice about how Parliament might be involved in overseeing the operation of the Service, whether through approval of its codes or through scrutiny of ministers' powers and ministers' powers of the managing of the Civil Service. I wonder if we could hear from our witnesses this afternoon on that.

Sir Christopher Foster: Our view is very much that we see civil servants as being responsible to the government. We do see Parliament as having a role if the Select Committee wishes to scrutinise some particular area of government or its ministerial behaviour as perfectly reasonable. We also think that there is a strong case for a parliamentary resolution, in a sense requiring the government to set out its principles on this, as indeed on other matters, and that the government should then respond by in some sense stating its principles, its codes as being in response to such parliamentary resolution. Our idea here is twofold. On the one hand we do believe the time has come to have some greater sanction than perhaps the sanction provided by the government in some sense determining its own regulation in these matters, but we are extremely reluctant at this stage – and we probably hope forever – to contemplate a truly legalistic set of sanctions to ensure that these codes are operated effectively.

Sir Richard Mottram: Could I add to points? One is, I think there is a very interesting question of balance in how Parliament deals with the Civil Service if it is the wish of government and of Parliament that the Civil Service should be a politically impartial organisation because the thing that you absolutely want to avoid is so much discussion of the Civil Service in a partisan way that you undermine its political impartiality. At the same time obviously you have to ensure that it is being properly scrutinised and the way in that is done, it seems to me, is through the work of the Public Administration Select Committee and through the terms of competence in the work of the Public Accounts Committee and so on.

So I do not see a need for any fundamental shift in the constitutional relationships and I think it is very important in our constitution that civil servants, as Christopher said, are seen to account to Parliament through ministers and that Parliament holds ministers to account for the way in which the civil servant is being organised and managed, but Parliament does not get into the detail to the point of itself beginning to erode political impartiality. I think that is quite a nice little balance that has to be struck.

Sir Christopher Foster: And we do actually say we think that Parliament should approve the codes and also the amendments to the codes as part of the process.

Sir Christopher Kelly: I very much endorse what has just been said. When my committee looked these issues as long ago as 2003 they actually recommended that both the Civil Service code and the special adviser code should be subject to affirmative order and I do not think we really understand the difficulties in doing that.

Q406 Lord MacLennan of Rogart: Slightly unrelated but a cognate supplementary, you mentioned that civil servants should be accountable to Parliament through ministers but that slightly underlies a difficult problem that may arise if civil servants see a catch between the public interest or their duty to the public and their duty perhaps to the honesty and truth if they withhold, for example, purely factual information. Do you think that the legislation we are contemplating ought to recognise that the obligation of civil servants may be wider than the direct accountability through ministers?

Sir Richard Mottram: I do not actually because I think that if you get into that sort of argument you get into quite a slippery slope. I think the duties of civil servants are quite clear and in the version of the code that the government published recently I think they are well set out – I was slightly involved in that so perhaps I should not talk about what a marvellous document is – and I think it is a clear document. For example, a minister cannot ask a civil servant to do something that is illegal or unethical and expect them to do it. And there are all

sorts of built-in safeguards in the system to prevent civil servants being expected to do these things. But I do not think it is for civil servants to define a sense of what is the public interest and then to argue, “As my view of the public interest is this and my minister’s view of the public interest is that, it is perfectly okay if I pursue my view and I leak to a newspaper or I go out and make a speech”, or whatever. This is not a basis for good government; the basis for good government is to define obligations on ministers, obligations on civil servants, to operate obviously within the framework of the law and have clear accountability.

Q407 Lord Armstrong of Ilminster: The Bill gives us no formal definition of the Civil Service, it just says that Part 4 of the Draft Bill applies to the Civil Service of the state excluding those parts listed in clause 25(2) and that includes the security services, including GCHQ. Do you think we could improve on the definitions of the Civil Service for the purpose of this Bill? That is the first question. The second, even if the Bill goes forward as it is, should there be any protection for the staff of the excluded agencies, the security agencies and GCHQ, to have access to the Civil Service Commissioners for complaints? Or should they be subject to the same sort of requirements for recruitment through fair and open competition as the Civil Service without them?

Sir Christopher Foster: On the first point we have made the argument, following Robin Butler, that indeed the special adviser should be excluded from the Civil Service; we think that is a practical and sensible point. I have to say that we passed on the point of the definition of the Civil Service; we know that there are innumerable competing possibilities that various bodies have brought to our attention, but we are not at all clear that any one of them is ideal or indeed necessary. But perhaps on the second point I will turn to Richard.

