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HOUSE OF LORDS

HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

TUESDAY 17 JUNE 2008

MR TONY MCNULTY MP

MS JANET PARASKEVA and SIR GUS O'DONNELL

Evidence heard in Public Questions 489 - 580

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Oral Evidence

Taken before the Joint Committee on Draft Constitutional Renewal Bill

on Tuesday 17 June 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L	Mark Lazarowicz
Campbell of Alloway, L	Martin Linton
Gibson of Market Rasen, B	Emily Thornberry
Maclennan of Rogart, L	Mr Andrew Tyrie
Morgan, L	Sir George Young
Norton of Louth, L	
Plant of Highfield, L	
Tyler, L	
Williamson of Horton, L	

Witness: **Mr Tony McNulty,** a Member of Parliament, Minister of State, Home Office, gave evidence.

Q489 Chairman: Good afternoon and thank you for coming along. We, as a joint committee, are looking at a whole range of the constitutional renewal issues, but within those is the question of protests and the operation of SOCPA and the extent that some changes may or may not be needed. We are grateful in particular in your role in the Home Office for coming along to advise us on that. Can I first ask you what you consider the main problems with sections 132 to 138 of the Serious Organised Crime and Police Act 2005 may have been? Were any of them foreseeable?

Mr McNulty: I think we are where we are now because of a range of other things above and beyond the legislation; principally**,** as I think everyone here will know, the security provision now outside the House, the Parliamentary estate, and I think that connected with a kind of growing concern, summoning a version on mythology that SOCPA was all about banning entirely any demonstrations remotely close to the House of Commons. The combination of

those two principally, which I do not think were foreseen – I think SOCPA has broadly worked in its own terms very well – but we do feel and the Constitutional Renewal Bill was a chance to revisit this and consult in the end with the House authorities and then see what the appropriate way forward would be. I do not think it was a case of, as some would have it, SOCPA being some huge sledgehammer to crack a very small nut and now we have changed our mind or there is a massive government u-turn. I do not think things in those terms are appropriate at all. I think time has moved on and it is right and appropriate that we reflect on both the legislation and other circumstances, including the security provision now around the building and that is why we are here now. I do not like the notion of the mythology and I think the Government, as all these papers have made clear, do start very strongly from the presumption of freedom of expression in Parliament Square as well as everywhere else.

Q490 Lord Norton of Louth: The 2005 Act was brought in to deal with what were perceived as problems and inadequacies in the existing situation. As the 2005 provisions go, presumably those problems will still be there, so to what extent will the police lack the powers to deal with those problems? The Home Office provided this very helpful memorandum on policing protests framework and there is clearly a lot of legislative provision *extant* that would deal apparently with most of the problems, so where would you say the gap remains?

Mr McNulty: I am not sure there is a gap that remains save for the concerns that we do quite properly need to raise with the House authorities around noise and access to the House. *In extremis* in terms of a broad security threat the counter-terrorism legislation will suffice. As the memorandum tries to make clear, we think now that there has been this huge improvement, as everyone will know, in terms of the security paraphernalia around both Houses, that in that context all that is outlined in the memorandum around public order and everything else do prevail and we are on strong territory in terms of the legislative powers.

Q491 Lord Norton of Louth: The gaps that are remaining from your point of view are relatively narrow gaps in legislative terms.

Mr McNulty: I would say so but it is very important that in partly handing over the responsibilities encapsulated in SOCPA to the House authorities to review and partly through starting from a very strong premise, I think both the legislative powers and the security paraphernalia will work in future and with a third assumption in favour of rather than against freedom of expression and protest in the Square I think things will be pretty much covered, save for those two small points about noise and access that it is quite proper to raise directly with the House authorities.

Q492 Chairman: Were the Procedure Committee wrong then in suggesting that there were gaps that needed to be filled by new legislation?

Mr McNulty: No, I would not say entirely wrong because I have yet to take the view from the House authorities about whether they think there is still something lacking in terms of legislation around particularly those two issues of noise and access. I have my own personal view on that. I think it is probably premature to say they are entirely wrong in terms of something lacking, but quite properly we need to consult with them as part of this process having determined which way forward the Government wants to go.

Q493 Chairman: Have you had the chance of seeing the evidence yet that was given to us by the House authorities just recently?

Mr McNulty: I have had a summary of them but I have not read them in absolute detail. We obviously can, and we will, because the last element for us is quite properly to talk to the House authorities about what outstanding concerns they have.

Q494 Chairman: If we were able to provide you with the transcript as soon as possible you would be happy to provide a written response to that?

Mr McNulty: Absolutely.

Q495 Lord Armstrong of Ilminster: I had the impression that the police thought that the Public Order Act 1986 gave them the powers they needed to police marches but did not give them the powers they need to police static demonstrations. The first paragraph of the Home Office memorandum seems to take a different view of that.

Mr McNulty: I am not sure that that is entirely right. I think they think there are potentially more problems with static demos rather than marches, but I thought that revolved more around the power of arrest when the individual was known. Correct me if I am wrong, but I think that almost goes in part to the notion that you cannot continually arrest an individual having clearly established who that individual is save, for example, because he has been on a static demonstration for some time and that quite properly you can only arrest that individual on evidence or suspicion of an offence, whereas in the normal context in terms of demonstrations and processions, if you have a suspicion that someone may commit an offence, you can quite properly arrest them to ascertain name, address and other details. I thought their difficulty revolved around that rather than more generally.

Q496 Lord Williamson of Horton: In this Committee we start from the position that the Government has simply proposed to repeal sections 132 to 138 and when I read that I was very pleased myself but that is *en passant*. Can I follow up two points: the first one is what about maintaining uninterrupted access for Members of Parliament to get into Parliament? It might be possible to get in but if it is very difficult for them to get in and in the mean time we have had to vote on something or something difficult has happened, that is a rather tricky point. My second point is that the Serjeant at Arms has proposed to us that there should be a

ban on protests on the whole of the strip of pavement outside the main entrance to Parliament. I do not know if you would like to comment on that? That was a rather drastic solution I think but if you would like to comment on it?

Mr McNulty: On the second point, if I may, we start from the premise of free expression of protest outside the immediate environs of the estate, so I am not sure that I would be at one with the Serjeant at Arms on that second point. On the first point, the last piece of the equation for us is that we do need to quite properly talk to the House and the House authorities about their view on quite what *uninterrupted* access means. I have only been here about ten or 11 years and I think even with the new paraphernalia in place we could still be afforded proper and full access. I know at the Lords' end there is provision to get in. Under normal circumstances you do not go in and out that way but that is certainly the way I used during one or two of the rather larger demonstrations that were taking place. I am sure the Countryside Alliance people are wonderful people but I just did not feel like walking through them to try and make my way in, so it is quite proper that we do have that engagement with the House authorities to see if we can establish, no doubt with the Metropolitan Police, what access there should be for particularly large demonstrations. I would say that they are relatively so few and far between that we do need to start from the premise of there being that clear right to demonstrate.

Q497 Chairman: Do you think that the police have sufficient powers in their right to arrest for obstruction to ensure unimpeded access? Do you think that is a sufficient sanction or do you think more is required?

Mr McNulty: I think there is an argument that I know the Metropolitan Police have put forward that some of that does rely on really rather antiquated legislation – back to the 1830s in one case – and I would be very happy in the broader sense, not specific to either the policing of demonstrations or in terms of Parliament Square, to look at that in further detail

with the police to perhaps update all that. In the broad sweep of things I think the answer is yes.

Q498 Lord Tyler: In your very helpful memorandum you differentiate between the Metropolitan Police Act 1839 and the Sessional Orders, but from what you were saying just now should we take it that you think access for parliamentarians is of critical importance and therefore that we should be differentiating between when either or both Houses are sitting, or whether, for example, there should be a different regime applying during the long recess, or for a march on a Saturday? Access, as you have emphasised, is something that we all take very seriously and you obviously do too.

Mr McNulty: Access is important in both circumstances. Clearly there are others who will want to access the House during periods of recess, either to visit, or in many cases to carry on with their business. You will know that the Select Committee sit in September, et cetera, so recesses do vary, but I think the House authorities main concern will be around the uninterrupted access for Members and people employed gainfully to work here during times that the House is sitting. My comments were directed at both. I think there has been a mythology around Sessional Orders in the sense that they are struck and signed and this means that, come hell or high water, the Commissioner of the Metropolis must make sure there is unfettered access. The reality is not quite like that, either in legal terms or more generally, but I do think that the broad point about uninterrupted access, yes, matters in terms of recess, but clearly matters more in terms of when the House is sitting, but I would still start from the premise of trying to come up with a regime that did not differentiate the two because that goes to the broader point of differentiating this place from all other places in the context of policing protests. I do not think that is a way we want to go.

