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Constitutional Reform and Governance Bill

Bill 142 of Session 2008-09

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The *Constitutional Reform and Governance Bill* was introduced to the House of Commons on 20 July 2009. It followed the publication in July 2007 of the *Governance of Britain* Green Paper which set out a broad programme of constitutional reform. In March 2008 the Government published the *Draft Constitutional Renewal Bill* and *Constitutional Renewal* White Paper. The draft Bill was scrutinised by a Joint Committee, with other committees reporting on aspects of the proposals.

The content of the Bill is different from that of the draft Bill in some significant ways. As well as clauses on the civil service, the ratification of treaties, judicial appointments and protest around Parliament which were contained in the draft Bill, the Bill includes new provisions on the House of Lords, the Comptroller and Auditor General and the National Audit Office, Human Rights claims against the devolved administrations and the transparency of financial reporting to Parliament. Clauses on the Attorney General, which had been in the draft Bill, are not in the Bill as introduced.

This briefing has been prepared to inform the second reading debate on the Bill.

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Summary

The *Constitutional Reform and Governance Bill* is a wide-ranging Bill covering a number of different policy areas. Many of the proposals have their origins in the *Governance of Britain Green Paper* published in July 2007. The Green Paper was followed by the publication of a number of individual consultation documents before the *Constitutional Renewal* White Paper and Draft Bill were published in March 2008. The draft Bill was scrutinised by a Joint Committee, with individual select committees also commenting on its proposals. The content of the Bill as introduced varies in some significant ways from its draft version. New chapters have been added to the Bill and the clauses on the Attorney General which were in the draft Bill are not included. The Bill covers the following subjects:

- Part 1 of the Bill would introduce a **statutory basis for the management of the civil service.** It would enshrine the principle of appointment by merit in legislation, make the Civil Service Commissioners a statutory body and regulate the work of special advisers by requiring a code to be in force.

- Part 2 of the Bill implements the Government's proposal for parliamentary involvement in the **ratification of treaties.** The clauses would put the current informal requirement for treaties to be laid before Parliament for 21 days before ratification on a statutory footing, and give the House of Commons a statutory power to object indefinitely to the ratification of a treaty.

- Provisions on **the House of Lords** are included in Part 3. The Bill would end the by-elections for hereditary peers, and allow for the resignation, suspension and expulsion of members of the House of Lords. These clauses were not included in the draft Bill.

- Part 4 of the Bill covers **protests around Parliament.** The Bill would repeal certain sections of the *Serious Organised Crime and Police Act 2005* and hence remove the distinct legal framework for the policing of demonstrations around Parliament. However, the Bill would give the police powers to impose conditions on public processions or assemblies around Parliament to meet requirements set out in an order regarding access to and from the Palace of Westminster.

- Part 5 includes provisions to insert time limits for **Human Rights claims against the devolved administrations.** These clauses were not included in the draft Bill.

- The provisions on **courts and tribunals** in section 6 would remove the Prime Minister's role in the process for appointing Supreme Court judges as well as making other changes to the appointment and conditions of judicial office holders. These clauses have been pared down from those included in the draft Bill.

- Part 7 of the Bill makes changes to the governance arrangements of the **National Audit Office.** The Bill would create a new corporate governance structure for the National Audit Office, under a new paid post of Chair, which would develop a joint strategy with the Comptroller and Auditor General. These provisions were not in the draft Bill, but were trailed in the White Paper on *Constitutional Renewal* and draft clauses were published by the Public Accounts Commission.

- Clauses on the **transparency of government financial reporting to Parliament** are included in Part 8. These clauses were not in the draft Bill, but follow the announcement of an 'alignment project' to simplify financial reporting in the *Governance of Britain* Green Paper.

1 Introduction

The *Constitutional Reform and Governance Bill 2008-09* was introduced in the House of Commons on 20 July 2009 and is currently awaiting second reading. It is expected that the Bill will be carried over into the next session of Parliament.

The Bill would introduce:

- a statutory basis for management of the civil service;
- a new parliamentary process for the ratification of treaties;
- the end of by-elections for hereditary peers;
- provisions to allow for the suspension, resignation and expulsion of members of the Lords;
- new rules on protests around Parliament;
- new rules on time limits for human rights actions against devolved administrations;
- various provisions relating to judicial office holders, including the removal of the Prime Minister's role in the process of appointing Supreme Court judges;
- a new corporate structure for the National Audit Office and a limit to the term of appointment to the office of Comptroller and Auditor General; and
- measures designed to increase in the transparency of financial reporting to Parliament.

Some of the provisions in the Bill originate from the *Governance of Britain* Green Paper, which was published in July 2007.[1] The Green Paper was followed by the publication of a number of individual consultation documents on elements of the Government's programme. Then, in March 2008, the Government published the *Draft Constitutional Renewal Bill* and White Paper.[2] A joint committee was established to conduct scrutiny of the draft Bill, and various other committees conducted scrutiny on parts of the Bill.

The content of the Bill has changed in some significant ways since the publication of the draft version. It was not known that provisions on the House of Lords would be included in the legislation until the Prime Minister's statement on Constitutional Reform on 10 June 2009. The clauses on financial reporting and the National Audit Office were not included in the draft version of the Bill (although the Government had announced its intention to legislate on this and the Public Accounts Commission had published draft clauses). In addition, provisions which were in the draft Bill relating to the Attorney General have been removed from the Bill as introduced in July 2009.

Most provisions in the Bill extend to the whole of the United Kingdom. Part 4 of the Bill (demonstrations in the vicinity of Parliament) extends to England and Wales only. Certain provisions relating to the civil service contained in Part 1 trigger the Sewel Convention;[3] these are outlined in Chapter 3 of this Research Paper. The Bill also contains some

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1 Ministry of Justice, *The Governance of Britain*, Cm 7179, July 2007
2 Ministry of Justice, *Constitutional Renewal,* Cm 7342, March 2008
3 Library Standard Note, SN/PC/2085, *The Sewel Convention*

provisions which confer function on Welsh ministers and affect their responsibilities. Full details are set out in the *Explanatory Notes.*[4]

This research paper sets out the background to the *Constitutional Reform and Governance Bill 2008-09* in more detail. It then considers each element of the Bill separately, including initial reactions to the proposals.

2 Background

2.1 The *Governance of Britain* Green Paper

Gordon Brown's first oral statement to the House of Commons as Prime Minister in July 2007 was on the publication of the Government's *Governance of Britain* Green Paper.[5] The Green Paper set out wide-ranging proposals for constitutional reform.[6] The Government's intention was to "forge a new relationship between government and the citizen, and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power".[7]

The proposals were set out under four headings*:*

- **Limiting the powers of the executive** – proposals included reforming several aspects of the Royal Prerogative, increasing parliamentary scrutiny of public appointments and reviewing the role of the Attorney General;

- **Making the executive more accountable** – this included proposals to publish a draft legislative programme and to revise the Ministerial Code;

- **Reinvigorating our democracy** – the Green Paper considered increasing public participation in local services, to consult on moving election day to the weekend for general and local elections, and reviewing the right to protest in the vicinity of Parliament;

- **Britain's future: the citizen and the state** – this included a discussion on the need to develop a British Statement of Values, and a British Bill of Rights.

Rather than setting out a detailed programme for change, the Green Paper described itself as "the first step in a national conversation". A series of consultation papers were issued in the following months on issues including on protest around Parliament and on reform of the role of the Attorney General.[8] Announcements were made about involving people more fully in the development of constitutional reform,[9] and in policy development more generally. A series of citizens' juries were held on various subjects, such as crime and on the future of the National Health Service.[10] In addition, cross-party talks continued on House of Lords reform and a White Paper was published,[11] and a Speaker's Conference was established on matters relating to representation and elections.[12]

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4 *Explanatory Notes,* paras 73-77
5 HC Deb 3 July 2007 c816
6 For further background information on the *Governance of Britain Green Paper,* see the Library Research paper 07/72, *The Governance of Britain Green Paper*
7 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, p5
8 *The Governance of Britain: Managing Protest around Parliament,* Cm 7325, October 2007; *The Governance of Britain: A consultation on the role of the Attorney General,* Cm 7192, 26 July 2007
9 Library Standard Note, SN/PC/4482, *Citizens' Assemblies*
10 Library Standard Note, SN/PC/4546, *Citizens' Juries*
11 Ministry of Justice, *An Elected Second Chamber: Further Reform of the House of Lords,* Cm 7438, July 2008
12 See the Speaker's Conference website and the Library Standard Note SN/PC/4426, *Speaker's Conferences*

A number of the proposals in the Green Paper did not require legislation and have already been implemented, such as the introduction of pre-appointment evidence sessions held by select committees and the publication of a concordat between central and local government.[13] Some provisions of the *Local Democracy, Economic Development and Construction Bill 2008-09* currently before the House of Commons will bring into force some of the proposals made which related to local government.[14] Proposals to promote the number of female candidates in elections have been included within the *Equality Bill 2008-09*.[15]

Other elements of the Green Paper have not yet been implemented. For example, proposals for parliamentary involvement in the recall and dissolution of Parliament were passed to the Modernisation Committee for further consideration, and the Committee is yet to report. A wider review of prerogative powers has been carried out by the Government but is currently awaiting publication.[16]

The Government has published a table which sets out progress on the implementation of the Green Paper. This was first published in July 2008, and then updated in May 2009.[17] The House of Commons Library has published its own update table, *The Governance of Britain: An update,* which includes links to relevant Government and Parliamentary documents and debates, as well as Library Standard Notes on various elements of the proposals.[18]

2.2 The *Draft Constitutional Renewal Bill* and the *Constitutional Renewal White Paper*

The Prime Minister's intention to legislate on constitutional matters had been evident in the weeks before he took office. When he accepted his nomination as leader of the Labour Party, Gordon Brown stated that he would, "bring forward reform proposals to renew our constitution with the first draft constitutional reform bill later this year".[19] In the event, the draft Bill was published along with a White Paper the following year, in March 2008.[20] The draft Bill included provisions on protests around Parliament, reform of the Attorney General, judicial appointments, the ratification of treaties and the civil service. In addition, the White Paper addressed the role of parliament in the deployment of troops in combat operations overseas, the flying of the Union Jack, and various other policies such as reform of the Intelligence and Security Committee, public appointments and the matters relating to the National Audit Office.

The draft Bill was scrutinised by a Joint Committee, chaired by Michael Jabez Foster.[21] Various parts of the Bill were also examined by relevant select committees. The Public Administration Select Committee (PASC) considered matters relating to the prerogative and in particular the provisions relating to the Civil Service in their report, *Constitutional Renewal:*

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13 Library Standard Note, SN/PC/4387, *Parliamentary Involvement in Public Appointments;* Library Standard Note, SN/PC/4713, *The Central-Local Concordat*

14 Library Research Paper 09/45, *Local Government, Economic Development and Construction Bill [HL]: Democracy and involvement aspects* and 09/46, *Local Government, Economic Development and Construction Bill [HL]: Economic, regional and construction aspects*

15 For full details, see Library Research Paper, 09/42, *Equality Bill,* Part V, 2

16 See Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009, para 247

17 Ministry of Justice, *The Governance of Britain: One year on*

18 Library Standard Note, SN/PC/4703, *Governance of Britain: An update*

19 Gordon Brown, Speech, 17 May 2007

20 Ministry of Justice, *The Governance of Britain: Constitutional Renewal,* Cm 7342, March 2008

21 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* 31 July 2008, HL Paper 166-I HC Paper 551-I 2007-08

Draft Bill and White Paper.[22] The House of Commons Justice Committee published a report on the role of the Attorney General on 24 June 2008.[23] The Lords Constitution Committee submitted a memorandum to the Joint Committee on the Draft Bill.[24] Relevant comments from the various committee reports made are included in this Research Paper under the appropriate headings below.

