

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

SUBMISSION BY FDA

1. The FDA welcomes the opportunity to give evidence on the Draft Constitutional Renewal Bill. This evidence restricts itself to the civil service provisions of the Bill.

2. There is a qualitative difference between the civil service of the state and, say, a London Borough Council or an NHS Foundation Trust. However, both a local authority and a hospital Trust have much stronger statutory governance arrangements than does the civil service. Maintaining the integrity of the state and constitution is not simply about standards and governance for elected politicians. It must also be about the governance and standards of the permanent administration. Britain is justly renowned for the political neutrality, impartiality and lack of corruption of its civil service. We believe that the Bill should support and reinforce these strengths.

3. The FDA have argued for many years for a Civil Service Act which would enshrine in statute the core principles and values of the civil service, in particular a commitment to fair and open competition for appointments, and the political impartiality of civil servants, as well as giving statutory status to the Civil Service Commission. This would help to ensure that if a future Government wished to change the values or status of the civil service, it could do so only with the consent of Parliament. We therefore welcome the civil service provisions of the draft Constitutional Renewal Bill (CR Bill).

4. We welcome the report of the House of Commons Public Administration Select Committee (PASC) 'Constitutional Renewal: Draft Bill and White Paper', to which this evidence refers on points of concern.

5. We have five underlying concerns with the Bill as currently drafted.

6. Firstly, we have been advised by the Cabinet Office that once the Bill is enshrined in statute, the use of prerogative powers to make Orders in Council "will fall away", and that any future use of the Royal Prerogative in the civil service is only possible where this is allowed for on the face of the Bill, eg in relation to vetting. The Joint Committee will want to be satisfied of this interpretation. Moreover, if the subsequent management of the civil service is to rely on statutory provisions, then as drafted the Bill appears to leave a number of important issues unaddressed. In particular, one of the advantages of such legislation, in our view, is that it would extend to civil servants the protection of employment legislation enjoyed by other workers. We should like to be convinced that

the Bill successfully achieves this, and would not wish to see what we regard as contractual matters, such as vetting, left under Prerogative powers. An underlying concern of the FDA is that we are keen to draw a distinction within the Bill between current Government intention (which may be benign but is necessarily transitory) and Constitutional protections, which we believe should be permanent.

7. Secondly, we are unclear about the future employment status of civil servants. There remains a question as to who is the employer, and the related risk that Ministers (actually or potentially) could play an active role in the management of the civil service, including the promotion or dismissal of civil servants. At present, civil servants are 'Servants of the Crown'. The Civil Service (Management Functions) Act 1992 established in statute Her Majesty's Home Civil Service and allowed delegations through the Minister for the Civil Service (the Prime Minister) to other Ministers of the Crown. Clauses 27, 28 and 29 seek to maintain the practice and retain the basic structure of the 1992 Act. However, the Bill does not appear to guarantee the employment status of civil servants under law.

8. It appears to be being argued that the contract of employment of a civil servant remains with the Crown (although this is not evident on the face of the Bill) and that management of this is delegated to the Prime Minister, or Ministers. However, if the intention is to place a constitutional protection to maintain civil service independence in statute, it is not clear why a politician should therefore have the statutory right to manage civil servants and have oversight of the contract of employment of a civil servant, rather than this power being vested in a permanent official such as the Cabinet Secretary/Head of the Home Civil Service/Head of the Diplomatic Service. Whilst it has not been the practice of this or previous Governments for Ministers to intervene in issues about the employment of individual civil servants, there appears to be no constraint within the Bill that would prevent them from doing so in future.

9. We therefore endorse the view of PASC (para 22) that this requires further investigation.

10. Further, the draft Bill lacks clarity about what is meant by the terms 'civil service' and 'civil servant', and we would welcome clarification of the term 'Servant of the Crown' and differentiating the position of those appointed to an office under statute who are civil servants for this purpose, and those who are not.

11. Thirdly, we are concerned about the status and role of Special Advisors. The FDA is not opposed to the concept of Special Advisors and in practice Special Advisors perform a valuable role in supporting Ministers and liaising with departmental civil servants.

12. However, the Bill does not appear to offer any protection against a special adviser being given the authority to manage or direct civil servants. Clause 38 (1) (b) simply defines the duties of a Special Advisor as being "to assist" a minister. And Clause 32 (2) refers to the requirements of civil servants "to carry out their duties to the assistance of the administration". It is therefore not at all clear what it is, apart from the method of appointment, that differentiates a Special Advisor from any other civil servant. In contrast, the draft 2004 Bill published by the Government offered in Clause 16 a definition of "restricted duties" which included in 16 (8) (c) "exercising any function relating to the appraisal, reward, promotion or disciplining of civil servants in any part of the Civil Service".