Q499 Lord Tyler: As paragraph 10 in your memorandum makes clear, Sessional Orders are actually very limited, are they not?

Mr McNulty: Absolutely.

Q500 Lord Tyler: There is also a hiatus of course when they have not actually been passed so we should not be falling back on them as a reliable set of regulations.

Mr McNulty: That is absolutely right. What we do get to in terms of the broader regulatory architecture rather than legislative between the House authorities and the police is important and that is why we need to consult them, but it partly goes back to what I was saying about mythology: the notion that we can rely upon Sessional Orders to clear up all the difficulties around unrestricted access is precisely that – mythology.

Q501 Chairman: Should we drop Sessional Orders altogether then?

Mr McNulty: No. I think the relationship between the House authorities and the metropolis does set out a reasonable framework but, as Lord Tyler has said, I think it quite instructive that they have not been utilised by the Commons for some time. What I was trying to say was if there is either a different form of Sessional Order, or some other regulatory architecture that can prevail between the House authorities and the Metropolitan Police to achieve the same goal, then I am quite relaxed about that. Whether that involves dropping them or not, I do not know until that discussion has been had.

Q502 Emily Thornberry: If the provisions of the 2005 Act are abolished there has been some concern raised that the police and other authorities would not have sufficient powers to prevent noise disturbance, particularly the use of loudspeakers. Do you think that they would be left with sufficient powers, or do you think it does not matter?

Mr McNulty: This is not meant to be facetious but I was going to say their powers would be sufficient as they are now, notwithstanding SOCPA; i.e. not terribly strong anyway, but there are regulatory frameworks and legislation and some bylaws that could indeed prevail around the issue of noise disturbance. Equally that is a reason why I highlight noise as well as access as the two areas that we do need to talk to the House authorities about in some more detail. I do not think it is any better or worse with the removal of SOCPA and I do not think even if it was that noise disturbance should be the reason why we do not start from the presumption that there should be as free and unfettered right to protest and demonstrate in the Square as possible.

Q503 Emily Thornberry: Section 134 gives the police a general power to impose conditions on the maximum permissible noise levels to prevent hindrance to the proper operation of Parliament, although I think it has been confirmed that the police do not tend to use it.

Mr McNulty: No. Equally I would underline the question in part is not simply noise disturbance level the larger the crowd; there can be noise disturbances when the crowd is very small, as we have seen.

Q504 Emily Thornberry: One of the things that we have been particularly exercised about is the lone protestors with loudspeakers for long amounts of time. What is your view about whether or not there should be some powers in place to allow there to be some control over that?

Mr McNulty: That is why I have set aside noise as well as access to discuss further with the House authorities in the first instance. On a purely personal view, which is deeply courageous of any Government minister, I would say it is an irritant but no more than that, and certainly

has not impeded in any way shape or form my ability to do what I do in my little way inside the estate, but it is a pain.

Q505 Chairman: Did the Government have discussions with House authorities before bringing in the 2005 Act?

Mr McNulty: I notified the Speaker's Office that this was the route that we were seeking to go and would value at some stage wider discussion around areas, particularly like noise and access, with the Speaker and, through him, the House authorities before we came to any long term conclusion around some of the issues we have been discussing, but that the principle of repealing these particular sections of SOCPA relating to Parliament Square was something that the Speaker's Office, and I think the wider House authorities, welcomed.

Q506 Chairman: I was wondering if there were those discussions before we legislated for SOCPA?

Mr McNulty: No, because I think we were very clear that the House authorities' views were not going to impact on whether we should repeal SOCPA or otherwise, but clearly, as I have said, there was a role for the House authorities, particularly around noise and access, when looking at what will prevail if SOCPA does not.

Q507 Lord Campbell of Alloway: What are your views? Could you give us any information about whether you are going to remove all the placards, the erection of tents and one thing and another in Parliament Square on environmental grounds? People come to this country and see this muck lying around all over the place. Is anyone thinking about it, is anyone doing anything about it and is there any prospect that anything shall ever be done about it?

Mr McNulty: Plenty of people are thinking about it or have thought about it. I would say given where we have got to, and where particularly Westminster City Council has got to, it is their little strip of highway, as you will know, then the prospects of doing much about it are very limited and I would not want to give anyone the impression that repealing SOCPA and those proposals that are before us is going to do anything about that particular display because I do not think it will.

Q508 Lord Campbell of Alloway: How do we do something about it? How do we get onto this? Whose responsibility is it?

Mr McNulty: As I understand it, that strip of highway is Westminster City Council's. Westminster City Council have tried variously through planning laws, unauthorised advertising hoardings and other such attempts to get much of the display taken down but without success. The difficulty in the broader sense under the law is that whilst it might be public highway, given the current configuration of Parliament Square you could not honestly say that it is an imposition on people's right to walk the public highway unfettered, given that nobody walks on that particular strip. I suspect – it is again only a personal view – that if the Mayor and the Greater London Authority move forward with their plans for a World Square and pedestrianise much of what is immediately in front of Parliament between where the display is and block off that bit of the road, and the equivalent bit on the other side in front of what I think we now have to call the Supreme Court, then the traffic configuration there and the broadening up of that particular stretch of highway may mean that things can be done to that display that cannot be done at the moment whilst the Square is configured in the particular way that it is. I am sorry not to offer much hope in that regard but I do stress that nothing that we are proposing here in terms of SOCPA and discussions with the House authorities will do anything at all to that particular display.

Q509 Mark Lazarowicz: On the issue of noise, like yourself I tend to regard the noise as an irritant and that is all, but on the other hand I have an office which has a window over an internal courtyard, whereas colleagues who have offices at the front clearly take a different view as to the effect of the disturbance. Is it not right to think of having some coherent framework of regulation to cover the control of noise in this location because otherwise we are going to keep coming back to this every couple of years with people just not being able to cope with the level of noise? Is it not better to have a clear framework which tries to control the level of noise while at the same time trying to minimise the impact and the right to protest?

Mr McNulty: It may well be but I think that is more properly done between us, the Metropolitan Police and the House authorities to see, quite rightly, what that coherent framework should be. It might depend more readily on local bylaws. It might well be – who knows – something for a broader and perhaps more efficacious set of Sessional Orders or it might be something in between. What I do not think it is is something that is absolutely germane to a national legislative framework that treats this place, however sensitive, as much like any other place as possible in the context of protests and demonstration. I do not disagree but that is what the discussion with the House authorities in the first instance will be about along with the point about access.

Q510 Lord Morgan: We have dealt with more permanent protests and we have heard calls from the Clerk of the House and the Serjeant at Arms for a ban on permanent protests. On the one hand what would you think about the human rights aspect of that? On the other hand, what do you feel about the point that long term protest, which make protest a way of life, prevents other people from protesting?

Mr McNulty: It is a novel manifestation, that is very clear, and I think we would start from the presumption of not trying to impede protest in the Square at all and whether the authorities

at large, like it or not, there is almost, to use the planning lexicon, an established use there; i.e. the particular individual has been there for some time. Until we do get some sort of reconfiguration of the public highway and the traffic around the Square, we are stuck with that particular instance. I would not like to go down the notion of other suggestions too where perhaps a little bit of the Square can be put aside for static and more long term demonstrations or that they can be controlled in other fashions. I do not say it lightly but we do start from the premise that free and unfettered access for demonstration and protest should be the norm.

Q511 Lord Morgan: Would residence and the fact that people would be sleeping overnight there and so on in the long term, would that give ---

Mr McNulty: I think that is problematic and as and when things in the Square move in terms of its current configuration, I think that should be looked at. Part of the difficulties as I understand it is that because it is such a narrow strip there, because it is public highway and Westminster City Council's rather than the rest of the Square which is the Greater London Authority's, that is part of the difficulty. I would not support an outright ban and I do not think much is going to change unless the configuration of the whole Square is going to change, but we do need to seriously reflect not just there, but elsewhere, on the conflict between a static and permanent demonstration and this weekend's demo of whatever description. I think you will have heard that the individual concerned got on terribly well apparently with the Countryside Alliance and that all went tickety-boo, but that is not always going to necessarily be the case. Whatever form the static is may well conflict with whatever the wider demonstration is and we do have to balance all these competing rights and responsibilities that go with them.