In its conclusions, the Joint Committee on the draft Bill suggested a number of substantial changes to the nature of the Bill. They recommended that, ideally, the provisions on the civil service should be presented to Parliament in a separate bill, to become a Civil Service Act.[25] They also suggested that the draft Bill be amended to entirely remove the clauses on judicial appointments, arguing that it was too soon after the creation of the Judicial Appointments Commission to propose significant reform in this area.[26] The Joint Committee was also not sure that the provisions on protest around Parliament should be part of a bill dealing with constitutional issues.[27]

The Joint Committee recommended that the long title of the Bill should include the objectives of the *Governance of Britain* Green Paper. The report stated "Changing the approach to the long title would enable Parliament to consider wider issues of constitutional reform during the passage of the Bill, without obliging the Government to introduce provisions to do so".[28] The summary of the report stated their view that:

> We recognise that the Draft Bill is a first step in a wider programme of reforms to the constitution recommended in the Green Paper and we commend the Government for taking these first steps towards its stated objective of making Government more accountable to Parliament. However, we have found it difficult to discern the principles underpinning the Draft Bill and we ask the Government to reflect further on whether "Constitutional Renewal" is an appropriate title. It is clear to us that further work is required before the Bill will be ready of introduction in the next session of Parliament.[29]

A number of witnesses to the Joint Committee had expressed a concern about describing the provisions in the draft Bill as "Constitutional Renewal":

> Professor Bogdanor told us that "[i]t would be an exaggeration to say that if they were passed into law this would amount to constitutional renewal". Professor Tomkins said that "to call this Bill a Constitutional Renewal Bill is an exaggeration… of both the terms 'constitutional' and 'renewal'. Graham Allen MP agreed and said that there might be a case to be brought under the Trade Descriptions Act "if we are talking about constitutional renewal in the very narrow confines that it is laid out in the White Paper". The Better Government Initiative argued that "the Bill does not go far enough in strengthening the relationship between Parliament, the executive and the people to warrant the title 'constitutional renewal'". Lord Falconer described it as "a sort of 'Constitutional Retreat Bill'! To call it a Constitutional Renewal Bill in my view is a little

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22 Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper,* 4 June 2008, HC 499 2007-08

23 Justice Committee, *Draft Constitutional Renewal Bill: Provisions Relating to the Attorney General,* 24 June 2008, HC 698 2007-08

24 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* 31 July 2008, HL Paper 166-I HC Paper 551-II 2007-08, Ev 71

25 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* 31 July 2008, HL Paper 166-I HC Paper 551-I 2007-08, para 377

26 *Ibid,* para 201

27 *Ibid,* para 379

28 *Ibid,* para 385

29 *Ibid*, p7

> bit over-claiming". Several witnesses suggested that a more appropriate descriptor would be "miscellaneous provisions".[30]

The Joint Committee called on the Government to reflect further on the appropriate title for the Bill before it was introduced:

> As with our approach to the long title, our concern about the short title stems from our regret that many of the ideas set out in the Green Paper have not been brought forward into the Draft Bill. We commend the Government for taking these first steps towards the stated objective of making Government more accountable to Parliament, but would encourage the Government to use this opportunity to make progress beyond these first steps.[31]

The Government responded to the Joint Committee's report in July 2009, at the same time as they published the *Constitutional Reform and Governance Bill.*[32] The Government stated that they had thought "long and hard" following the pre-legislative scrutiny of the draft Bill and had decided that it was best to get the response and the final Bill "right". In response to the Joint Committee's conclusions about the coherence of the draft Bill, the Government commented that:

> The Government does not agree, however, that the principles of the Draft Bill were difficult to discern. The Bill looked to modernise the constitution by looking to effect changes in the relationship between the citizen, Parliament and the executive. A fundamental principle of the Government's approach to constitutional modernisation has been a rebalancing of power, and each of the proposals involved a modification and reduction in the power held by the executive.[33]

The Government went on to state that the Bill "aims to rebuild trust in our democratic and constitutional settlement by ensuring openness, transparency and accountability".[34]

2.3 The *Constitutional Reform and Governance Bill 2008-09*

The Queen's Speech at the opening of the 2008-09 Session did not include firm proposals to legislate on constitutional renewal. A Press Notice released by Downing Street stated that:

> The Government continues to work on the proposals in the draft bill with a view to introducing a bill when time allows.[35]

On 31 March 2009, the Liberal Democrat peer Lord Tyler published a Private Members' Bill entitled *Constitutional Renewal [HL] Bill.* Lord Tyler's Bill contained provisions on many of the matters raised by the Government in its Green Paper, but also on many areas where the Government's own draft Bill and White Paper had either remained silent or had argued in favour of non-legislative solutions. In a press notice, Lord Tyler stated that:

> The Government has promised a Constitutional Renewal Bill to restore civil liberties and drag our political system into the 21st century.
>
> The draft they published last year was a mouse, and Ministers have continued to dither over whether and how to bring back a stronger set of proposals in this Parliament.[36]

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30 *Ibid,* para 387
31 *Ibid,* para 389
32 Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009
33 *Ibid,* para 260
34 *Ibid,* para 261
35 Number 10, *Queen's Speech – Constitutional Renewal,* [on 7 October 2009]

Questions on the Government's intention to introduce the legislation during the 2008-09 Session indicated, however, that a Bill would be published before the summer recess.[37]

On 10 June 2009, in the wake of the furore over Members' expenses, the Prime Minister made a statement to the House of Commons on Constitutional Reform in which he indicated that proposals for reform of the House of Lords would be introduced before the summer recess.[38] Then, on 29 June 2009 the Government published its draft legislative programme and an accompanying document, *Building Britain's Future*. The document stated that the Bill was intended for introduction before the end of the current session and gave an indication of its contents.[39]

The Bill was introduced in the House of Commons on 20 July 2009, the day before the House rose for the summer adjournment. The main points of difference in content between the two Bills are:

- the omission of clauses on the Attorney General;[40]
- the "paring down" of clauses on judicial appointments;
- the inclusion of clauses on the National Audit and Comptroller and Auditor General;
- the inclusion of clauses on the transparency of financial reporting to Parliament;
- the inclusion of clauses on time-limits for human rights cases brought against Ministers within the devolved administrations under devolution legislation; and
- the inclusion of clauses on the House of Lords.

The Constitution Unit at UCL responded to the publication of the Bill with the following comments:

> The Constitutional Reform and Governance Bill, published late on Monday, risks being dismissed as a damp squib. It is disappointing, but the Constitution Unit nevertheless believes it should be passed. The most important changes are to the composition and regulation of the House of Lords, putting the Civil Service on a statutory footing, and strengthening parliamentary scrutiny and approval of Treaties.
>
> "It is disappointing that the government has laboured so long to bring forth a mouse. This is really a Constitutional Reform (Miscellaneous Provisions) Bill, and should have been introduced a year ago" said the Constitution Unit's director Prof Robert Hazell.[41]

3 Statutory basis for the management of the Civil Service

3.1 The Civil Service

Background

The current impartial British civil service selected on merit dates from the Northcote Trevelyan reforms of 1854.[42] That report recommended that the principles of the merit based

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36 Lord Tyler's website, *Bill to fulfil Brown's promise: "Power to Parliament and the People"* [on 1 October 2009]
37 See for example HL Deb 7 May 2009 c663
38 HC Deb 10 June 2009 c795
39 HM Government, *Building Britain's Future,* Cm 7654, June 2009, p107
40 Library Standard Note, SN/HA/4485, *The Law Officers*
41 Constitution Unit Press Notice, *Constitutional Reform Bill disappointing, but deserves to be passed,* 21 July 2009, [on 7 October 2009]
42 Northcote Trevelyan is accessible in Appendix B of the Fulton Report Cmnd 3638 June 1968

civil service be set out in statute, but this remains unimplemented and the civil service is established through Royal Prerogative powers, set out in Orders in Council. The *Civil Service Order in Council 1995* has been informally consolidated and is available on the Civil Service Commission website.[43]

Since 1855 the Civil Service Commissioners have been responsible for the appointment of civil servants.[44] Recruitment to lower grades was delegated to departments in 1982, but the Commissioners oversee recruitment to the Fast Stream and direct recruitment to appointments in Pay Band 3 and above of the Senior Civil Service and some other senior civil service posts. They chair the appointment boards for the Top 200 senior civil service posts. The Commission also hears appeals from civil servants on alleged breaches of the Civil Service Code.[45] Commissioners are not civil servants and generally have experience in recruitment and public sector issues. They are serviced by civil servants based in the Cabinet Office. Their annual report is available online.[46] On 20 December 2005 the then Prime Minister, Tony Blair, appointed Janet Paraskeva as First Civil Service Commissioner.[47]

The civil service in Northern Ireland has been separately constituted since the creation of the devolved entity in the *Government of Ireland Act 1920*. The practice in Northern Ireland since 1920 has been to confer statutory functions on departments, in contrast with the Whitehall practice of conferring functions on ministers. A separate set of Commissioners for Northern Ireland were appointed in 1923 by Order in Council.[48] The Orders also assigned to the Department of Finance and Personnel (DFP) certain "management and control" responsibilities in relation to the Northern Ireland Civil Service. Following devolution in 1999, two new Orders were made - the *Civil Service Commissioners (Northern Ireland) Order 1999* and the *Civil Service (Northern Ireland) Order 1999*, which provide separately for the functions of Commissioners and those of DFP.[49]

In contrast, the civil servants who work for the Scottish and Welsh administrations remain part of the Home Civil Service.