13. We therefore welcome the recommendation in Paragraph 44 of the PASC Report that it needs to be absolutely clear in primary legislation that Special Advisors have restricted powers.

14. Fourthly, we are concerned at the facilities within the Bill for some appointments to be "excepted from appointment of merit on the basis of fair and open competition", both into the Home Civil Service and to the Diplomatic Service. We have not yet been presented with evidence to explain the type and number of appointments that the Civil Service Commissioners might wish to exempt from the principle of fair and open competition into the Home Civil Service, and believe that this is a matter that needs to be investigated further. Whilst we recognise that such a facility may be helpful in very limited circumstances, there should at the very least be transparency about its use in the Home Civil Service, and ideally express constraints on when it might apply.

15. Moreover, we share the view of PASC (Para 35) that "we do not understand why it should ever be appropriate for the government to make senior diplomatic appointments other than on merit following a fair and open competition". The FDA recognises that senior figures from outside the Diplomatic Service may have much to bring to overseas relationships and we have no objection to their appointment, provided that they secure the post by fair and open competition.

16. Fifthly, we share the concern of PASC (para 28) that the Bill must encapsulate the core values adequately, and that the definition in particular of 'impartiality' must be strengthened and political impartiality made a statutory requirement.

Questions raised by the Joint Consultative Committee

4. Do the provisions in the Draft Bill increase the accountability of the civil service and the Civil Service Commissioners to Parliament?

17. The FDA has long argued that the civil service has a wider accountability to Parliament, beyond its obligation to the Government of the day. We accept the statement in the Civil Service Code that the civil service "supports the Government of the day in delivering and implementing its policies and in delivering public services. Civil servants are accountable to Ministers, who are in turn accountable to Parliament". However, in addition to this primary accountability, the civil service should have a status separate from that of the Government of the day; there are not only certain practical functions for which civil servants are directly accountable to Parliament (such as the role of an Accounting Officer) but also a constitutional understanding that there must be a wider accountability for the civil service to protect the interests of future Governments and citizens.

18. We believe therefore that the provisions of the Bill will enhance and confirm this wider accountability and constitutional status. We also believe that the Civil Service Commissioners should themselves be understood as having accountability to Parliament and not solely to the Executive.

19. We therefore welcome the argument of PASC (Para 48) that would require the agreement of the Leader of the Opposition to the appointment of the first Civil Service Commissioner rather than simply being consulted. We further welcome PASC (para 54) in proposing that the Joint Committee consider further how the Civil Service Commission should develop financial and operational independence from the Government. Finally, we suggest that any report of the Commission should be to Parliament rather than to the Prime Minister as proposed in Schedule for Part 2 18.

5. The Draft Bill puts the Civil Service Commission on a statutory footing as a non-departmental public body. Will this increase the independence of the commissioners?

20. We believe that this will help to do so, but see above in answer to Q4.

6. Under the Draft Bill, the Commission retains the right to hear appeals from civil servants and make recommendations, but the Draft Bill does not state who recommendations should be made to. Should this be included in Statute?

21. We believe that any such report should, in the first instance, be to the Cabinet Secretary/Head of the Home Civil Service/Head of Diplomatic Service.

7. Should the Commission be given the powers and resources to initiate investigations without an appeal being made to it?

23. We recognise the ambivalence of the Civil Service Commission themselves on this issue, as explained by PASC (para 55-58). The FDA has long argued that the Commission should be able to consider a specific complaint by a third party, including a trade union representing civil servants. We therefore endorse the recommendations of PASC, that the Commission should be enabled to undertake investigations at their discretion, other than in response to specific complaints from civil servants and without the need for Government consent.

8. Appointments to the Civil Service must be made on merit following open and fair competition, but the Draft Bill sets out a number of exceptions to this, in Clause 34 (3). Are these exceptions appropriate?

24. See above, paragraphs 14 and 15. We have expressed deep reservations about the use of exceptions under the recruitment principles. We believe that the most senior positions in the Diplomatic Service should be filled only through fair and open competition. It must be right that other appointments made by Her Majesty, by definition the more important positions, should be made through such a process. We accept, however, that there may need to be an exception in relation to Special Advisers.