Q512 Chairman: I was a little concerned about your reference to reliance on bylaws. What if bylaws did impose complete bans that may even be non-compliant with human rights? How would the Government respond to that?

Mr McNulty: As I understand it, I do not think they would be lawful if they were going for outright bans that contradicted the broader national legal framework. My point about bylaws was simply they can and have been used more generally in the planning world for things like noise abatement and the reduction of noise where noise is a nuisance; so just in that narrow element in terms of how to deal with noise around a loudspeaker, for example, rather than the noise of considerable thousands in the Square. It was just in that very narrow focus. I am not saying that we are going to rely on the wonder of City of Westminster bylaws for the policing of protests in Parliament Square.

Q513 Chairman: You are aware that Westminster Council, the Mayor's Office and indeed the police are in close co-operation; in fact they appeared here together. Does that extend to consultation with government and indeed House authorities so far as you are aware? Do you have a relationship with them that allows these things to be looked at in the round?

Mr McNulty: I think we do have that broad relationship. Had we had those discussions specifically on Parliament Square, no, I do not think so, or I certainly have not, but I am sure officials did.

Q514 Lord Tyler: I think many of us share your basic premise and welcome it but I wonder whether you therefore would be sympathetic to the view that has been put to us in evidence that when the Square is re-planned to make it more accessible for pedestrians, that might be a moment to make it even more evident that this is the right place for people to demonstrate their democratic right to support as well as to oppose what may be happening in their Parliament and therefore we should be looking towards something that would in a sense give

self-discipline to the Square by relocating Speaker's Corner in the Square. Do you think that would be a good way to be looking at this situation?

Mr McNulty: I think it may well be. The starting premise that if there is to be the development of the Square into pedestrianised zones and part of this World Square type concept that the last Mayor had, and which I do not think the new one has resiled from and hopefully endorses, that should be an opportunity to do both what you have suggested, which I would broadly endorse, and try with all the assorted authorities to deal with issues around noise, access and all the other elements all at once and maybe even static demonstrations I think would be a splendid idea.

Q515 Lord Tyler: Is it your view that if everybody had a right to express a view in Parliament Square on an equal basis this would put in context the one and only lone permanent protest which would then be rather diluted?

Mr McNulty: I am not sure that that is my view. I am not sure I would want 15 static long term demonstrations in the Square newly transformed as a World Square with pedestrianised areas or otherwise, but I do think the essential premise that this is quite appropriately a place that people come to air views to MPs and peers of the realm is absolutely right. Most people would accept that starting premise and accept that that should happen within the context of the law, quite properly, and your point that all these matters should be explored if we are transforming it into a World Square, including I would say noise access and other elements, is absolutely right.

Q516 Lord Norton of Louth: I am merely coming back to an issue I think you may feel that you have already answered. Certainly when we had the Serjeant at Arms and Black Rod before us they took the view that, from the point of view of a security risk, the existing legislation was not sufficient, but the independent reviewer of terrorism legislation,

Lord Carlile, takes the view that now with the anti-terrorism legislation in place it is sufficient. I take it from what you were saying in opening that you would side with Lord Carlile that the legislation is adequate?

Mr McNulty: I would absolutely, alongside the other significant change since 2005 which is the assorted security paraphernalia around the estate, I think that is right. That, of course, in terms of the paraphernalia and how secure the site is is always kept under review, but I think I would absolutely side with Lord Carlile on that and think things are appropriate. As I have said, in terms of broader security issues as and when there are demonstrations and protest, I think ultimately in terms of impact and effects on security then much of that security and counter-terrorism legislation can, if need be, be brought to bear.

Q517 Baroness Gibson of Market Rasen: Can we look at the public safety risk because, if SOCPA is repealed, the police will lose their powers to impose conditions on a protest on the grounds of the public safety risk. What do you think the implications would be and do you think there are other powers that we can rely upon to address public safety at the moment?

Mr McNulty: I think they can, when a demonstration or protest is happening, have due right under the law to constantly review that public safety risk, but if we start from the premise, as many of the consultees said, that the very notion that, under SOCPA, you have to ask in advance for the right to demonstrate is probably anti-democratic and runs against the vein of spontaneous protest. Even in that context I think there is still sufficient provision for protecting the broader public safety realm under public order and various other elements of the legislation. Even on the day of an event, it is still incumbent on the police to bear in mind broader public safety concerns and risks in terms of too many people in too small an area and various other aspects, the broader public safety and welfare of the wider public on an ongoing basis as they are policing a demonstration or protest and those core powers do not diminish or go because of the repeal of sections 132 to 138 of SOCPA. It is still a very strong duty.

Q518 Baroness Gibson of Market Rasen: You would agree with Liberty and Baroness Mallalieu, who actually maintain just what you have said, that in fact even if SOCPA is repealed there are already in existence the laws for the police to be able to act.

Mr McNulty: Yes, I would broadly.

Q519 Chairman: What core powers are you talking about when you say there are sufficient in place? You mentioned obstruction simply for access and so on, but what other powers do you think?

Mr McNulty: I think broadly many of those outlined in the memorandum. Even under the public order legislation there is broad provision to maintain the wider public safety and risk to the public and that is germane to the very core of policing a protest and demonstration wherever it happens and that public safety and public risk that I mention is as important to arresting or picking someone up on public order offences as the fact that they may well be able to commit some subsequent offence. That is absolutely central to policing in the broadest sense.

Q520 Chairman: Is that not rather suggesting that one could repeal SOCPA and put nothing in its place because it is all there already?

Mr McNulty: The only narrow difference, as I think I said right at the start, is what the House authorities feel they need above and beyond a situation without SOCPA for uninterrupted access, noise and other elements. I am saying that we have come to the view with the assorted security paraphernalia, the security police and everything else that now prevails on the estate where SOCPA is no longer necessary. We can work from a presumption of freedom to protest and demonstrate in the Square within the wider legal framework. I am saying that but only save for those two narrow dimensions that it is right and proper that the House authorities are brought in to discuss further.

Q521 Lord Armstrong of Ilminster: Would you like to see a compulsory prior notification scheme to allow protests to be managed in an effective way?

Mr McNulty: Broadly it will be in the interests of both the police and the other party, if there were prior notification, but I do not think we start from the premise of it having to be, as with SOCPA, compulsory.

Q522 Lord Armstrong of Ilminster: Would you apply that only to groups over a certain size or would you make that a general requirement?

Mr McNulty: I think general and one would hope that the larger a demonstration the more rather than less goodwill would prevail and things will be done by prior arrangement and notification, which notwithstanding demonstrations around Parliament is, as I understand it, what does prevail more or less in non SOCPA areas, if I can use it that way.

Q523 Chairman: It was put by some of the protester witnesses that we had that it was a good idea to give notice but a principal objection to doing so as a matter of law. Would you see room for legislation which gave different rights to those that gave notice as opposed to those that refused to do so?

Mr McNulty: No, I do not think so. I think the distinction should be between those who would duly act and behave within the confines of the law and those who do not. I think that is the important distinction and that the framework within which people have the right to protest or demonstrate outside this very building should, as much as possible, notwithstanding what I said about discussing noise and access with the House authorities, be as much the same as people's rights to demonstrate or protest outside any other building. Those are the two things that govern us, I think.

Q524 Chairman: Are you aware of any problems before SOCPA by the non-giving of notice? I appreciate that in most cases notice is given as a matter of common-sense, but where it did not happen are you aware of any examples where there were problems when notice was not given?

Mr McNulty: Not off the top of my head. I am trying to think now whether when someone gave Winston Churchill a grass Mohican I am sure that pre-dated SOCPA but was at a weekend so it was not as troublesome or problematic as it may have been had the House been sitting with all the incumbent traffic and everything else, but that sort of demo as far as I know, both if I may say from an MP observing and further back in the midst of time as a participant, I have not noticed any major difficulties of that order pre SOCPA that go to the point about notification because, in the main, certainly when I was doing it we were all terribly well behaved and there was due notice given and everything else as part of the process because that is clearly in the demonstration organisers' interests as much as otherwise. I do not think the notion of spontaneous guerrilla *"we're never going to tell you when we're going to come but we're coming"* type demos around the Square have been that much of a problem in the past, although notwithstanding what I said about Winston Churchill with the Mohican.