Recruitment principles

The Commissioners are responsible for drawing up the Recruitment Principles for civil servants, explained in the following extract from their website:

> The Recruitment Principles explain what the fundamental requirement of selection for appointment on merit on the basis of fair and open competition means. The Recruitment Principles also set out the circumstances in which appointments can be made as exceptions to this requirement.
>
> The Recruitment Principles describe what responsibilities departments and agencies have in meeting this requirement, for example the extent to which Ministers may be involved in the selection process. Departments and agencies are however free

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43 Civil Service Commissioners Order in Council 1995 [on 7 October 2009]

44 For a full history, see *The Civil Service Commission 1855-1991: A Bureau Biography* Richard A Chapman 2004

45 Library Standard Note SN/PC/3924, *The Civil Service Code*

46 http://www.cscannualreport.info/i

47 Cabinet Office press notice, *Appointment of the First Civil Service Commissioner and Commissioner for Public Appointments,* 20 December 2005 http://www.cabinetoffice.gov.uk/newsroom/news_releases/2005/051220_commissioner.aspx [on 7 October 2009]

48 For background, see Harry Calvert *Constitutional Law in Northern Ireland: a study in regional government,* 1968, p362

49 See the Civil Service Commissioners for Northern Ireland website for the text of the Orders and further background [on 7 October 2009]

> to develop their own approaches to recruitment as long as they are consistent with the Recruitment Principles.
>
> The Recruitment Principles came into effect on 1 April 2009 and replaced the Civil Service Commissioners Recruitment Code. The Commissioners have published a Question and Answer brief to help departments and agencies manage the transition.
>
> The Recruitment Principles are concerned only with the requirements of the Orders in Council. They are not a guide to everything required to carry out recruitment; such as pre-appointment checks on nationality, health or qualifications, or the implications of employment law. It is for departments and agencies to handle the recruitment and subsequent employment of staff in a way that complies both with the Recruitment Principles and with employment law.[50]

Civil Service Code

In May 1996 a Civil Service Code was issued by the Cabinet Office. This follows demands for a set of guiding principles for civil servants, spearheaded by the Treasury and Civil Service Committee, and its successor the Public Service Committee, in the 1990s. The Code was also recommended by the (Nolan) Committee on Standards in Public Life (CSPL) in its first report of 1995. The Code is designed to set out the essential values of the civil service, promoting impartiality and ethical behaviour. The Code also introduced an independent appeals procedure based on a strengthened Civil Service Commission. Further information is available in the Library Standard Note *The Civil Service Code.*[51] A new simpler draft of the Code was adopted on 6 June 2006, following a review by the CSPL in 2003, which recommended greater publicity and an enhanced role for the Commissioners in hearing appeals. The Code may be viewed on the Cabinet Office website.[52] Similar Codes have been adopted by the administrations in Scotland and Wales. References are available in the *Explanatory Notes* to the Bill. A Code of Ethics applies for the Northern Ireland Civil Service.[53] There is a separate Diplomatic Service Code of Ethics.[54]

Proposals for reform

CSPL reviewed the civil service in its report: *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service* in April 2003.[55] This followed an earlier review in 2000, *Reinforcing Standards: review of the First Report from the Committee on Standards in Public Life.*[56] The Government responded to the CSPL report in September 2003.[57] Both reports had heard evidence expressing concern about the potential for politicisation of the civil service.

In brief, the CSPL recommended a Civil Service Act, following a similar recommendation made in 2000.[58] The Government response was as follows:

> The Government accepts the case in principle for legislation but any legislation has to compete for its place alongside many other priorities. The Government also believes that much more can be done to implement most of the Committee's concerns without or in advance of legislation. For example, in recommendation 14, the Committee feels strongly that the appointment of the First Civil Service Commissioner needs to be able

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50 Civil Service Commissioners, *Recruitment Principles,* [on 7 October 2009]
51 Library Standard Note SN/PC/3924, *The Civil Service Code*
52 *The Civil Service Code,* [on 7 October 2009]
53 Civil Service Commissioners for Northern Ireland, *Code of Ethics,* [on 7 October 2009]
54 The Diplomatic Service Code of Ethics 2006
55 Cm 5775
56 Sixth Report, Cm 4557, January 2000
57 Cm 5964
58 Cm 4557

> to carry the confidence of each new Administration. As the Committee acknowledges this can be achieved through consultation with Opposition leaders. Another example is the appointment procedures for public appointments where a rigorous and effective process has been established without legislation. The Government believes that the present arrangements work well but it will continue to reinforce the impartiality of the Civil Service. Once the Public Administration Select Committee's proposals for legislation for the Civil Service have been published, the Government will itself publish a draft Bill, as a basis for further consultation.[59]

The Public Administration Select Committee (PASC) published a draft bill in January 2004, which attempted to set out the principles of civil service legislation. The Government published its own draft bill on 15 November 2004 attached to a consultation paper, but there was no pre-legislative scrutiny, and the Blair Government did not commit itself to immediate legislation. The Library Standard Note *Civil Service Legislation* examines in detail these earlier drafts of civil service legislation.[60]

When Gordon Brown became Prime Minister he promised to focus on constitutional reform, and introduce a civil service act. The Green Paper *The Governance of Britain* promised legislation.[61] The intention would be to:

- place the independent Civil Service Commissioners on a statutory footing;
- make the principle of appointment by merit following fair and open competition a legal reality;
- clarify the "legitimate and constructive role" of Special Advisers within government; and
- make permanent the new administration's belief that "it is inappropriate for even a limited number of special advisers" to be allowed to give orders to civil servants. Previously, Article 3(3) of the Civil Service Order in Council 1995 (as amended in 1997) had given the Prime Minister the ability to appoint up to three such advisers.

The Draft Constitutional Renewal Bill 2007-08

Part 5 of the draft *Constitutional Renewal Bill* published in March 2008 included provisions to put the civil service and the Civil Service Commissioners on a statutory footing.[62] The provisions were outlined in detail in the Library Standard Note *Civil Service Legislation* and are not repeated here.[63]

Scrutiny of the draft Bill

Public Administration Select Committee

PASC published their report, *Constitutional Renewal: Draft Bill and White Paper,* on 4 June 2008.[64] This broadly welcomed the Government's proposals but made recommendations for changes. The Report also includes an Annex which compared the provisions in the current *Draft Constitutional Renewal Bill* to those in the Government's 2004 draft Bill and the PASC 2004 draft Bill.

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59 Cm 5964
60 Library Standard Note SN/PC/2863, *Civil Service Legislation*
61 Cm 7170, July 2007
62 For background see Library Standard SN/PC/4703 *Governance of Britain-An Update*
63 Library Standard Note SN/PC/2863, *Civil Service Legislation*
64 Ministry of Justice, *The Governance of Britain - Draft Constitutional Renewal Bill,* Cm 7342-II, March 2008

Joint Committee on the Draft Constitutional Renewal Bill

A Joint Committee was established in May 2008 to undertake pre-legislative scrutiny of the *Draft Constitutional Renewal Bill.* In summary, on the civil service aspect of the draft bill, they stated:

> We welcome the Government's intention to put the civil service and the Civil Service Commission on a statutory footing and set out the historic principle of appointment on merit on the basis of fair and open competition, 154 years after Northcote and Trevelyan called for a Civil Service Act. Ideally, we would like to see this as a separate Civil Service Act rather than part of wider constitutional legislation.[65]

The Government published responses to PASC and the Joint Committee in July 2009. The Library Standard Note *Civil Service Legislation* provides full background to the recommendations of both committees and the Government responses.[66]

The Bill now before Parliament has made minor adjustments to the provisions in the draft Bill with no major policy changes. The main changes from the draft Bill are:

- more detailed exemption from the definition of civil service of certain diplomatic service appointments to posts overseas;
- changes to the drafting on the power of Ministers to manage civil service, to omit references to dismissals and the imposition of rules on civil servants;
- redrafting of clauses on the application of other statutory management powers over the civil service;
- new clauses to provide more details on the complaints process for civil servants, both in relation to the civil service code and in relation to the appointments process;
- more detail about the monitoring powers of the Civil Service Commissioners;
- redrafting of clause on special advisers to include more detail on special adviser appointments in Scotland and Wales; and
- addition of a clause to reflect the separate position of the Northern Ireland Civil Service Commissioners.

The Bill

Part 1 of the Bill applies to the United Kingdom. However, as set out in the *Explanatory Notes*, there are a number of provisions that will trigger the Sewel Convention, requiring approval from the Scottish Parliament for legislation within devolved areas.[67] The areas are: Scottish Executive Civil Service Codes and Special Advisers Codes, appointments of special advisers, duty to lay before the Scottish Parliament annual report on special advisers and Civil Service Commission.

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65 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09

66 Library Standard Note SN/PC/2863, *Civil Service Legislation*

67 *Explanatory Notes*, para 74

Application to the civil service

The Bill has been restructured since the draft version, and the first part establishes a statutory basis for the civil service. This is the substance of **clause 1** which applies part 1 to the 'civil service of the State' with reference to those aspects not to be included. These are:

- the Secret Intelligence Service (MI6);
- the Security Service (MI5);
- Government Communications Headquarters;
- Northern Ireland Civil Service; and
- Northern Ireland Court Service.

The Royal Household is not considered to be part of the civil service and so is not specifically referred to in the clause. The clause is not identical to clause 26 of the draft Bill. It now contains subsections relating to the selection of non civil servants to posts with duties outside the UK, a reference to diplomatic appointments. There is likely to be some continuing debate about the definition of the civil service during the passage of the Bill, particularly in relation to Government Communication Headquarters (GCHQ) employees. Witnesses to the Joint Committee differed as to whether they should be excluded from statutory access to an appeal mechanism and from a statutory guarantee of recruitment on merit.[68]

Management of the civil service

Clause 3 gives power to manage the civil service to the Minister for the Civil Service and the Secretary of State in relation to the diplomatic service. However, national security vetting remains a prerogative power and is specifically excluded from these statutory powers.

Clause 4 provides that statutory powers of management are subject to the powers in clause 3. This excludes powers under the *Superannuation Acts*, but includes the *Civil Service (Management Functions) Act 1992.* This Act enabled the delegation of civil service functions.

The parliamentary committees raised concerns about the drafting of these clauses, suggesting that ministers should not be given the power of appointment. The *Explanatory Notes* stress that the power to appoint and dismiss civil servants would continue to be delegated, as now, to the Head of the Civil Service and permanent Heads of Departments. References to the power to dismiss civil servants have been removed, as these were considered to have been covered by general references to 'manage'. The Joint Committee also had concerns about the extent to which prerogative powers over the civil service would remain. In the current drafting, these appear to be exclusively for national security vetting.

Civil Service Commission

Clause 2 establishes the Civil Service Commission as a body corporate. This clause is identical to the draft Bill clause 27. **Schedule 1** provides for a minimum of seven members of the Civil Service Commission, one as First Civil Service Commissioner. The Minister for the Civil Service must consult the First Ministers for Scotland and Wales and the two major opposition parties (defined by share of vote at the most recent parliamentary election) on the appointment of the First Commissioner.

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[68] Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* 31 July 2008, HL Paper 166-I HC Paper 551-II 2007-08 paras 245-249

There is no provision for a specifically parliamentary dimension to the appointment, such as reference to PASC, or a joint committee of both Houses, unlike for the Comptroller and Auditor General (C&AG), whose appointment is made by the Crown following an address by the House on a motion by the Prime Minister 'acting with the agreement of the Chairman of Committee of Public Accounts'. This is set out in section 1 of the *National Audit Act 1983* and explained further below.