Sir Richard Mottram: I would just say in relation to the Intelligence Agencies, having had some responsibility for them until quite recently, I quite understand the logic which has led the government to say that the three agencies should be treated similarly. Then I think you

get into an interesting, rather more detailed set of issues about which parts of the Bill as they apply generally to civil servants might be expected to apply to all three Intelligence Agencies, if you treated them as three? I think the answer to that is there is no reason why an obligation on the agencies as in the case of the Civil Service to recruit and, in my view promote – because I think that should also be part of this Bill – on merit, that would raise no difficulty whatsoever for the intelligence agencies because that is what they do now, but it is just not enshrined in any legislation. If you then said that you should apply the Civil Service code to the agencies, I think without getting into the detail of that when you read the Civil Service code and you think of some of the things the agencies do, which are governed by separate law actually, then that might not be a perfect mix. Then I think the agencies, to my knowledge, are quite happy to involve, for instance, the first Civil Service Commissioner in some of their senior appointments and some of her colleagues. What I think they would be very reluctant to do, for good reason, is to accept legislation which placed a duty on them really to open up all of their personnel and their personnel files and all their practices to the scrutiny of the Civil Service Commission, as a home department would, for instance. And I think that would be undesirable. So I can see why the government does not want to apply all of the provisions of this Act to the agencies; I can see why they want to treat GCHQ like its sister agencies or its brother agencies. The bit that could be dealt with, if you wanted to, would be recruitment and promotion on merit.

Q408 Lord Armstrong of Ilminster: As a rider to this, is it still the case that both in GCHQ and in the intelligence and security agencies there are existing processes for dealing with complaints, which give members of the service the right to take complaints to an independent body?

Sir Richard Mottram: Exactly so, and I should have said that, Lord Armstrong. So precisely because they are not covered by some of these provisions alternative arrangements have been

put in place which do include an individual that they can all take their complaints to, and that individual who they take their complaints to has access to the directors of each of the agencies and there is visibility and transparency in that process which also involves other people. So in my previous job, for instance, I saw the reports of that person and they were taking the temperature of what life was like inside the agencies.

Sir Christopher Kelly: Can I just add to that? I start from a slightly different position than Richard and Christopher, but I think I end up in the same position. I think on principle things like appointment on merit and competition through merit should apply to the security agencies, among others, and the presumption is that is where you start and then you have to justify the exceptions from that.

Sir Richard Mottram: I entirely agree with that.

Sir Christopher Kelly: Although I am not an expert on the definition either I would have thought that one advantage of the definition, taking the general definition of the Civil Service, is that actually what it does is it puts more focus on the exceptions, and so you can identify where the exceptions are. If, on the other hand, putting into statute some of these issues for the Civil Service is the right thing to do, then I would have thought the argument was that there ought to be some way of finding the equivalent arrangements in the security services, should also have the same level of support.

Q409 Lord Armstrong of Ilminster: When it comes to recruitment and promotion by merit, Sir Richard said that that happens already in the agencies – and I am sure that is the case – would you wish that to be subject to the scrutiny of the Civil Service Commission or would you feel that for the same sorts of reasons that were being mentioned that the agencies should be given the duty of recruiting and promoting on merit but should not be expected to be accountable outside?

Sir Christopher Kelly: Speaking personally, I am perfectly happy to accept the argument that there are peculiar circumstances, which Richard has outlined, but that does depend on the assumption that an equivalent arrangement is in place, as we are assured it is.

Q410 Lord Norton: Coming back to the Civil Service Commission, whether it should have the power itself to initiate enquiries of its own. I think we may get different views of the evidence we have received on this, as we have from other witnesses. Is there a case for allowing that? What would be the implications in terms of resources and what are the wider implications of actually empowering them to do that?

Sir Richard Mottram: Personally I think this is a very interesting subject because of course the first Civil Service Commissioner, in evidence I have seen that she gave, for example, to the Public Administration Select Committee, herself seems to be quite cautious about this. I am a bit reluctant to second-guess her view. My own view is that the Civil Service Commission should have the power to initiate enquiries but this should be framed in a way – and again the Public Administration Select Committee I think have made some interesting points about this – which, as far as possible, deals with the First Civil Service Commissioner's concern that she does not want to be inundated with frivolous things she has to deal with and diverted from her fundamental task, which I understand. But my view is that they should have this power. If you then asked the question what might be an argument against it, I cannot really think of a good argument against giving a regulator such a power, and all experience suggests that the Civil Service Commissioners would exercise this responsibly. It might have resource implications but it is not a great consumer of resources and I do not myself regard that as an appropriate or decisive consideration.