Q525 Sir George Young: Can we go back to the answer which you gave to Emily Thornberry when she asked you about noise. I wrote down what you said about the powers and I think you said these are not terribly strong anyway. This confirms what we heard from the police, that if somebody repeatedly makes a lot of noise that does not score under the conditions under PACE for actually taking any powers. Do I take it from what you said earlier that you would support more powers for the police; for example, to confiscate a loudspeaker if they repeatedly went on making an excessively loud noise?

Mr McNulty: Where it is absolutely repetitive and a positive nuisance, then I think there is something worth looking at. We are fairly close to the end of our PACE review but that is certainly something I shall take back. My broader point about planning, bylaws and the noise reduction side of things is that I think there might be potentially more mileage in that side of the law rather than through PACE, but I do take the point and will take that away and look at it.

Q526 Sir George Young: This will apply everywhere, not just outside the House of Commons.

Mr McNulty: Surely, yes.

Q527 Lord Norton of Louth: Surely a follow up to that on the base of your own memorandum because part of the problem on the base of the memorandum appears to be the Noise and Statutory Nuisance Act because it actually exempts, as I understand it from the memorandum, political demonstrations. One way might simply be to remove that from that Act.

Mr McNulty: Yes, or indeed I would certainly look at the notion of maybe utilising PACE, but in the broader sense of everywhere, not specific to the gentility of Members of these Houses and the noise outside it.

Q528 Chairman: Thank you very much for helping us this afternoon. I have one final question. Whilst this area has been covered by the Constitutional Renewal Bill, do you have a view as to whether it should be contained within the other areas that Constitutional Renewal deals with, or should it be part of a Criminal Justice Bill when the next one comes along?

Mr McNulty: We are trying not to make the next one come along with the same rapidity as perhaps in the past. Given the importance of protest, given the symbolism and I would say

potentially at least mythology of the impact of SOCPA and demonstrations outside this House, for now at least it properly belongs in the Constitutional Renewal Bill. I think any future look may well appropriately belong somewhere else in the context maybe a Criminal Justice Bill in the context of how we police protests and demonstrations in the broadest sense in the country rather than specific to Parliament. It is almost because it is looking at the context of Parliament Square I think it is more than proper that it belongs in the Constitutional Renewal Bill.

Chairman: Thank you for dealing with our questions so efficiently.

Witnesses: **Ms Janet Paraskeva**, First Civil Service Commissioner, and **Sir Gus O'Donnell**, Cabinet Secretary and Head of the Home Civil Service, gave evidence.

Q529 Chairman: Good afternoon, thank you for coming to assist our Committee. As you know we, as a joint committee, are considering the whole area of different aspects of constitutional renewal and some say oddly the issues of the Civil Service Bill has been contained within the area of consideration. Perhaps I could ask you both to begin with: the Ministerial Code currently places a duty on Ministers "to give consideration and due weight to informed and impartial advice from civil servants". Should this requirement in the Ministerial Code be made statutory in the Bill?

Sir Gus O'Donnell: I am very glad to be here and delighted that you are doing this joint process. I think it is extremely good and I am very pleased that 150 years on from Northcote and Trevelyan that we are getting round to this. I hope very much that you will keep the legislation strategic and allow us to manage, as we need to do in the 21st century, so you will give us that flexibility as well. On your specific question about Ministers, I do not believe that we should put issues to do with Ministers in this legislation. I am very happy that we have a Ministerial Code and I think that is the right place for it in terms of accountability. I think Ministers have accountability to the Prime Minister, to Parliament and to the public and I think that is the right place for it.

Ms Paraskeva: Like Gus, thank you very much for the invitation to be here this afternoon. We too hope that this legislation will be kept relatively light touch, but nonetheless hitting on the very important principles that certainly, as Civil Service Commissioners, we have argued for for many years. The Civil Service Code that we hold very dear gives of course the right to a civil servant to say no to a Minister and we think that this is probably the right place to contain that. That gives any civil servant then the opportunity to come to the Civil Service Commissioners and to raise any issue if a Minister has asked them to behave improperly and

we would think that this was probably the most appropriate place for this to remain. We think to put it on the face of the legislation might actually be unnecessary following the statements that Sir Gus has made.

Q530 Chairman: Should the Ministerial Code as a whole be subject to some form of parliamentary approval?

Sir Gus O'Donnell: I do not think it needs to be. It is laid before the House, there can be discussions about it, but I would not put it to parliamentary approval, just as I would not with the Civil Service Code. I think in the interests of transparency it is important we put it there, select committees can cross-examine us on it, but I do not see the need for it to be put to Parliament.

Q531 Lord Norton of Louth: Sir Gus, you mentioned a few moments ago management of the Civil Service and there is a question as to who should head the management and be in charge. In the Draft Bill is a Minister. Some of the evidence we have heard suggested it really ought to be the Head of the Civil Service who is vested with that responsibility. Do you have a view on that?

Sir Gus O'Donnell: What the Bill does remember is that because we are removing the Royal prerogative then there has to be the powers vested with someone and, you are absolutely right, this legislation vests the powers with the Minister for the Civil Service which is the Prime Minister, which is actually where it is now, so I am very content with that. I think that is the right place. In practice what happens is the Prime Minister delegates that authority down through Ministers to permanent secretaries. Dare I say it, but the person two to your left, the Armstrong principle makes it absolutely clear that the Civil Service, whilst it is right it is impartial, it is not independent. It is there to serve the interests of the duly elected

Government and to my mind consistent with that it should be the Prime Minister who is there, not the Head of the Civil Service.

Q532 Lord Norton of Louth: Given you accept that it should be legislating for what is the current situation, is the Bill as drafted adequate for that purpose? Does clause 27 define the Minister's powers sufficiently?

Sir Gus O'Donnell: As far as I can see, yes. Obviously we would be happy to listen to what comes out of this process but I think it is perfectly okay as it stands.

Q533 Lord Armstrong of Ilminster: It appeared to give the Minister power to regulate appointments and dismissals of civil servants. That was not in the 2004 proposals and I wondered whether that was what we really wanted.

Sir Gus O'Donnell: We could certainly clarify the language there. As you will know, Lord Armstrong, that is the situation as is. In fact, Ministers do not get involved in those decisions and the Civil Service Commissioner can confirm that.

Ms Paraskeva: It is not the intention of clause 27 to be read as a standalone clause and, like Sir Gus, we would agree that some clarification might help. It really needs to be read in conjunction with the rest of the Bill which requires fair and open competition on merit based on the Civil Service Commissioner's principles and in those principles we actually define how Ministers can be involved in the process. If you do not clarify the actual clause of the Bill it could lead to confusion and could lead to a need on every senior appointment for us to re-explain the situation to a Minister, so therefore we would certainly seek, if possible, for some further explanation on the face of the Bill.

Q534 Lord Armstrong of Ilminster: I think what most likely troubled me is if the Minister is given explicit power in the Bill for appointments and dismissals then, quite rightly, the

Minister is accountable, but perhaps the Minister could be required to answer questions in Parliament about individual appointments and dismissals. I would have thought that we did not want to go that far, but I would welcome comments on that.

Sir Gus O'Donnell: I would agree with you that the intention is to keep things as they are. Given that we are replacing the Royal prerogative, we need to have the powers vested somewhere. It is to my mind quite clear that what you would want is those delegated down to Permanent Secretaries.

Q535 Baroness Gibson of Market Rasen: We have heard from different witnesses differing views about whether or not the Civil Service Code should be subject to Parliamentary approval and you have just said, Sir Gus, that you believe it should not. Are you in agreement on this or would you like to say anything more about this point?

Sir Gus O'Donnell: If you look at the Code, this is a document about the management of the Civil Service. It incorporates the values and what to my mind is a great advantage of the legislation is that those values will be enshrined in legislation – that is tremendous – but it also covers areas other than the values and those are management areas to the Civil Service that at different times we might need to change. I think it needs to be a living document. We went through a very good process and I have to say that the Civil Service Commissioners were an important part of the process of amending the Code recently. Certainly we have turned it into much better English. I remember the first sentence used to be about a hundred words long and it had a footnote. I think you can read it and understand it much more clearly now and that to my mind is very important. We went through a detailed process together to revise it. I would not rule out the fact that we may need to revise it further. If technology changes the way we operate, for example, then you would want to keep this up to date so I would regard this as a living document that we put to Parliament and select committees can cross-examine both of us on it, but we both have quite a passion that this is something we

need to get out and explain to civil servants so they understand it in their everyday occupations.