The term of office is for a single non renewable term of five years for all Commissioners, as with the Parliamentary Commissioner for Standards and the new Parliamentary Commissioner for Investigations in the *Parliamentary Standards Act 2009*. Again, this contrasts with the proposals for the C&AG in Part 7 of the Bill where a longer non renewable 10 year term is set out in clause 37.[69] There is provision for appointment of ex-officio Commissioners, such as the Commissioner for Public Appointments. Civil Service Commissioners are currently appointed for one five year non renewable terms,[70] and the Commissioner for Public Appointments is a Civil Service Commissioner.[71]

The Commission is not to form part of the civil service itself and will have power to appoint its own staff. Grant in aid is provided from the Minister for the Civil Service following consultation with the Commission. The Commission annual report will be provided for the Prime Minister and for the Scottish and Welsh Executives who will have the responsibility to lay the report before the respective parliaments, but there is no provision for an annual debate on the topics raised. There are transitional arrangements to allow for the existing Commissioners to continue in post.

PASC and the Joint Committee raised concerns about the independence and status of the Commissioners. The Government responses argued that the Non Departmental Public Body (NDPB) model was the most appropriate and that select committees would offer detailed scrutiny. It is noteworthy that other Cabinet Office sponsored NDPBs such as the Advisory Committee on Business Appointments and the Office of the Public Appointments Commissioners are to remain non statutory bodies, although their roles also promote propriety in the civil service and the wider public sector.

Responsibilities of the Civil Service Commission

Clauses 10-13 provide for appointment on merit and require the Commission to publish a set of recruitment principles, including provision for the approval of the Commission for appointments. The main exception to the principle of appointment on merit is for special advisers and Heads of Mission or Governors of overseas territories in the diplomatic service. The Joint Committee heard evidence from the Lord Chancellor that there were good reasons for the Foreign Secretary and Prime Minister to have discretion in a limited number of cases.[72] However, such exceptees would be required to be appointed on the basis of merit to any subsequent post in the civil service.

There is provision for other exceptions, as set out in the *Explanatory Notes* to the Bill*:*

> 104. *Subsection (1)(b) and subsection (4)* enable the recruitment principles to set out exceptions to the requirement of selection on merit on the basis of fair and open competition where justified by the needs of the Civil Service or in the interests of

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69 Library Standard Note SN/PC/4595 *Comptroller and Auditor General*

70 For details, see Government response to PASC report *Ethics and Standards: The Regulation of Conduct in Public Life* in PASC First Special Report, November 2007, HC 88

71 For more information see Library Standard Note SN/PC/4720, *Officers of Parliament: recent debates*

72 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill,* 31 July 2008, HL Paper 166-I HC Paper 551-II 2007-08 paras 284-288

> enabling the Civil Service to participate in Government employment initiatives, such as initiatives to relieve unemployment.
>
> 105. *Subsection (6)* make provision for the recruitment principles to specify the procedures and the terms and conditions for appointments made under the exceptions contained in the recruitment principles under *subsections (3)(c)* of *clause 10. Subsection (7)* allows the recruitment principles to give the Commission or Civil Service Management Authorities discretion in applying aspects of the recruitment principles.

These exceptions were also in the draft Bill.

There is also provision for complaints to be made to the Commission, where there are allegations that recruitment principles were not followed. The Bill simply sets out in statute the current procedures and roles of the Commission. The Bill does not give the Commission a proactive role in undertaking individual investigations on its own initiative, although such a power was recommended by the parliamentary committees. The Government responses indicated that this might place the resources of the Commission under pressure and subject them to politically motivated correspondence.[73] The First Commissioner's evidence to the Joint Committee had expressed some uncertainty as to the merit of the power of initiation.[74]

However, **clause 14** requires the Commission to undertake monitoring or recruitment policies and practices. For this purpose, it may require a civil service management authority to provide information.

The concerns expressed by PASC and others as to the desirability of ensuring that promotion is made on merit, as well as appointment are not directly dealt with by the Bill. The Government responses argued that giving the Commission oversight over promotions would risk overstretching the Commission, and that Commissioners already had a role in appointing the most senior members of the Civil Service. [75]

Clause 9 enables civil servants to complain to the Civil Service Commission about alleged breaches of the Civil Service Code and diplomatic codes. The Commission may require a civil service management authority and another civil servant involved in the incident to provide information. **Clause 17** enables the Minister for the Civil Service and the Commission to agree to carry out additional functions.

Clause 20 deals with the Civil Service Commissioners for Northern Ireland. It amends the *Northern Ireland Act 1998* to make clear that appointments of these Commissioners are a reserved, rather than an excepted matter. A reserved matter may be transferred to the Assembly at a later date under section 4 of the *Northern Ireland Act 1998.*

Codes of conduct

Clause 5 requires the Minister for the Civil Service to publish a civil service code (excluding the diplomatic service), which is to be laid before Parliament. Different codes for Scotland and Wales will apply, as currently, and these will be laid before the Scottish Parliament and Welsh Assembly. There is no provision for the various Parliaments and Assemblies to amend or debate the Code. **Clause 6** provides for a diplomatic service code. **Clause 7** sets out minimum requirements for the civil service and diplomatic service codes, whether in the UK,

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73 Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009

74 Evidence to Joint Committee on the Draft Constitutional Renewal Bill HL Paper 166-/HC Paper 551 2007-08 Q565

75 Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009

Scotland or Wales, including requirements on integrity and objectivity, provisions on special advisers and an appeal system to the Civil Service Commission. This clause has been subject to some redrafting since the draft bill, as the requirement to include an appeal mechanism is now dealt with separately in clause 9 (see below).

Clause 8 provides for a code of conduct for special advisers, also to be laid before the relevant parliament or assembly. Once again, there is no provision for a parliamentary debate on its contents. PASC has pressed for parliamentary approval of these codes, but the Joint Committee considered scrutiny by select committee more appropriate. However the Joint Committee did consider that the *Ministerial Code* should be formally laid before Parliament, since it contained duties on ministers not to require civil servants to act in a partisan role; it also considered that the principles behind the Business Appointment Rules should be laid formally before Parliament. These recommendations do not appear in the Bill.

3.2 Special advisers

Background

The role of special and unpaid advisers has been the subject of intense scrutiny following the election of the Labour Government in May 1997. The Library Research Paper *Advisers to Ministers* discusses much of the background to the question of special advisers and in particular the report from the (Neill) Committee on Standards in Public Life *Reinforcing Standards* in 2000 which made a series of recommendations on this issue.[76] Library Standard Note *Special Advisers* contains full background.[77]

Currently, special advisers are appointed in accordance with Article 3(2) of the *Civil Service Order in Council 1995* (as amended) for "the purpose of providing assistance to Ministers".[78] They are temporary civil servants and their employment ends at the end of the administration which appointed them. In common with all civil servants, they are bound by the *Civil Service Code* (except sections one and five which relate to the impartiality and objectivity of the Civil Service and civil servants and the aspects of paragraph nine which relate to future administrations and potential future Ministers). However, they also differ from the majority of permanent civil servants because they "are exempt from the general requirement that civil servants should be appointed on merit and behave with political impartiality and objectivity".[79]

The responsibilities of, and limits on the activities of special advisers are contained in five separate documents. These documents collectively set the framework within which special advisers operate. The documents are: the *Civil Service Order in Council 1995*, as consolidated, the *Code of Conduct for Special Advisers;* the *Model Contract for Special Advisers*; the *Civil Service Code*;[80] and the *Ministerial Code.*[81]

The debate over the powers of special advisers is epitomised by the PASC inquiry of 2001 which called its report *Special Advisers: Boon or Bane?*[82] The report summarised concern about the potential creation of a 'spoils system' of government associated with the American system, and whether the growth of special advisers within No 10 could be considered a move towards a more presidential style of government. Another concern has been the role of special advisers in Government communications, vis a vis the civil service, and the appropriate form of supervision for special advisers.

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76 Library Research Paper 00/42, *Advisors to Ministers*
77 Library Standard Note, SN/PC/3813, *Special Advisers*
78 Cabinet Office, *Model Contract for Special Advisers,* November 2007, as amended April 2009
79 Cabinet Office, *Code of Contract for Special Advisers,* November 2007, as amended April 2009
80 Civil Service, [on 7 October 2009]
81 See Library Standard Note SN/PC/2863 *Civil Service Legislation*
82 Public Administration Select Committee, *Special Advisers: Boon or Bane?*, 28 February 2001, HC 293 2000-01

The Code of Conduct and Order in Council for Special Advisers

One of the recommendations from the (Neill) Committee on Standards in Public Life was for a code of conduct for special advisers, to be enforced, it stated, by 'permanent heads of department'.[83] The Code was first published in July 2001 by the Cabinet Office. The Library Standard Note *Special Advisers* gives the full history of subsequent drafts of the Code and discusses the rules governing unpaid advisers.[84]

In 2003 the (Wicks) Committee on Standards in Public Life recommended there be a clear statement of what special advisers could not do and that the Code of Conduct for Special Advisers should continue to list the types of work a special adviser may do at the request of the minister. It also recommended that there should be an annual statement to Parliament setting out details of the special advisers and the Ministers for whom they worked and that the total number of special advisers should be limited by statute in the context of a Civil Service Bill. Finally, it recommended that the *Ministerial Code* should be amended to make sure that ministers were personally accountable to the Prime Minister and to Parliament for the management and discipline of their special advisers. Where necessary, the Prime Minister should be able to refer the matter for investigation in the same way as an alleged breach of the Ministerial Code. The Government response accepted that it should be the minister who took responsibility. An exchange of opinion between the CSPL and the Government then followed, set out fully in the Library Standard Note on *Special Advisers.*[85]

The (Wicks) Committee on Standards in Public Life report had noted that the Civil Service Order in Council relating to special advisers of 1995 had referred to their role as one of "giving advice only". This was inconsistent with the Code of Conduct for Special Advisers which listed activities that special advisers could be asked to do by their Ministers. These activities went far beyond only giving advice. PASC had therefore recommended the wording "providing assistance" in its report on a draft Civil Service Bill in 2004.[86]

It emerged in July 2005 that the Government had changed the terms of the Order in Council which governs the role of special advisers and was drafting a new Code of Conduct and new Model Contract for special advisers. The Prime Minister, Tony Blair, announced the changes in a parliamentary written statement on 21 July 2005.[87] The manner of the change upset CSPL, whose then chairman, Sir Alastair Graham, issued two press releases on 19 and 21 July, quoting from his correspondence with the Cabinet Office.[88] There was a starred question debate in the House of Lords on 7 November 2005 on the number and role of special advisers.[89] Several peers expressed concern that the role of special advisers was being extended in a way that usurped the role of permanent civil servants.[90] No major change resulted.

Special advisers and the Brown Government

The new Prime Minister, Gordon Brown, took office on 27 June 2007. The afternoon press briefing for that day noted that "In his first act as Prime Minister he revoked the Orders of

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83 Committee on Standards in Public Life Sixth Report Cm 4557 January 2000 Recommendation 22

84 Library Standard Note SN/PC/3813, *Special Advisers*

85 *Ibid.*

86 January 2004, HC 128 2003-4. See Library Standard Note, SN/PC/2863, *Civil Service Legislation*

87 HC Deb 21 July 2005 c162WS Dep 05/1001 (Code of Conduct for Special Advisers) and Dep 05/1002 (Model Contract for Special Advisers)

88 "Changes to the law on Special Advisers" Committee on Standards in Public Life PN 19 July 2005. The relevant Order in Council is the Civil Service (Amendment) Order in Council 2005 made 22 June 2005 which can be found at Gazettes on-line. See also "Revision of the Code of Conduct for Special Advisers" Committee on Standards in Public Life PN 21 July 2005

89 HC Deb 7 November 2005 c482-98

90 HL Deb 7 November 2005 c496

Council granting powers to special advisors to give instructions to civil servants".[91] This was a reference to the revoking of the powers given to Tony Blair in 1997 to appoint up to three special advisers with executive powers.