9. The Draft Bill does not define the number or role of Special Advisers. Instead Special Advisers must comply with a Code of Conduct published by the Government, and the Government must make an Annual Report containing information about the numbers and cost of Special Advisers. Are these provisions appropriate?

25. The FDA recognises the difficulty in not defining the number of Special Advisers, and endorses the sentiments of Sir Robin Mountfield quoted in PASC (Para 41). However, as explained above, we believe that the key issue in the context of Special Advisers is to address the question of their powers. An attempt to define the numbers of the Special Advisers might in practice simply lead to the establishing of a norm. It would be important therefore to be clear on what the functions of Special Advisers are on the face of the Bill. The current wording which refers to them 'assisting' Ministers is inadequate, or at least incomplete, in part for reasons we have already discussed above.

10. Is the way that the Draft Bill defines "Civil Servants" and "The Civil Service" appropriate? Are the exclusions in Clause 25 (2) appropriate?

26. Our concerns on this matter are explained above in paragraphs 7 to 10. In principle we believe that all employees of the state should have the full protection of statute law and that matters relating

to their employment should be removed from the Royal Prerogative decisions. We recognise that this raises practical issues in some circumstances. In this context of this Bill, therefore, the FDA is content with the exclusions in Clause 25 (2), although the Joint Committee will wish to note that the staff of GCHQ are civil servants. Staff in the Secret Intelligence Service and the Security Service are Crown Servants. We also believe that parallel legislation for the Northern Ireland Civil Service (and Courts Service) should also be enacted.

Other Issues

27. In addition to the issues explored above, we share the view of PASC (paras 62-65) that the Joint Committee may wish to consider further the obligations upon Ministers. In addition to the obligations explored by PASC, we also believe that it would be appropriate for a reference to be made on the face of the Bill to the obligation on Ministers in the Ministerial Code Paragraph 3.1 that "Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions".

28. We also share the concerns of PASC (paras 66-67) about the way in which successive Governments have handled machinery of government changes. Whilst any Government must retain the power to shape departments as they believe is appropriate, too often such changes are undertaken for what appear to be cosmetic reasons or, even where there are clear operational benefits, are undertaken without any proper review or the development of a business case, or even proper planning. We cannot understate the disruption that is caused to the work of departments, and to individual civil servants, when such changes are made, especially where there has not been proper planning. These changes are often also costly and cause significant HR difficulties for departments and individual civil servants themselves. The FDA's recent Annual Conference supported calls for the Bill to include the requirement for a full review of organisational arrangements in the relevant areas in consultation with trade unions, before changes were made.

29. An outstanding issue not incorporated into the draft Bill is that of civil service nationality rules. This is a long standing issue which the Government has repeatedly indicated it intends to address, and the Government has been supportive of the attempts by Andrew Dismore MP to pursue the matter through a Private Members Bill. Unfortunately Mr Dismore has to date been unsuccessful, and we believe that this should be addressed in the draft CR Bill.

30. Finally, in considering the role of the Commission and the oversight of the important principle of appointment on merit, sight must not be lost of the needs of the civil service as an organisation and the importance of a fair and structured approach to managing and developing people.

31. For a variety of reasons the civil service has moved in recent years to a much greater degree of external entry into posts within the Senior Civil Service. This was primarily because it was felt that the civil service had not the right match of skills given new challenges facing government. A position has been reached where two out of every five director generals (Grade 2s) are external appointees. In 2007, 40% of appointees into the Senior Civil Service were external candidates. That said, there is evidence that up to 50% of external hires are not successful. The FDA has welcomed the fact that Sir Gus O'Donnell and colleagues are examining closely the experience of significant external recruitment and its implications for the long term health of the civil service and whether the taxpayer is actually getting value for money. Any organisation the size of the civil service should be able to generate the majority of senior staff it requires, recognising as the FDA has long done, that there will always be a need for some degree of external entry to more senior posts; it is getting the balance right that matters.

32. There is a danger at the moment that the concept of appointment on merit is being defined in a way that undermines the health of the civil service and risks becoming a 'tick box' exercise rather than recognising that the civil service is an organic entity operating in a complex political environment in which broader management needs must be an important consideration. It is already arguable that Ministers and the civil service as an organisation are suffering from the loss of 'collective memory' (which is not simply a matter of 'filing' but a historic understanding of complex issues) and experience that recent practices have fostered.

33. It is important therefore that the Bill does nothing to exacerbate this problem.

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