Ms Paraskeva: I would support that but have one thing to add and that is that we do need to be absolutely clear that the values of honesty, integrity, impartiality and objectivity are defined and understood and that the meanings are not meanings that can be simply changed over time and that is what we would need to see very clearly stated. It is interesting though, picking up a point that Sir Gus made earlier, that there is nothing in the Bill at present to actually secure the ability of the Civil Service to actually serve successive administrations and it is the point that Sir Gus was making about the Civil Service working to the Government of the day and we may revisit that when we talk about the importance of impartiality later on.

Q536 Chairman: What if a political judgment was made by a government that, for example, membership of the BNP was incompatible with public service, how would that be dealt with? The suggestion you are making is that the Code would be subject to parliamentary consideration but would that be something which Ministers could properly impose in the Code or should that be for the Commissioners?

Sir Gus O'Donnell: I think that is something where we have to interpret it. Your question is not entirely new in the sense of this has come up with regard to prison officers, as I am sure you know, so it has been a live issue for us for some time. It gets us into some legal issues about whether or not it is appropriate to proscribe institutions. There are some legal issues that are really quite complex in the issue of BNP, so in general I would again keep this out because you are thinking about what are the possible combinations of different political parties as we go forward and there is a whole array of possible new parties. I just want to say the way round this is to keep that really clear view about impartiality and values. I have very strong views about values and having a very diverse Civil Service and I am very passionate about that, but once you get into the area of saying actually if somebody represents a certain

political party that gets you into some very dangerous territory where the lawyers – Janet is very good on these sorts of things – would tell you about the ECHR and the like, so it is quite complex territory.

Ms Paraskeva: I would only add that it is the active participation of the civil servant in party political activity that one would be concerned about rather than *de facto* membership of any particular party.

Q537 Lord Maclennan of Rogart: The issue of impartiality sometimes seems to arise when civil servants are called upon to make a judgment as to whether it is their duty to serve their ministers or, alternatively, to take a view that Parliament requires to be served, and these things are not always nicely aligned. For example, select committees may want to hear factual information from civil servants which have not necessarily been regarded as a matter of policy by the Minister, but the deferential attitude of the civil servant to the Minister sometimes seems almost to preclude the wider duty to Parliament. Would you not think that there would be some virtue in putting, on the face of a Civil Service Bill, the wider duty of civil servants to Parliament as well as to serving ministers?

Sir Gus O'Donnell: I think this gets to the heart of what you mean by the word "impartial" and, remember, it is one of the four values, so honesty, objectivity, integrity and impartiality, all of those four values which will be in the Bill and, therefore, in legislation, should guide a civil servant in all of their actions and, I would say, that would include your action in terms of giving evidence to a Select Committee, so, if you are asked questions by a Select Committee, it is your duty, as the Prime Minister in line with those values, not to mislead the Committee and to give them as much information as they require and ask for, so I think that is important. That is your overriding duty, to live with these values and that is being impartial in its broadest sense, not just its political sense. Ministers of course may have a view about

wanting a particular policy, but it is our job to explain and give factual information to select committees, so I do not think they would contradict each other.

Q538 Lord Maclennan of Rogart: So you would have no particular objection to there being a reference on the face of the Bill to the obligation of the Civil Service to Parliament?

Sir Gus O'Donnell: Well, I think that would get you into some dangerous territory as to what actually does that mean.

Q539 Lord Maclennan of Rogart: So there is ambiguity about the values too, and what does that mean in practice?

Sir Gus O'Donnell: I think the important thing is that that is what we should concentrate on, what are the appropriate values that we want and what do they mean. I think it is fairly clear, and the Code lays out, what they mean: the honesty; objectivity; integrity; and impartiality. They certainly would not be consistent with misleading Parliament, for example.

Q540 Lord Armstrong of Ilminster: It may be over-simplifying it, but I have, generally speaking, taken the view that civil servants are accountable to ministers and ministers are accountable to Parliament and, when civil servants give evidence to parliamentary committees, they are doing so with the agreement, and approval, of their ministers and subject to any directions that ministers may give as to what they should, or should not, say, so there might be circumstances in which a civil servant would say, "I think you must ask the Minister that question, not me". As to the matter of impartiality, the Code is pretty clear: impartiality is acting solely according to the merits of the case and serving equally well governments of different political persuasions. I think it is a question of whether we want, or need, to go further and try to insert that on the face of the Bill, and I would welcome your comments on that.

Sir Gus O'Donnell: I would agree with all of that, and particularly that description, which is actually what I tell civil servants before they go before select committees, is precisely right as to how they should behave, and ministers could, and indeed I have had this in the past, say that actually that is an issue that they will want to cover themselves, in which case they do. Your point about impartiality, absolutely, and we have got various definitions of "impartiality" in the Code and we have split out political impartiality. I think it is important that it is spelled out and accurately in the legislation, and we could take in the wording that you have suggested certainly.

Q541 Chairman: You were saying that the obligation is to ministers obviously, but ought it not also be to parliamentarians as well as to Parliament itself, and let me tell you what I mean by that. If you are in local government, as many of us have been, and the Chief Officer has an issue in your area, he will talk to the Member as well as to the Chair of Committees. Civil servants almost refuse to talk to parliamentarians about areas that are wholly consistent with their need to know relating to their areas because they have this stop at the point of the ministerial responsibility. Do you think that that should change or, if not, how can democracy be better improved by individual Members having the opportunity to know what is going on beyond the barrier of the ministerial ranks?

Sir Gus O'Donnell: Well, we have a duty, not just to MPs, but to the public as well to inform, so I think that is important, but I would go with Lord Armstrong, that this is through ministers, so, if MPs, for example, for a particular area wanted briefings on a subject, I would seek ministerial guidance. If the Minister has said, "Yes, go ahead, do that", then you would do it, so I think there is the opportunity for that to happen, but I would just make sure, because we are serving ministers, that we have cover from ministers for that.

Q542 Mr Tyrie: Do you think that parliamentary select committees should have the power to call specific civil servants before them or do you think that the opportunity for the Civil Service to put somebody else up should be retained?

Sir Gus O'Donnell: Well, I think it is actually ministers that usually decide who are the best civil servants to appear on particular subjects before a Select Committee.

Q543 Mr Tyrie: I can recall occasions when we have wanted to speak to a particular senior Minister and, hey presto, we found ourselves with the Cabinet Secretary because this all looked far too interesting to cross-examine the slightly more junior person about.

Sir Gus O'Donnell: I am sure we would want to give the Select Committee the best and most experienced person to answer the questions on every occasion.

Q544 Mr Tyrie: Yes, okay, I think there is a serious question here. If we put the Civil Service on a statutory footing with accountability to Parliament, are we not then also not saying that Parliament can have before it whomever it wants to have before it? This is half-way to the 'people and papers' point which of course distinguishes us from the United States' form of executive scrutiny.

Sir Gus O'Donnell: Well, again I would say it is ministers who are responsible to Parliament, it is the Armstrong Doctrine, and then it is for ministers to decide which civil servant should appear, assuming that they are competent to cover the areas required by the Select Committee.

Q545 Mr Tyrie: So you think that, even after we have got this legislation on the statute book, ministers should be able to indefinitely prevent civil servants from giving evidence?

Sir Gus O'Donnell: Well, in general, I would say ministers have always been quite happy to co-operate with select committees about who would appear, so, if it is a particular agency, the

Chief Executive of the agency, so I do not think there has been a big issue here, but again ultimately I think it must be for ministers to say who is going to speak on their behalf.

Q546 Lord Maclennan of Rogart: Sir Gus, you are enunciating what has been the practice, and we are bound to consider what might be, or should be. A lot of the evidence that we have received has suggested that ministers are listening much less to civil servants than they used to, and it occurs to some of us to enquire why that might be because it seems highly desirable that they should. One thought has occurred in the context of the questions we have just had which is that we have had two long periods of government, in which first we had the Conservative Party, a series of ministers, and then we have had a long period of Labour ministers, as a result of which the civil servants have been, in the public mind and perhaps in the mind of Parliament and perhaps in the minds of political parties, very closely identified with their ministers. Indeed, phrases like "not one of us" have been heard to be mentioned. Is it not partly because of this, through ministers to Parliament, that civil servants are being so closely identified with the governments and would it not be much healthier for civil servants and for the perception of their independence if they were in fact accountable, not solely through ministers, but as individuals, particularly when they have a clear responsibility and particularly when they are dealing with facts?