The Green Paper *The Governance of Britain* of July 2007 contained commitments to bring forward legislation on the civil service and to include within this legislation the regulation of special advisers.[92] However, there was no commitment to limit the role of special advisers to advice and not assistance, and no commitment to include a limit on the numbers of special advisers in the proposed civil service legislation.

On 22 November 2007 a written ministerial statement was issued giving the list of special advisers appointed under the Brown Government, including the Council of Economic Advisers.[93] At the same time a revised Code of for Special Advisers and a revised Model Contract was published.[94] There were no major changes in the revisions and there was no change in the Order in Council setting out the role of special advisers. The revision omitted the justification for specialist special advisers in the 2005 Code version and promoted their use as "an additional resource for the Minister, providing assistance from a standpoint that is more politically committed and politically aware than would be available to a Minister from the permanent civil service".[95] The twelve types of work suitable for a special adviser set out in the Code remain the same.

Gordon Brown's Chief Press Adviser, Damien McBride, resigned on 11 April 2009 as a result of leaked emails suggesting personal attacks on Opposition figures.[96] The Cabinet Secretary, Sir Gus O' Donnell, then wrote to the Permanent Secretaries of departments, with "strengthened" guidance on codes of conduct. Special advisers are required to sign an undertaking that they are aware of the new guidance.[97] Updated versions of the Code and Contract were issued.

Numbers of special advisers

Since July 2002, the Prime Minister has provided information to the Commons on an annual basis detailing the names, expertise, pay range, number and cost of special advisers.[98] Information for earlier years has been extracted from parliamentary answers and summarised by the CSPL in its 2003 report. [99] Each answer gives the number of special advisers in post in July annually and offers a pay total figure which relates to the previous year.[100]

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91 No 10 Downing Street Afternoon Press Briefing for 27 June 2007. The relevant Order in Council is the *Civil Service (Amendment)(No 2) Order in Council 2007*, made on 28 June 2007. This Order did not make amendments to the new power given to special adviser to assist ministers in the Order in Council amendment made in 2005 by Mr Blair

92 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007, paras 45-47

93 HC Deb 22 November 2007 c147WMS-150W. For CEA, see "Two's a crowd" 26 October 2007 *Financial Times*

94 Dep 2007/0134, available on Cabinet Office website [on 7 October 2009]

95 Cabinet Office, *Code of conduct for special advisers* November 2007 para 2

96 "Mc Bride's resignation statement in full", *BBC News,* 11 April 2009, [on 7 October 2009]

97 "Email smears a "serious breach", *BBC News,* 15 April 2009, [on 7 October 2009]

98 HC Deb 16 July 2009 c73-76WS; HC Deb 22 July 2008 c100WS; HC Deb 22 November 2007 c147WS; HC Deb 24 July 2006 c86WS;HC Deb 21 July 2005 c160WS; HC Deb 22 July 2004 c 466W – 470W; HC Deb 16 July 2003 c328 – 330W; HC Deb 24 July 2002 c1372 – 1374W; Numbers in this table include special advisers in no 10 who are paid above the pay bands given, and members of the Council of Economic Advisers

99 Committee on Standards in Public Life, *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service*, 8 April 2003, p50

100 HC Deb 22 January 2001 c469w

Table 1: Special advisers 1994/95 to 2007/08

	Total	*of which:*			
Financial Year (a)		**No 10**	**Departments**	**Special Adviser Pay £m**	**Change in pay on previous year (%)**
1994/95	34	6	28	1.5	-
1995/96	38	8	30	1.5	0
1996/97	38	8	30	1.8	20
1997/98	70	18	52	2.6	44
1998/99	74	25	49	3.5	35
1999/00	78	26	52	4	14
2000/01	79	25	54	4.4	10
2001/02	81	26	55	5.1	16
2002/03	70	27	43	5.4	6
2003/04	72	26	46	5.3	-2
2004/05	84	28	56	5.5	4
2005/06	82	25	57	5.9	7
2006/07	68	20	48	5.9	0
2007/08	73	23	50	5.9	0
2008/09	74	24	49	5.9	0

There is a discontinuity in the calculation of the total pay bill between 2001/02 and 2002/3. Parliamentary answers since then have included the total cost, including salary, severance pay and estimate of pension costs. Previously, the pay bill only was included.

The Bill

Clause 15 defines special advisers as appointed to 'assist a Minister of the Crown' and makes provision for their appointment. The definition has been recast since the draft Bill, but the general principles are similar. A special adviser is a person who is appointed personally by a Minister, with the approval of the Prime Minister, whose appointment ends with the term of office of the Minister or a general election. The clause also sets out the definition of special adviser in relation to the administrations in Scotland and Wales. Here, the appointment is made personally by the First Minister and ends when the First Minister resigns.

These provisions mirror the current position as set out in the Civil Service Order in Councils, except that at present there are limits on the numbers of special advisers in Scotland, Wales and Northern Ireland, introduced as devolution took effect in 1999.[101] The Bill removes those limits. No cap in numbers is proposed for any administration. Pressure on the Government to institute a cap appears to have declined since the early 2000s, given that numbers are no longer increasing and that the special 1997 authorisation to direct civil servants given to special advisers at no 10 was removed in 2007. The Government response to the Joint Committee argued that numbers of advisers were in practice limited by the restrictions on Cabinet Ministers in para 3.2 of the *Ministerial Code* to appoint up to two special advisers.[102]

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[101] *Civil Service (Amendment) Order in Council 1999.* Background is given in the Committee on Standards in Public Life Sixth Report Cm 4557 2000,, para 6.13. Equivalent provision was made for Northern Ireland in the *Civil Service Commissioners (Northern Ireland) Order 1999*

[102] Cm 7690, para 216

Clause 16 requires the Minister for the Civil Service, and the two First Ministers to prepare annual reports about special advisers to be laid before the respective Parliaments and Assembly. The report must contain information about the number and cost of such advisers. The *Explanatory Notes* point out that such reports are already published by the Minister for the Civil Service and the Scottish First Minister.[103] There is no requirement for these reports to be subject to parliamentary debate.

4 The ratification of treaties

4.1 Background

What are treaties?

Treaties, which are sometimes called 'conventions', 'protocols' or 'agreements' instead, are a major source of international law and are binding on the states that have ratified them. Many treaties have major implications for domestic law and policy, but the UK Parliament currently has no formal role in the ratification of treaties, which is a matter for the Government under the Royal Prerogative.

Current forms of scrutiny

In the UK, although Parliament has no formal treaty-scrutiny role and cannot directly block ratification by the Government, it does in fact provide some scrutiny of treaties. Various ways in which this is done are described below. However, unless a treaty requires a change in UK legislation or the grant of public money, Parliament has little power to overcome the will of the executive to conclude a particular treaty.

Treaties which require ratification are subject to the 'Ponsonby Rule'

The Ponsonby Rule began life as an undertaking given by Arthur Ponsonby, the Under-Secretary of State for Foreign Affairs in the Labour Government, on 1 April 1924.[104] It committed the Government:

1. To lay on the Table of both Houses of Parliament every treaty, when signed, for a period of 21 sitting days before ratification and publication in the Treaty Series. They would be debated in two circumstances:

    a. in the case of "important Treaties" the government would submit them to the House for discussion within the 21 days;

    b. for any other Treaties, time would be found for debate if there was a formal demand from any party forwarded through the usual channels; and

2. To inform the House of all other "agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances" and which may involve "international obligations of a serious character, although no signed and sealed document may exist".

Under the Ponsonby Rule as it is currently practised, each treaty subject to ratification (or accession, approval or acceptance)[105] is laid before Parliament by the deposit of a Command

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[103] This is a reference to the annual Written Ministerial Statement made in the UK Parliament and to a similar statement in the Scottish Parliament. The Internet links are provided in the *Explanatory Notes*.

[104] HC Deb 171 1 April 1924 cc2000-2005

[105] Accession arises when the government did not sign a treaty when it was open for signature but subsequently wishes to become a party to it. Approval and acceptance are rather like ratification, signalling that a state wants to be bound be a treaty – sometimes a state will sign a treaty subject to approval or acceptance respectively, to give it time to review a treaty after signature without invoking the constitutional procedures which might be required for ratification.

Paper. It is accompanied by a Government Explanatory Memorandum (EM) which provides information about the contents of the treaty, the Government's view of its benefits and burdens and its rationale for ratification. A copy of each treaty laid under the Ponsonby Rule is also sent to the relevant departmental Select Committee.

Few treaties are actually debated under the Ponsonby Rule, although the Government has agreed to make time for a debate in certain circumstances; and even if there is a debate and Parliament expresses its disapproval, this does not necessarily prevent the Government from ratifying the treaty. Furthermore, not all international commitments take the form of a treaty. For example, many Memoranda of Understanding cover very important issues but are not treaties under international law. Although the second limb of the Ponsonby Rule requires the Government to inform the House of all other binding agreements which involve serious international obligations, this has had much less attention, and does not in any case include any reference to debates. The Ponsonby Rule has, however, resulted in most important treaties having some degree of parliamentary scrutiny. It also encourages greater transparency in treaty-making by requiring information to be provided to Parliament (and thence the public) about recent treaties.

Some treaties stipulate parliamentary approval

Where an agreement is of a political nature and is known to be controversial, one (or both) of the governments involved may wish to safeguard its position by writing an express requirement for parliamentary approval into the text.

Many treaties require a change to domestic legislation which will be subject to the usual parliamentary procedures

If the Government needs to introduce domestic legislation to allow it fulfil its obligations under a treaty, it will usually ask Parliament to pass the legislation before it ratifies the treaty.

Treaties with direct financial implications require the assent of Parliament because they affect revenue

The most common type of treaty in this category is bilateral agreements to avoid double taxation. The *Inheritance Tax Act 1984*, the *Income and Corporation Taxes Act 1988* and the *Finance Act 2006* provide that an Order in Council to implement such a treaty is subject to an affirmative resolution of the House of Commons, and a copy of the treaty is attached to the draft Order.

European treaties have their own mechanisms for parliamentary scrutiny

The UK has established sophisticated and comprehensive methods for parliamentary scrutiny of European Union (EU) business, not least because much European Community (EC) law is directly applicable in the Member States or creates directly enforceable rights. This includes scrutiny of EC and EU treaties and of international agreements to be concluded by the EC or EU (with or without member States also being parties). In particular, section 12 of the *European Parliamentary Elections Act 2002* requires any treaty increasing the powers of the European Parliament to be approved by a specific Act of Parliament before ratification can take place, and section 5 of the *European Union (Amendment) Act 2008* provides that any future treaty amending the founding EU treaties must be approved by an Act of Parliament before the Government may ratify it.[106]

Other treaties and international agreements may be subject to some degree of parliamentary scrutiny if a Member raises the issue

This may be for example through a Parliamentary Question or Early Day Motion.