Sir Christopher Foster: I think we also added on this the importance of the Commission being allowed to undertake inquiries, not necessarily on the basis of complaint, because we see that kind of function as being tremendously important.

Sir Christopher Kelly: My committee made a recommendation that they should have this power in 2003. At the time the Civil Service Commissioner supported that. She has now changed her mind.

Sir Richard Mottram: A different Commissioner.

Sir Christopher Kelly: She has now changed the mind of the Commission, thank you! We have not discussed this in my Committee in any detail but personally I find it a little difficult to understand why, if you are a regulator, you would not want to have this power.

Q411 Lord Norton: Just to reinforce the point that Sir Richard made, it is not necessarily in response to complaints, actually it is a power to look at issues more widely on their own initiative that you think is actually important?

Sir Richard Mottram: Yes. I think this is a good point that Christopher made. To give an illustration of this, the present Commissioners under the present First Civil Service Commissioner have taken a much more forward position in relation to the Civil Service code, both on the importance of it being drafted in a way in which civil servants could understand it, which may sound a crazy thing but actually was rather important, and so it got redrafted. And then pressing departments to show that they were properly incorporating the code into their work and in the way in which they dealt with their employees, and that is quite a proactive thing, and it is precisely that sort of thing – which is the core purposes of the Bill – where I think it is appropriate for them to have that power to initiate and to take action. Certainly in that case, far from it being difficult or awkward for the government, the government – and I was involved in this myself – then cooperated with the Commission as we thought it was an extremely positive exercise for the Civil Service and the contribution they made was valuable both to the management of the Service and to its regulation.

Sir Christopher Foster: We also added that we think the Commissioner should, if they want, initiate surveys amongst civil servants. It also goes beyond the investigation of complaints.

Q412 Sir George Young: We talked about special advisers and, Sir Richard, you made it clear that there was nothing at the moment to stop a future administration just appointing huge numbers of special advisers, and you made it clear you thought that would be a bad thing. But could you just look at the functions? The Committee on Standards in Public Life basically said that control over functions was more important than control over numbers. What are the controls on the functions of a special adviser that you would like to see incorporated in the draft Bill?

Sir Richard Mottram: What I think is interesting about this is that the government's 2004 draft actually specified things which special advisers could not do, and you might expect that that would remain. These were quite important things that they could not do – they could not authorise the expenditure of public funds; they could not exercise any power given under an Act; they could not exercise any function relating to the appraisal, award or disciplining of civil servants, and so on. There is in the special adviser's code a provision now that says that they cannot let contracts. Presumably – although I do not know because I was not involved in the preparation of the new draft of the Bill – the government has left all this out for reasons of flexibility, but I think that the effect of leaving it out is actually as I said at the beginning, to leave open the possibility, hypothetically, that under this Bill the powers of the Civil Service could largely be exercised by civil servants with a designation of special adviser. People may think this is absurd but that is what the Bill would permit. Therefore, I think there is a strong argument for putting on the face of the Bill those things which special advisers cannot do as well as a definition of what they can do, which is to assist ministers, and I think the “assist” word follows on from the Public Administration Select Committee, and there is a history to that. But I cannot see why things they cannot do are not on the face of the Bill, and I think that is also the view of the Public Administration Select Committee.

Sir Christopher Kelly: And at the moment the steering Committee on Standards in Public Life, the 2003 Report was quite specific about the things that we thought should be not allowed. Special advisers should not be involved in the appraisal, reward, discipline or promotion of civil servants authorising public expenditure, exercising management functions – all the things you would expect to see there, most of which were in the 2004 draft of the Bill and have now disappeared. I think the key point is the one made in the Governance of Britain paper itself – the point I made earlier – where it says that what we want to do is to make permanent the arrangements for special advisers in the forthcoming legislation and this Bill does not actually achieve that.

Sir George Young: That sounds like a question for the minister, Chairman.

Q413 Chairman: I am grateful to you for helping us prepare our list for the minister, thank you!

Sir Richard Mottram: It will make one of us in particular very popular, Chairman!

Chairman: Can I thank you very much, and can I also thank colleagues who managed to change their arrangements so as to maintain a quorum so we were able to complete our questions. I do have to tell you – because I always forget at the beginning – that you should note that Members have declared interests relevant to the inquiry and these are available on the website. Beyond that, can I thank you very much for coming along to help us, and indeed for your written papers?