Sir Gus O'Donnell: Well, on the last point, let me be clear. As accounting officers, we all have individual responsibility, so we appear before the PAC, for example, in our individual role of accountability. It is an interesting point that you make and I think this is a change from the past in that, if you look back to a civil servant like me who joined in 1979, I have seen one change of administration in 1997, whereas Lord Armstrong, for example, would have seen many more changes of administration over an equivalent period through the 1960s and 1970s; it works both ways. The fact that I am here as a Cabinet Secretary, having been selected by Labour Prime Ministers and yet having served a Conservative Prime Minister, I

think, shows you that actually the Civil Service is doing rather a good job and ministers in general are looking for the best people in the posts, and I am not saying, "Oh well, you worked with them, so you must be…" I did not get the impression in 1997 that the incoming Labour Government said, "Well, you're all Tories", and I wonder if, when we change, they will all say the opposite. I actually think that they, and there are people on this Committee that I have worked with, respect the fact that we operate to the best principles of the Civil Service and we operate with whoever is elected. The fact that there are long strings, I think, works in different ways as well. I think it is certainly the case that, when a party has been in opposition for a long time, when they come in, their special advisers may be rather influential for a while, but the most influential of those special advisers go on to become MPs and ministers and actually the power of the Civil Service as they go on longer, to my mind, gets stronger relative to the special advisers as you go further through a Parliament because the ones they have known best have actually left them and gone off and become ministers, so I do think that this idea of the influence of the Civil Service reducing is not one I would accept. I think we live in a world now, which I think is a very good thing, where, if you take the question of where does a minister get expert advice on a specific subject, back 20 years ago, it would have been your civil servants and then you would have looked at what is the outside world telling you about this. Actually, now we are in a situation where there are lots more think-tanks and we have access, at the push of a button, to all the information on the Internet, so actually the civil servants can provide that, but it is certainly true that they are providing information from a much vaster store of experience, so we are looking at international evidence and we are looking at what works in a whole range of different places, so I think ministers are getting much better advice and it is coming through the Civil Service, but it is not necessarily advice that has merely come from a monopoly called 'civil servants'.

Q547 Martin Linton: It could be said, could it not, that you are trying to have your cake and eat it? After 150 years, the Civil Service wants statutory approval from Parliament, yet you do not want accountability to Parliament.

Sir Gus O'Donnell: What I would like, which is what Northcote and Trevelyan wanted, was to get those core values incorporated so that they will be there through changes of administration. I think that is what I would love you to provide for me, yes. On your point about accountability, I think we are very accountable. I have appeared before lots of select committees, before the Public Administration Select Committee, before PAC, I have appeared before other select committees, and it does not feel that I am short of accountability.

Q548 Martin Linton: Let me make the point that the Chairman made that, when a local councillor phones up a council officer and asks for some information, that council officer is legally obliged because that council officer is employed by the council and that person is a member of the council. If I phoned a civil servant, they may be very co-operative, but they may just refuse to talk to me because they work for the Government and I am a Member of Parliament, so I have absolutely no call on a civil servant's time, unless they feel inclined to help, so that, at a small level, is an illustration of the fact that you have to decide really, if you are a creature of government, then why is it that you want the statutory approval of Parliament and, if you want the statutory approval of Parliament, why is it that you do not think civil servants should act with any sense of accountability to Parliament, as such?

Sir Gus O'Donnell: I think because it does go back to the Armstrong principle, that we are there to help the Government of the day as represented by its ministers. MPs may be pursuing an agenda which is a very different agenda, but it is our job to pursue the agenda set by Cabinet, so that is where we have to come from and we cannot be in a situation where we are trying to advise MPs who may be on a different tack, I am afraid.

Q549 Martin Linton: I did not say "advise", I just said "information".

Sir Gus O'Donnell: Well, I would hope that we make information available as much as we can on the website, through government offices, through ministers of the regions, all of those sorts of things.

Q550 Chairman: I think that what has been asked of you is: are MPs not special? I think really that is the point. I know that, whenever there is a sort of consultation or something like that, it always seems that MPs are just another member of the public. Maybe that is the case, but is that how the civil servants see it?

Sir Gus O'Donnell: No, Parliament is very special. Because of the fact that we are here, the fact that we lay all of our codes and we are ready to be scrutinised by select committees on all of these subjects, Parliament is certainly incredibly special.

Q551 Lord Tyler: The logical conclusion of your emphasis on the secretaries of state and ministers being responsible to Parliament and that is the line of accountability is surely that the secretaries of state should be subject to confirmatory hearings by the appropriate Select Committee?

Sir Gus O'Donnell: No, I think that is for the Prime Minister. It has to be the Prime Minister's responsibility to select his ministers and then the ministers are certainly accountable to Parliament and appear before Parliament regularly, but I think it is the Prime Minister's job to select his ministers.

Q552 Lord Armstrong of Ilminster: We have all tried to define the Civil Service and have all found that very difficult. Are you content with the definition of the Civil Service in the draft Bill in the sense that the definition, by exclusion, provides you with sufficient clarity,

and are you happy with the exclusion of GCHQ specifically, with the security and intelligence agencies, from that definition for the purposes of the Bill?

Sir Gus O'Donnell: Yes, I am happy with the clarity that is there. I think that the alternative, which was put in the draft 2004 Bill, of listing the parts suffers from the problem that actually these things change quite rapidly as decisions are made possibly to privatise an area or change its status or create new agencies, so that would change and you would be talking about having to change primary legislation all the time, which I think would not be a good idea, so I am happy with the clarity. In terms of the exceptions, yes, I think it makes a lot more sense to treat GCHQ in the same way as we treat the other intelligence agencies. They have very special considerations, they are different, and I think it is really important that we lump the group together. It may be flippant, but I was thinking about precisely how you would, if you were an intelligence agency, meet the condition of fair and open competition when you were trying to recruit agents from another country, for example, and it strikes me that you would not put an advert in *Pravda*; that might not work.

Q553 Lord Campbell of Alloway: On a change of government, and I have seen this happen when the Conservatives went down and Labour came in, the civil servants came here and were taught everything that they could be taught to pick up for the purpose of helping the Labour Government. Now, is there really any need for any further machinery, as seems to be suggested by Ed Miliband, the Minister for the Civil Service, because, somehow or other, the Prime Minister could not do this in advance? You probably know the quotation. Do you see any need for any form of change as regards the conduct of the Civil Service on a change of government?

Sir Gus O'Donnell: No, the one thing I would say is that we need to be more careful this time for the reason that, I think, was brought out by Lord Maclennan, that actually the experience within the Civil Service of changes of administration is actually very limited.

There are lots of people who are civil servants now who have never seen a change of administration, so it is important that we remind them of the rules, we remind them of the conventions, and I send out advice about what should happen around general elections, so I think there is a need, as we move to this situation where actually changes of administration have occurred more rarely, to actually remind civil servants of the rules. I think the reference you are talking to may have related as well to training for new ministers and I think that was an issue that the Minister was talking about as well.

Q554 Lord Campbell of Alloway: Well, actually, as I say, if you go back, we had been in government for about ten years and it was remarkable to see how the civil servants, who were at that disadvantage, came and were taught by civil servants here and by our own ministers how to deal with the new Government, so, as I saw it going on, if that is how it goes on, it will go on again and I see no need for change. Do you?

Sir Gus O'Donnell: No, I think the Civil Service is absolutely ready to live the values that are there about serving a government of any administration, and I think it is my job to make sure that they are ready, if ever there is a change of administration, to do that in the light of our best values.

Q555 Lord Maclennan of Rogart: Sir Gus, in answer to an earlier question from me, you spoke of the greater resources of advice and information that are now available. One of the ways in which that is tapped in government now is by the secondment of people from outside the Civil Service into the Civil Service and there is a much greater fluidity between the Civil Service and the private sector, and that is being positively encouraged. Does that not raise issues that we need to consider, when we are thinking about putting the Civil Service on a statutory basis, about these people and indeed about civil servants who are going into the private sector perhaps quite early in their working lives? Should there not be some statutory

provision imposing an obligation on civil servants not to accept subsequent employment or remuneration which exploits inappropriately their employment in the Civil Service?