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[106] See Library Research Paper 08/03, *The European Union (Amendment) Bill*, 15 January 2008, p12 ff

Select Committees are increasingly being involved in scrutiny.

Select Committees have recently become more involved in the scrutiny of treaties, and receive a copy of all treaties in their subject area that are laid before Parliament. However, the extent of the scrutiny which might follow inevitably depends on the Committee's other priorities and demands on its time. The Joint Committee on Human Rights (JCHR) has been the most active in this area.

Public consultation

Sometimes the Government organises a public consultation exercise on a treaty prior to ratification. The first example was the public discussion of a draft *International Criminal Court Bill* in 2000, which led to ratification of the 1998 *Rome Statute for the International Criminal Court*. It has also consulted during negotiations of a treaty: from April to September 2002 it consulted the public in detail on options for amending the 1972 *Biological and Toxin Weapons Convention*.[107]

Devolved administrations

Under the devolution arrangements, international relations including treaty-making remain the exclusive responsibility of Westminster.[108] But it has nevertheless been recognised that the devolved administrations need to be involved where a treaty might have implications for devolved areas of responsibility. Rules governing the cooperation between Whitehall and the devolved administrations over treaties are set out in a 'Concordat on International Relations'.[109]

Crown Dependencies and Overseas Territories

The Crown Dependencies of the Channel Islands and the Isle of Man have their own legislative assemblies, and the 14 Overseas Territories have separate constitutions. The UK nevertheless maintains responsibility for their defence and international relations, and may decide to extend the application of a treaty to one or more of them. The Ponsonby Rule does not apply to such extensions, but the UK Government will usually consult with the Government concerned.[110]

Proposals for change

In recent years there have been calls for Parliamentary scrutiny of treaties to be enhanced. Some of the most often-used arguments for and against enhanced scrutiny are given below:

The case for increasing parliamentary scrutiny:

- The volume and scope of treaty-making has grown and now covers a wide range of subjects, often with clear implications for domestic law and policy.
- The current degree of parliamentary oversight arguably amounts to a 'democratic deficit'.
- Current practices rely largely on the sanction of political criticism and have no legal effect on the Government's decision to ratify.
- There is no requirement for sub-national tiers of government to be involved in oversight.

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107 *Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons*, Cm 5484, April 2002

108 Expressly reserved under the *Scotland Act 1998* Sch. 5 part 1 para 7; not transferred under the *Government of Wales Act 2006*; and an 'excepted matter' under the *Northern Ireland Act 1998* Sch 2 para 3

109 The concordat forms part of the *Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales*, Cm 4444, October 1999, subsequently replaced by *Memorandum of understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 4806, July 2000.

110 *The Governance of Britain - War Powers and Treaties: Limiting Executive Powers*, Cm 7239, 25 October 2007, para 129

- There is no institutional mechanism to ensure treaties are given adequate security.

The case for the status quo:

- The executive needs to have freedom of action in foreign relations.
- The executive is subject to ministerial accountability of Parliament in respect of treaties in the same way as any other policy area.
- Where a treaty requires implementing legislation to have domestic effect, Parliament remains the law-maker.
- There are many methods which can be used to trigger parliamentary debate on a treaty.
- The Ponsonby rule is adaptable, and has been improved through introduction of Explanatory Memoranda and referral to relevant Select Committee.
- Select Committees are already showing increasing willingness to scrutinise treaties.

Specific proposals for reform have been put forward in private member's bills,[111] a Royal Commission report,[112] several Select Committee reports[113] and a Conservative Democracy Task Force report.[114] These have had some results, including the Government promising to provide an Explanatory Memorandum (EM) for each treaty and to send each treaty and EM to the relevant departmental Select Committee. One major proposal that has not yet been taken up is that a new parliamentary committee should be created to scrutinise treaties at either the negotiation or the ratification stage (see below).

The Government's *Governance of Britain* consultations included a proposal to formalise the current arrangements for parliamentary scrutiny of treaties by "putting the Ponsonby Rule on a statutory footing" (by which it meant imposing a legal obligation on Government to publish and lay a treaty before Parliament for at least 21 sitting days prior to ratification) and giving the House of Commons the power to block ratification.[115] Only 11 responses were received.[116] They showed "a reasonable level of support for placing the Ponsonby Rule onto a statutory footing" though four respondents argued that it was not necessary as the arrangements worked well on the basis of convention. There were mixed views on the current parliamentary procedures for triggering a debate and on the proposals that a vote against ratification should bind the Government. Some respondents supported the establishment of a new parliamentary select committee or sifting committee on treaties, and some suggested that there should be pre-signature scrutiny of treaties.[117] Many of the same themes arose in a House of Lords debate on the proposals in January 2008.[118]

The March 2008 White Paper[119] and draft Bill[120] on "constitutional renewal" included provisions on treaties which were very similar to the draft clauses in the consultation paper, but with revised provisions on the effect of a negative resolution. They did not include any

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111 Lord Lester's Bills of 1996, 2003 and 2006; and in the current session both Lord Tyler's *Constitutional Renewal Bill* (HL Bill 34 2008-09) and Lord Willoughby de Broke's *Constitutional Reform Bill* (HL Bill 50 2008-09)

112 Report of the Royal Commission on the Reform of the House of Lords (the Wakeham Commission), *A House for the Future*, Cm 4534, January 2000

113 House of Commons Procedure Committee, *Parliamentary Scrutiny of Treaties*, HC 210 1999-2000; *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, 16 March 2004, HC 422 2003-04,; Joint Committee on Human Rights, *Protocol No. 14 to the European Convention on Human Rights*, 8 December 2004, HL 8/HC 106

114 Conservative Democracy Task Force, *Power to the People: Rebuilding Parliament*, 6 June 2007

115 *The Governance of Britain,* Cm 7170, July 2007, and *The Governance of Britain, War Powers and Treaties: Limiting Executive Powers,* Consultation Paper CP26/07, Cm 7239 2006-07

116 *The Governance of Britain – Analysis of Consultations*, Cm 7342-3, March 2008

117 *The Governance of Britain – Analysis of Consultations*, Cm 7342-3, March 2008

118 HL Deb 31 January 2008 c747 ff

119 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, March 2008

120 Ministry of Justice, *The Governance of Britain – Draft Constitutional Renewal Bill*, Cm 7342-II, March 2008,

provision for increasing the number of debates on treaties or for changes to the institutional mechanisms of parliamentary scrutiny. The White Paper did signal the Government's willingness for greater involvement of committees in treaty scrutiny, but emphasised that this was a matter for Parliament to decide. Both PASC and the special Joint Committee made detailed comments on the treaty provisions of the draft Bill. PASC considered the proposals to be a very weak form of parliamentary safeguard which the Government could in any case short-circuit by declaring a need for urgency, by failing to make time for a debate or by repeatedly asking the House of Commons to reconsider a negative decision.[121] The Joint Committee took a great deal of both written and oral evidence on this issue, and while it generally welcomed the proposal to put this aspect of the Ponsonby Rule on a statutory footing, it also recommended the creation of a new Joint Committee on Treaties.[122]

For further background information see the Library Standard Note on *Parliamentary scrutiny of treaties* which includes a summary of how parliaments in a selection of other countries scrutinise treaties.[123]

4.2 The Bill

Part 2 of the Bill (**clauses 21 to 25**) concerns the parliamentary scrutiny of treaties. It implements the Government's proposal to put the current informal requirement for treaties to be laid before Parliament for 21 days before ratification on a statutory footing, and to give the House of Commons a statutory power to object indefinitely to the ratification of a treaty. Though some of the wording has been changed from that of the draft Bill, the substance is almost identical (the main change is the addition of a power to extend the 21-sitting-day period). Some of the issues surrounding this proposal are discussed in the next section.

4.3 Issues and analysis

Resolution, statute or custom?

In 1924 Mr Ponsonby considered whether parliamentary scrutiny of treaties should be a matter of resolution, statute or custom, and concluded that custom was the most enduring method. Some witnesses to the Joint Committee on the draft Bill agreed, suggesting that making the Ponsonby Rule statutory would not make the Government any more likely to comply with the requirements, and would risk "blurring the constitutional separation between the courts and Parliament".[124] It would also mean a certain loss of adaptability. Other witnesses, however, felt that it would be a positive and beneficial step, and the Joint Committee took this view.[125]

Enough time for scrutiny?

There are mixed views about whether a 21 sitting-day period is sufficient for considered scrutiny of a treaty. Some commentators suggest that it has worked well in the past, whereas others suggested that flexibility might be needed, especially if Select Committees were going to conduct inquiries and publish reports. The Joint Committee on the draft Bill

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121 Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper*, 4 June 2008, HC499 2007-08, paras 81-89

122 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09

123 Library Standard Note SN/IA/4693, *Parliamentary Scrutiny of Treaties*

124 Clerk of the House of Commons and Clerk of the Parliaments, Further evidence to the Joint Committee on the Draft Constitutional Renewal Bill, July 2008 (Ev 65) para 24

125 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, paras 205 and 208

called for a mechanism to be set out in statute to increase this period in exceptional circumstances;[126] a general provision to this effect appears in **clause 22** of the Bill.

Effect of a negative vote

The biggest difference brought by the Bill would be that the Commons would be able to prevent a treaty from being ratified for as long as it continues to oppose the measure (the Lords alone would, by contrast, only be able to delay ratification briefly). This is achieved through the special negative resolution procedure under **clause 21**, meaning that unless either House objected, ratification could go ahead. This provision has generally been welcomed as strengthening Parliament's role, though some have called for the affirmative resolution procedure instead.[127]

The proposal that after a negative vote in the Commons the Government should be able to re-present a treaty as many times as it liked attracted some support, notably from the Joint Committee on the draft Bill.[128] There was also, however, significant criticism. PASC, for example, felt that this was "constitutionally dangerous" and suggested that the Government should not be able to re-lay a treaty before the next Parliamentary session.[129] The Government rejected this recommendation.[130]

Despite the innovation of this provision, many commentators have pointed out that it is unlikely to be used very often if current patterns of parliamentary interest in treaties continue.[131]

Exceptions and exclusions

In "exceptional" circumstances (undefined), the Government would be able to ratify a treaty without following the new treaty scrutiny requirements (**clause 23**). There have been some concerns that not all of the instances in which the Ponsonby rule has been avoided in the past have been genuinely urgent cases.[132] The Joint Committee on the Bill therefore called for the Government's statement in such cases to include detailed information on the nature of the exceptional circumstances,[133] but neither this nor other suggestions have been included in the Bill.