Sir Gus O'Donnell: On your first point, yes, indeed we are encouraging people to move in and out of the Civil Service, we do have secondments, that is absolutely right, and we find ourselves at times with certain skills gaps that we need to improve. The Gershon Report, for example, recommended that we have professionally qualified finance directors in all departments, but you cannot grow them overnight, so we got a lot in from the private sector, some on secondment, and we are growing the next generation internally, so we will in time, as what the Civil Service needs to do changes over time, need to use secondments. I think it is important now, when it comes to the question of when they come in and go out again and what are they covered by, that we have the Business Appointments Rules and, absolutely, when somebody leaves, particularly of a senior grade, goes to the Business Appointments Committee who will say, "Actually, given what this person was involved in, we think they should have nothing to do with, say, company X" or a contract in a certain area, and they will impose conditions, for example, that you cannot be involved in lobbying the UK Government for any period, three months, six months, a year, so those sorts of conditions are there at the moment.

Q556 Lord Maclennan of Rogart: I have to declare an interest in belonging to that particular Committee.

Sir Gus O'Donnell: Indeed.

Q557 Lord Maclennan of Rogart: I am actually asking a slightly wider question, whether, because of the importance of this issue and the growing number of certain cases in which such moves both ways take place, it would not be appropriate to have statutory provision, when one is defining the Civil Service and all that, which makes it plain that certain jobs would be

inappropriate and that there is a contractual obligation upon those who are entering the Civil Service to recognise a constraint on what they do subsequently, as perhaps is not entirely unknown in other spheres, such as non-compete clauses, for example?

Sir Gus O'Donnell: To be honest, I think in practice it would be incredibly hard to draw those up in advance in ways which would meet the requirements that I think you are after and, if we did set up a set of rules, I think it would take people about five minutes to find ways to get round them.

Q558 Lord Maclennan of Rogart: It was not a rule I was thinking of, it was a principle and that is the principle of appropriateness. You talked earlier about the values. Should there not be a similar sort of recognition that this is a modern problem?

Ms Paraskeva: If I could say something about the entry part of the equation here, certainly it is for the commissioners to approve any secondments or short-term contracts from the private sector, for example, and we do this where there is a business need, the kind of need that Sir Gus has just outlined in relation to finance staff, sometimes IT or HR professionals where the Civil Service needed that, or where there is literally a short-term business need for a department to have expert advice. All of these people come in subject to the Civil Service Code and values and those values absolutely apply in exactly the same way as they do to any other civil servant, and it is one of the questions that we always make sure that we ask, when we are chairing competitions, of people who are joining the Civil Service perhaps later in their career, that they understand that, in becoming a civil servant, they adopt these values which are then part of their contract of employment effectively, so on the inward side certainly I think we make every effort to make sure that people understand that they are signing up to those Civil Service values.

Q559 Chairman: I think Lord Williamson has got some questions to ask particularly of Janet Paraskeva, but can I ask one question first, and it is this: within the reference to the GCHQ being excluded from the definitions, do you, Janet, have a particular view about that because in consequence they are also excluded from the Civil Service Commission?

Ms Paraskeva: I think our point here was to make sure that the civil servants at GCHQ were not disadvantaged in any way either in relation to appointment on merit or indeed the requirement, or protection, of the Civil Service Code, and I think that is the assurance that we are seeking. Because GCHQ, as part of the home Civil Service, have been, as it were, within our remit and then suddenly to see a change, as you rightly say, from the draft 2004 legislation, we wanted to ask that question and make sure that we had a satisfactory answer.

Q560 Chairman: You say you seek that assurance, but what form does that assurance take? What are you looking for specifically?

Ms Paraskeva: I think we are looking for an explanation of how the Code, for example, particularly the requirement to apply the Code and protection of it, will be there for the employees of GCHQ and, if they are, for example, asked to behave inappropriately, to whom do they take that complaint.

Q561 Lord Armstrong of Ilminster: It was suggested to us in evidence that GCHQ and, I think, the other agencies do at any rate, to a considerable extent, use the Civil Service Commission for their selection.

Ms Paraskeva: They do indeed and I myself have been involved in the appointments of the Head of MI5 and GCHQ very recently as well as the Home Office appointments in security.

Q562 Lord Williamson of Horton: When we declared our interests earlier, I made clear that, for what seemed like years and years, I was a member of the Civil Service and,

incidentally, I was Private Secretary to two Labour ministers and two Conservative ministers during that time, so what was said earlier shows that the Civil Service was acting, if I may say so, in a manner which I personally find very appealing. I wanted just to turn now to the independence of the Civil Service commissioners, and you will know that the Public Administration Select Committee was a bit concerned about this point, and our indefatigable clerks have quoted your evidence to the Public Administration Select Committee, and also the Constitution Unit were much concerned about it, so I do ask you whether you feel reasonably satisfied that the draft Bill provides the Civil Service Commission with an appropriate degree of independence from the Government? Secondly, should the Commission have the right to initiate investigations without receiving a complaint? It is my first question, the general one, that I am mainly interested in.

Ms Paraskeva: In some ways, I suppose, you could argue that we will have more independence once our remit is actually defined in statute. We thought very long and hard with colleagues from the Cabinet Office about what kind of model would enable us, going forward, to secure that independence. Whilst we have agreed with them that the executive NDPB, non-departmental public body, is an appropriate mechanism, I think there may be one or two areas for clarification when we establish that body. We would like something, for example, to safeguard the Commission from government interference and we think that it is not beyond us to draft something that would enable that. We also think that perhaps funding is a difficult issue if indeed the control of your finances is by those whom you regulate and perhaps one way through that would be to put a duty on us to report on the adequacy of our funding rather than to set up some complicated mechanism that would just be costly in itself. A further nuance is the provision for all commissioners to be appointed on the basis of fair and open competition in the same way as the First Commissioner is, so I think, with some small, but important, amendments, we are fairly content.

Q563 Lord Armstrong of Ilminster: Are you content that your appointment is confined to five years and cannot be renewed?

Ms Paraskeva: I think five years is probably the right amount of time. My appointment was originally three years, renewable by two, and it did seem to me, when it was suggested as five years from the outset, that that is a much better length of time to plan how you are actually going to use the job and develop the role, and I think five years is just about long enough to see through the kinds of changes or developments that you might want in a job.

Q564 Lord Armstrong of Ilminster: In other parts of the Bill for other commissions the term is five years, but it is renewable or there is no provision which says it is not renewable. In the case of the Chairman of the Civil Service Commission, it is specific, one term only.

Ms Paraskeva: Indeed, as it is for the other commissioners, and I actually think that is probably right. I think it would be wrong for either the First Civil Service Commissioner or the Commissioners to stay in those posts for a very long time. There is the question, if you are the regulator, of your actually trying to stay at some distance and over time one gets closer and closer to the departments that one works with, and I think there is a safety net in having a fixed term of office.

Q565 Chairman: Lord Williamson also asked the question about the right to initiate investigations without receiving a complaint from a civil servant. Do either of you have a view on that?

Ms Paraskeva: Indeed you will have seen me quoted as sitting on the fence, not a place I normally comfortably land myself, but I do find this a very difficult area. Clearly, we have some nervousness about opening the floodgates and I think we all know what that would do. Nonetheless, as an independent regulator, it is actually quite difficult to argue that we should not have this power, so we have been giving it some further thought and we might suggest

some careful wording, which would give us the reserve right to carry out investigations where there was sufficient evidence. As I say, we are nervous with the resource implications of this and the fact that it would change the nature of our work quite considerably, so we would not enter this area lightly. At the present moment, I do investigate and I do this by writing to the Head of the Home Civil Service and suggesting that he might invite me to, and that has worked very well. Of course, what we have to do is to legislate for the people that come after us, not the people in the current roles and, therefore, I can see that I might need to get off the fence.

Q566 Chairman: Sir Gus, on that very specific point, do you have a view?

Sir Gus O'Donnell: Certainly. Remember that at the moment civil servants can take complaints with the Code directly to the Commissioner, so that, I think, is a really important safeguard. What Janet has said about us working together on other sorts of complaints has worked very well very informally. I would really worry about giving commissioners that sort of discretion because, if someone wants to question that discretion as to why it was used in one case rather another, then you get into some difficult territory as well, so personally I would not go there.

Q567 Lord Morgan: We considered the question of posts in the Civil Service that were excepted from the requirement of appointment on merit and they include, as you will know**,** senior posts in the Diplomatic Service and also posts under the Royal Prerogative. Do you see any difficulty with the principle of having exceptions from appointments on merit and do you think they can be justified and, if they are justified, should any conditions, nevertheless, be attached to those appointments?

Ms Paraskeva: To be clear, because I think in the past we have joined the two together, there are two kinds of exceptions. There are the groups of people, as you say, those appointed by

Her Majesty, special advisers and so on, and then there are the exceptions that the commissioners can make themselves, the cases that I referred to earlier. On the groups of civil servants, Gus, I am sure, will comment on those appointed by Her Majesty, and we would of course assume that any civil servant caught by that provision, for example, commissioners at HMRC, would come within the ambit of the Bill. We can see no reason either why diplomats should not be appointed on merit; it does seem bizarre that you would not want to have your best people as your diplomats. The other named group of people of course was special advisers and they are completely outwith our remit and they are of course the personal appointment of ministers.

Q568 Lord Morgan: To take the diplomatic appointments, this would cover the appointment of somebody on merit who was not himself a member of the Diplomatic Service, would it? I can think of cases where people who are not members of the Diplomatic Service have been appointed to be ambassadors, but on merit it was a very good appointment and it worked very well.

Ms Paraskeva: Indeed I would say that that was on a par with a member of the public, who had not been a civil servant, coming in to take a top job in the Civil Service for the first time. They are, nonetheless, appointed on merit and I think it is very difficult to argue that that should not be the case.

Q569 Lord Tyler: We have not heard from Sir Gus on this because I understand he takes a different view from the Commission, that the general blanket exception for the Diplomatic Service is justified, so I would be very interested to hear why he thinks that.

Sir Gus O'Donnell: Well, in practice, over the past 40 years I think something like one in 200 of these appointments have been through different means. The example I gave when PASC asked me was when I was very much involved when I was working for John Major as

Prime Minister, when Chris Patten did the job in Hong Kong. I think there are cases where you might want to have someone with a strong political background specifically for specific cases, so I think there are some truly exceptional cases where actually you might find that the best person comes from outside the Diplomatic Service, but I would stress that I would think they would be truly exceptional.

Q570 Lord Tyler: But that is not a justification for the general exception, that is supporting what the commissioners are saying, that one in 200, I think you said just now, may be a very special case which the Commission could consider.

Sir Gus O'Donnell: That is why I would say that the appropriate way to go about this is to have procedures which would allow this to happen in exceptional cases, and that is what happens at the minute.

Q571 Lord Tyler: But then it does not need the general exception.

Sir Gus O'Donnell: Well, that is a question with the general exception where we have used that general exception to operate in a way where it has always been members of the Diplomatic Service who have taken up these posts, unless there has been a desire for a truly exceptional case.

Ms Paraskeva: We would argue in the opposite direction, that, if you have the general exception there, we can, nonetheless, exempt in the specific cases that you suggest.

Q572 Sir George Young: Can we move on finally to the question of special advisers where there are, I think, three issues. One is their numbers, the second is their functions and the third issue is how they are paid for. On function and numbers, we have got Janet's views helpfully set out that, in the way the Bill is drafted, you could run a coach and horses through the entirety of the Civil Service. Sir Gus, do you agree that there should be a limit on the

numbers of special advisers and also that on the face of the Bill there should be a restriction on their functions?

Sir Gus O'Donnell: I am happy with the current situation in the sense that I think it is very important that we have transparency about numbers and cost, and I think it is very important that we treat special advisers as temporary civil servants, so we have a Special Advisers Code. I worry just about the practicalities of having a cap on numbers because, as soon as you announced a cap, I suspect that that would become a minimum, not a maximum, and that people would just move to it straightaway. I think it is important for the Civil Service to do the functions of operating impartially, not getting involved in political partiality, but that you actually have some groups there who can operate in a partial way, so I think good special advisers are actually good for impartiality in the Civil Service, so I am in favour of special advisers to a limited extent. I thought the kinds of numbers we have talked about have been fine. In terms of their functions, I think it is important and actually I think this is where we could clarify that it is clear that they do not order civil servants around, look after budgets and those sorts of things.

Q573 Sir George Young: You would like to see that in the Bill?

Sir Gus O'Donnell: I could certainly live with clauses like that.

Ms Paraskeva: I think we would very much like to see greater clarity in terms of the role of the special adviser. There has been a suggestion, your suggestion, of short money and maybe one would not need to cap it, if indeed the budget for advisers were arranged in that way. I think the most important point for us is that there is some absolute clarity about their role and the restrictions. I think it is the case that good fences make good neighbours and, if civil servants and special advisers understand each other's respective and complementary roles, we might secure for the future what we have now, I think, which is a really very workable arrangement.

Q574 Sir George Young: Can I just press you a little bit on the number because I think in your evidence you were more cautious than Sir Gus about the absence of any number. Is there not a point where the terms of trade between the Minister and the Civil Service might change and, if you get more than a certain number of special advisers around that particular Minister and interacting through him, is there not a downside if you do not have any limit on the number of special advisers?

Ms Paraskeva: Certainly there is a difficulty if you have too many advisers compared to the number of senior civil servants who are actually working at the ministerial interface. It is a question of whether a cap would actually secure what you are looking for or whether there are other ways of dealing with that, and I think Sir Gus makes the point that, if you have a cap, it is almost inevitable that people will employ up to it, which is why I did think it was an attractive proposition to see the financial limitation of party monies being used, and of course that would change the nature of the special adviser and lead one to question whether in fact special advisers actually need to be civil servants.

Q575 Sir George Young: Can we just pursue that for a moment. What would be the impact if, for the sake of argument, we did say that we were going to extend short money to the Government and they would fund special advisers out of short money rather than as they are funded at the moment? A good thing or a bad thing?

Ms Paraskeva: I assume that, whenever there is a financial cap, there is a real cap on the numbers of people that one would employ, so that could be, I think, something that was really worth looking at.

Q576 Lord Armstrong of Ilminster: Would their status as temporary civil servants not be weakened if they were paid in that way?

Ms Paraskeva: I think it does beg the question of whether they would be civil servants at all.

Sir Gus O'Donnell: I would be very cautious about this. You could put a monetary cap and then say, "That's enough", and then we will find we have got lots and lots of unpaid people around, so I would be very nervous about that. The idea that we separate them out and put them in a different class so that they are no longer subject to all the rules that are in the Special Advisers Code now at the minute, I would be very, very nervous about. It will make them, as it were, something other than the team and actually I think it would drive them into a different place and we will get an adversarial relationship internally, and I would really be very, very cautious about going down that route.

Q577 Sir George Young: Although Lord Butler seemed to take a different view.

Sir Gus O'Donnell: Illustrious predecessors will, I think, probably have a range of views on this matter.

Q578 Lord Armstrong of Ilminster: Could one predecessor just say that in earlier evidence to this Committee, it was suggested quite strongly, I think, that there should be a change in the Bill, not just in any Code, but in the Bill, which would add a provision to the effect that special advisers may not recruit, manage or direct civil servants. Would you like to see that in the Bill?

Sir Gus O'Donnell: As I said earlier, I think there is scope for having more words in here which would better specify the appropriate functions of special advisers. They are specified in the Code, but actually having it in the Bill, I would certainly have no objection to that.

Q579 Lord Maclennan of Rogart: Again in answer to an earlier question, you pointed to the growing use of people parachuted into the Civil Service from other areas of expertise, businessmen and the like. I wonder what sort of special procedures there are in place to

ensure that such people do in fact fulfil the criteria of merit and are not simply friends of those in high places. It is a third category perhaps.

Sir Gus O'Donnell: You are absolutely right, it is hugely important, and the reason we are bringing these people in is because we have skills gaps in the Civil Service, possibly temporarily. They are invariably done through open competition with Janet alongside me and we are assessing them. What is the principle of this legislation? That we get fair competition.

Q580 Lord Maclennan of Rogart: Can we just get a note on what the procedure is and how it is handled so that we can make a comparison with the normal methods of recruitment?

Sir Gus O'Donnell: The vast majority of them come in through the normal methods of recruitment.

Ms Paraskeva: We regulate them in exactly the same way as we regulate open competition, but we can indeed provide you with some further information as to how it happens.

Chairman: Perhaps you would be good enough to do that, and the final question I would ask, apart from thanking you also for coming, is: do you think that this really should be within the Constitutional Renewal Bill or, having waited 150 years, do you think it deserves a Bill of its own? You may like to drop us a note on that, as you are not able to answer it now. Thank you very much for coming.