Nor do the proposals widen the scope of treaties considered by Parliament. As with the Ponsonby rule, only treaties requiring ratification (or similar) would be covered, and double taxation agreements and EU treaties would continue to be dealt with under their own special arrangements instead. Treaties where consent to be bound is expressed by signature alone would not be covered, which MJ Bowman, Director of the University of Nottingham Treaty Centre, suggests is a "significant loophole".[134] Furthermore, 'treaty-like' documents such as

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126 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 212

127 See for example Mark Ryan, Senior Lecturer in Constitutional and Administrative law, University of Coventry, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, Ev 36, para 15

128 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 220

129 Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper*, 4 June 2008, HC499 2007-08, para 87-89

130 Ministry of Justice, *Government response to the report of the Public Administration Select Committee on the Draft Constitutional Renewal Bill*, Cm 7688, July 2009, para 74

131 See for example Elizabeth Wilmshurst, Associate Fellow, Chatham House, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 13 May 2008 (Q19)

132 Public Administration Select Committee, *Constitutional Renewal: Draft Bill and White Paper*, 4 June 2008, HC499 2007-08, para 87

133 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 226

134 MJ Bowman, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, June 2008 (Ev 41)

Memoranda of Understanding (MOUs) would also remain outside the parliamentary scrutiny arrangements. The Commons Foreign Affairs Committee suggested that many of these may be more important in their effect than most treaties,[135] and Anthony Aust notes that they are especially important for many defence arrangements (for instance on the stationing of ballistic missiles) which need to be classified and so cannot be embodied in treaties.[136] Some international lawyers indeed consider MOUs actually to be treaties.[137] The Secretary of State for Justice and Lord Chancellor, Jack Straw, envisaged that such documents could be examined in future by a Select Committee, in confidence if need be,[138] and the Joint Committee on the Bill recommended that the scrutiny of such documents should be enhanced.[139]

Do the reforms go far enough?

The Bill would put the existing customary requirement for laying treaties before Parliament on a statutory basis, but neither incorporates the other aspects of the Ponsonby Rule on making time for a debate or vote or on notifying Parliament of other treaty-like agreements, nor includes the developments of the Ponsonby Rule such as the publishing of an Explanatory Memorandum for every treaty laid or the sending of a copy of each treaty to the relevant Select Committee. Nor does it provide for any increase in number of treaties being debated or any other method of Parliamentary scrutiny.

The one significant reform is to give the House of Commons a statutory power to object indefinitely to the ratification of a treaty, but this does not guarantee that parliamentary time will be made available for a debate and vote. There have been calls instead for a formal requirement for a debate or vote if requested by a committee or a well-supported Early Day Motion.[140] Jack Straw has suggested that an appropriate mechanism might be to make provision in the Standing Orders of each House that if a certain number of members said they wanted a debate and vote then this would have to happen.[141] The Government is likely to resist fettering the discretion of the business managers.[142]

There is a question-mark over whether even the limited duties under the new provisions could be enforced. The House of Lords has in the past suggested that the ratification of treaties is a non-justiciable issue,[143] so it has been suggested that if Parliament wants to be sure it could take a judicial review action against the Government for ratifying a treaty in breach of the new requirements, it may wish to provide for this expressly on the face of the Bill.[144]

Several witnesses to the Joint Committee on the draft Bill considered that the Government was focusing on the wrong issue, and instead should focus on ways of improving Parliamentary scrutiny of treaties.[145] Sir Franklin Berman, former legal adviser to the Foreign

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135 Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 19 June 2008 (Ev 75), para 2

136 Anthony Aust, former Deputy Legal Adviser to the Foreign and Commonwealth Office, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 2 June 2008 (Ev 16), para 10

137 See Jan Klabbers, *The Concept of the Treaty in International Law*, 1996

138 Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008, Q 752

139 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 232

140 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 237

141 Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q751)

142 Jack Straw, Lord Chancellor and Minister for Justice, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)

143 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418, *per* Lord Roskill

144 Professor Adam Tomkins, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 11 May 2008 (Ev 01), para 9

145 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 207

and Commonwealth Office, suggested that "it would be by far more productive for both Parliament and the Executive, in place of the Government's present proposals, to undertake a more thorough and wider-ranging study into the linked questions of the treaty-making process as such and the incorporation of treaty rights and obligations into United Kingdom law."[146]

Options for increased scrutiny

As noted above, whilst some commentators are relatively content with the proposed framework for the parliamentary scrutiny of treaties, others are concerned that it would be ineffective and have suggested various options for increased scrutiny. In considering these, it is important to think about the purpose of the scrutiny: would it be to ensure regularity/constitutionality, or to provide or legislative/quasi-legislative approval of treaties as precondition for UK's assent? Should parliament be sharing policy-making with the executive (which would really require it to be involved in treaty-negotiation) or simply be given a take-it-or-leave-it power once the treaty had been agreed? If a new Committee were created, should it just be a sifting committee or should it have substantive powers to conduct inquiries and make recommendations?

More public consultation

There are precedents for consulting the public more widely on treaties (see above). Building upon these precedents, it may be possible to encourage wider discussion of treaty and international issues in the future.

More parliamentary debates and votes

There is a view that Parliament and its committees do not make effective use of existing scrutiny mechanisms and that there is more scope for debate on treaties within Parliament, if Members wish.[147]

Parliamentary involvement at an earlier stage

Some commentators have called for a non-statutory "soft mandating" mechanism, allowing Parliament to have some influence on the negotiation of a treaty or at least immediately before signature.[148] This could minimise the risk of disagreements between Parliament and Government over the desirability of ratification.[149] However, it has been pointed out that treaty negotiations are often conducted in secret, making parliamentary scrutiny at that stage difficult if not impossible.[150] The Government does not consider that a formal mechanism for the scrutiny of treaties prior to signature is practical or workable, "given the diverse circumstances and timeframes in which treaty negotiations are conducted".[151]

Enhanced Select Committee scrutiny

As noted above, reforms introduced by the Government in 2000 gave departmental Select Committees a potentially greater role in the scrutiny of treaties. This has not been taken up as enthusiastically as some had hoped, but the JCHR has shown that Committees can and do take an active role in treaty scrutiny. MJ Bowman, Director of the University of Nottingham Treaty Centre, has suggested that committee scrutiny of treaties requires not

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146 Sir Franklin Berman, former legal adviser to the Foreign and Commonwealth Office, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 11 June 2008 (Ev 34)

147 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 238

148 See Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 236

149 MJ Bowman, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, June 2008 (Ev 41)

150 Sir Michael Wood, former legal adviser to the Foreign and Commonwealth Office, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 6 June 2008, (Ev 18) para 8

151 Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, March 2008, para 165

only expertise on the subject covered by the treaty in question, but also expertise on how the treaty could be used for recognising, protecting and enhancing the relevant interests under international law.[152]

A new Parliamentary Treaty Committee?

During the consultations and debates on the "constitutional renewal" proposals, calls for a new dedicated Treaty Committee have been renewed. The Joint Committee on the draft Bill recommended the creation of a new Joint Committee on Treaties for the UK. It proposed that a new committee should sift treaties to establish their significance, assess whether an extension to the 21-day sitting period is required for a particular treaty, and scrutinise treaty-like documents such as Memoranda of Understanding.[153] The Government has suggested it would welcome any institutional change which would provide better parliamentary scrutiny of treaties within the proposed framework, but regards it as being for the Commons and Lords to decide for themselves on any such innovations.[154]

5 The House of Lords

5.1 Introduction

The 1997 Labour Party manifesto had included a commitment to remove the hereditary peers from the House of Lords as the first stage in a process of reform to make the House of Lords "more democratic and representative". The *House of Lords Act 1999* provided for the removal of all by 92 hereditary peers from the House of Lords. Despite various committee reports, five white papers, and two votes in both chambers on composition of the Lords, no further legislation had been introduced by the Government to reform the composition of the House of Lords until the introduction of this Bill.[155]

The most recent White Paper on Lords reform, published in July 2008, was the outcome of cross-party talks on the way to proceed with future reforms. The proposals were based on the outcome of the March 2007 votes on composition of the House of Lords which had, in the Commons, produced majorities in favour of both an 80 per cent and 100 per cent elected second chamber. In the foreword to the White Paper, Jack Straw had indicated that there would be no legislation before the next general election:

> Parliament as a whole will not be an effective and credible institution without further reform of the House of Lords. The proposals and options in this White Paper are intended to generate discussion and inform debate, rather than representing a final blueprint for reform. The Government has long held that final proposals for reform would have to be included in a general election manifesto, to ensure that the electorate ultimately decide on the form and role of the second chamber.[156]

However, on 10 June 2009 the Prime Minister indicated that there would be "new legislation for new disciplinary sanctions for the misconduct of peers in the House of Lords".[157] This

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[152] Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, June 2008 (Ev 41)

[153] Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 238

[154] Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-1, March 2008, para 164

[155] For a fuller chronology see Library Standard Note, SN/PC/5135, *House of Lords reform: the 2008 White Paper and recent developments* and House of Lords Library Note, *House of Lords Reform Since 1997: A Chronology*

[156] Ministry of Justice, *An Elected Second Chamber: Further reform of the House of Lords,* Cm 7438, July 2008, p3

[157] HC Deb 10 June 2009 c797

followed recent controversy in the House of Lords over the conduct of some of its members.[158]

The Prime Minister then went on to state that the Government:

> …would move forward with reform of the House of Lords. The Government's White Paper, published last July, for which there is backing from other parties, committed us to an 80 or 100 per cent. elected House of Lords, so we must now take the next steps as we complete this reform. The Government will come forward with published proposals for the final stage of House of Lords reform before the summer Adjournment, including the next steps we can take to resolve the position of the remaining hereditary peers and other outstanding issues.[159]

The clauses in the Bill were not included in the *Draft Constitutional Renewal Bill* published in March 2008.

5.2 Removal of the excepted hereditary peers

Background

The 92 peers who sit in the House of Lords were "excepted" by the *House of Lords Act 1999* from the provisions in that bill that removed the right of all other hereditary peers to sit in the Lords. This provision was the result of negotiations between the Government and Conservative peers without the full knowledge of the then leader of the Conservative Party, William Hague, or the Shadow Cabinet. The peers agreed that they would not hold up the Government's legislative programme or force the use of the *Parliament Acts* for Government bills in return for Government support for a crossbench amendment, introduced by the former Speaker Lord Weatherill, to allow the 92 to remain. The 92 were considered in some respects to be a guarantee that the second stage of Lords reform (the introduction of an elected element) would occur. Full background information on the events surrounding the Weatherill Amendment is set out in the House of Lords Library Note, *The Weatherill Amendment*.[160]

The 92 hereditary peers fall into three categories. The Earl Marshal and the Lord Great Chamberlain are both Royal Appointments. 15 places are then set aside for those hereditary peers who were office holders in the House (deputy speakers and deputy chairmen of committees). These fifteen were elected by the whole House. The other 75 peers (this number represented 10 per cent of the 750 hereditary peers in the House of Lords in 1999) were elected to reflect the strength of the different parties from among their number. These members are elected by their own party or group.

Since the passage of the Act, any vacancies among the 90 elected hereditary members of the House of Lords which have arisen as a result of a death have been filled in accordance with Lords Standing Orders.[161] This involves holding by-elections where the electorate are those hereditary peers in the Lords in the relevant party or grouping, and the possible candidates are hereditary peers who are not disqualified from membership of the second chamber.

It had always been envisaged that the hereditary peers would not continue to sit in the House of Lords indefinitely. Their removal, therefore, has been a feature of every government proposal for further reform of the House of Lords. For example, the most recent Lords reform White Paper, published in July 2008, stated that:

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158 See Library Standard Note, SN/PC/4950, *Standards of Conduct in the House of Lords*
159 HC Deb 10 June 2009 c798
160 Lords Library Note 2007/009, *The Weatherill Amendment*
161 House of Lords Standing Orders 9 and 10

> The Government proposes that there should be no further by-elections to select hereditary Peers to sit in the House of Lords during the transition to a reformed second chamber.[162]

In September 2003, the Government announced that it would bring forward legislation to remove the remaining hereditary peers.[163] At the time, the proposal was criticised by the opposition spokespersons in the Lords. Lord Strathclyde argued for the Conservatives that the 92 hereditary peers were there to "guarantee genuine reform" and Lord Goodhart argued for the Liberal Democrats that "the hereditary Members should go when, and only when, they can be replaced by a mainly elected membership". In the event, no legislation was brought forward.

The *House of Lords (Amendment Bill) 2006-07,* introduced by Lord Avebury, would have ended the by-elections for the hereditary peers. In opening the second reading debate, Lord Avebury noted that the provision in the *House of Lords Act 1999* to retain 92 hereditary peers was meant to be a transitional provision. He argued that if it had been anticipated that it would remain in place for nine years, debate on it may well have been different. He said that the argument that retaining the hereditary peers to provide an incentive for further reform was "manifestly ineffective".[164] He argued that his Bill did not "in any way inhibit this or the next Government's freedom to propose wider reforms", but it did "remove a serious and dysfunctional error in the Weatherill arrangements, which continue[d] to undermine our credibility".[165] A number of peers likened the by-elections to fill vacancies among hereditary peers to the pre-1832 'rotten boroughs'. However, others argued that the Bill should not proceed because the constitutional change should not result from private Members' bills; and because the Bill did not provide a complete "stage 2" of Lords reform envisaged when the *House of Lords Act 1999* was passing through Parliament.

The Government announced on 10 June 2009 that their expected Bill on constitutional reform would include provisions on the House of Lords.[166] The Government document, *Building Britain's Future* published on 29 June 2009 stated:

> We have already pursued a radical programme of reform in the House of Lords, including reducing the number of hereditary peers who sit in the House from about 750 to 92 today. But fairness and the democratic principle require that the people's representatives are chosen by the people. The Government plans to legislate in the 2009-10 session for the next steps on House of Lords reform by completing the process of removing the hereditary principle from the second chamber. And, building on the Government's White Paper published last July, which committed us to an 80 per cent or 100 per cent elected House of Lords – reflecting the will of the Commons expressed in a free vote in 2007 – we will pursue the final phase of Lords reform by bringing forward a draft Bill for a smaller and democratically constituted second chamber.[167]

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[162] Ministry of Justice, *An Elected Second Chamber: Further reform of the House of Lords,* Cm 7438, July 2008, para 8.14
[163] See HL Deb 18 September 2003 c1058
[164] HL Deb 18 May 2007 c417
[165] *Ibid* cc418-419
[166] HC Deb 10 June 2009 c798
[167] HM Government, *Building Britain's Future,* Cm 7654, June 2009, p29

At time of writing, the draft Bill had not yet been published. Further background information is available in the Library Standard Note, *House of Lords reform: Proposals to end the by-elections for the hereditary peers.*[168]

The Bill

Clause 26 of the Bill would end the by-elections for hereditary peers, meaning that their numbers would decline as a death would no longer lead to a replacement being chosen. The clause would achieve this by reducing the number of excepted hereditary peers as set out in the *House of Lords Act 1999* by one every time a person who counts towards that limit dies.

5.3 Removal of members

Background

At present, a peerage cannot be alienated or surrendered; peers are not able to resign or retire from the House of Lords.[169] Although peers are appointed for life, it is possible for a peer to obtain a leave of absence for the rest of the Parliament by applying in writing to the Clerk of the Parliaments.

It is not possible to be both a member of the House of Lords and the House of Commons. The *Peerages Act 1963* made it possible for a hereditary peer to disclaim his or her title. The primary purpose of this legislation was to enable hereditary peers to sit in the House of Commons. The *House of Lords Act 1999* now allows hereditary peers to be elected to the Commons provided that they are not also members of the House of Lords. Life peers are also disqualified while being members of the European Parliament.

A member of the Lords who is declared bankrupt under the *Insolvency Act 1986* is disqualified from sitting and voting in the House during the period of bankruptcy. Once the period is over, he or she can resume sitting and voting. In addition, peers may be temporarily disqualified from sitting or voting in the House of Lords if convicted of treason under the *Forfeiture Act 1870* until he or she has either suffered his or her term of imprisonment or received a pardon. The creation of the Supreme Court under section 137 of the *Constitutional Reform Act 2005* means it is no longer possible to hold judicial office and sit in the House of Lords. Those under the age of 21 are also disqualified for membership, as are 'aliens'.

An Act of Parliament is needed to expel a peer who is not disqualified for any of the reasons above. The last time legislation was passed to remove particular individuals from the House of Lords was in 1917, where two peers were deprived of their writ of summons as a result of supporting "the King's enemies" during the First World War.[170] More recently, as set out above, the *House of Lords Act 1999* removed all but 92 hereditary peers from the House of Lords.

Recent developments

A recent inquiry was undertaken by the Committee for Privileges in the House of Lords into the powers of the House of Lords in respect of its members, in the wake of the lobbying allegations against four peers.[171] In January 2009, the *Sunday Times* had published

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168 Library Standard Note SN/PC/5141, *House of Lords reform: proposals to end the by-elections for the hereditary peers*

169 Although Lords of Appeal in Ordinary retire from their judicial office at 70, their peerages have enabled them to continue to sit in the Lords. The bishops who sit in the Lords are ex-officio members and are only able to sit and vote in the Lords by courtesy of the office they hold. Bishops retire from their sees at the age of seventy and hence leave the House of Lords unless appointed as life peers at this age.

170 *Titles Deprivation Act 1917.* See fn 5 in *Erskine May* (24th ed), p49

171 House of Lords Committee for Privileges, *The Powers of the House of Lords in respect of its Members,* 14 May 2009, HL 87

allegations that four peers had accepted fees to amend laws on behalf of business clients.[172] The Leader of the Lords, Baroness Royall of Blaisdon, issued a statement noting that she had spoken to the peers and the matter was being investigated by the Sub-committee on Lords Interests. In addition, she had also asked the Chairman of the Committee for Privileges, Lord Brabazon of Tara, to consider any issues relating to the rules of the House that arose, including the sanctions available if a complaint was upheld.

The Committee for Privileges had asked both the Attorney General, Baroness Scotland, and Lord Mackay of Clashfern (a Lord of Appeal and member of the Committee for Privileges) for their advice on the range of sanctions available to the House in the event of a serious complaint about a Member being upheld. The Attorney General argued that:

> While it is possible to construct a respectable argument that the power of the House to regulate its own procedure includes a power to suspend a member of a period within a Parliament on the grounds of misconduct, I consider, on balance, that the House does not have such a power. In my opinion, the key factor against this argument is that a suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament (albeit to a lesser degree than permanent exclusion). This is a fundamental constitutional right and any interference with that right cannot be characterised as the mere regulation of the House's own procedures.[173]

The Committee explained that the Attorney General:

> …also draws attention to a binding resolution agreed by both Houses, in 1705, to the effect that "neither House of Parliament hath power, by any Vote or Declaration, to create to themselves any new Privilege, that is not warranted by the known Laws and Customs of Parliament". She advises that a decision to suspend or expel a Member would exceed the limits of the House's power of self-regulation, and so constitute the creation of a "new privilege", contravening the 1705 resolution.[174]

The Committee explained that although Lord Mackay agreed with the Attorney General that Members were by statute and by their letters patent, entitled to receive a writ of summons at the commencement of each Parliament and that the House could not by resolution require that the writ of summons be withheld, he went on to argue that certain conditions were implied within the writ of summons. In particular, he suggested, there was

> … a requirement that Members respect the rules of the House; and the House must therefore possess a corresponding power to enforce its rules where necessary. He [Lord Mackay] therefore concludes:
>
> > "The House's existing power to adopt the procedures necessary to preserve 'order and decency' includes a power to suspend, for a defined period within the lifetime of a Parliament, a Member who has been found guilty of clear and flagrant misconduct. I consider further that the exercise of such a power would not affect the rights conferred upon Members by virtue of their letters patent; rather it would affirm the conditions implied in the writ of summons, that Members must conduct themselves in accordance with the rules of the House".
>
> Lord Mackay also advances a secondary argument, based on historical comparison between the two Houses. He concludes that the House of Lords, like the Commons "had in 1705 an inherent power, deriving from its status as a constituent part of the

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172 See Library Standard Note SN/PC/4950, *Standards of Conduct in the House of Lords*

173 House of Lords Committee for Privileges, *The Powers of the House of Lords in respect of its Members,* 14 May 2009, HL Paper 87 2008-09, para 4

174 *Ibid,* para 5

> High Court of Parliament, to discipline its Members". His advice on its secondary point therefore leads to the same conclusion, that "any decision that the House may now take as to the means by which it imposes such discipline, for example by suspension, falls within the undoubted privilege of the House to regulate its own procedures".[175]

The Committee agreed with the advice of Lord Mackay. The Committee asked the House of Lords to agree to the following:

- **The House possesses, and has possessed since before the 1705 resolution, an inherent power to discipline its Members; the means by which it chooses to exercise this power falls within the regulation by the House of its own procedures.**

- **The duty imposed upon Members, by virtue of the writs of summons, to attend Parliament, is subject to various implied conditions, which are reflected in the many rules governing the conduct of Members which have been adopted over time by the House.**

- **The House has no power, by resolution, to require that the writ of summons be withheld from a Member otherwise entitled to receive it; as a result, it is not within the power of the House by resolution to expel a Member permanently.**

- **The House does possess the power to suspend its Members for a defined period not longer than the remainder of the current Parliament.**

  The procedure for imposing a suspension should in due course be set out in a new Standing Order; the wording of the Standing Order would be a matter for the Procedure Committee. However, we emphasise that the function of Standing Orders is not to confer new powers, but to describe the rules and procedures governing the use of existing powers; the lack of a Standing Order does not prevent the House from exercising its existing power to suspend its Members in the interim.

  It will also be for the Procedure Committee to consider and report in detail on the practical implementation of any suspension. In outline, we expect that following any suspension the Member concerned would be required to withdraw from the precincts immediately, and that he or she would then be barred from the precincts for the duration of the suspension. This would be consistent with the procedures adopted by the House of Commons.[176]

The House of Lords agreed to the report on 20 May 2009.[177] They also agreed the report of the Committee for Privileges on the conduct of the four peers.[178] Lord Snape and Lord Moonie were invited to make personal apologies to the House.[179] Lord Truscott and Lord Taylor of Blackburn were suspended until the end of the current session of Parliament.[180]

More details of their report are set out in the Library Standard Note, *Resignation, suspension and expulsion from the House of Lords*.[181]

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175 *Ibid,* paras 6-7
176 *Ibid,* paras 8-10
177 HL Deb 20 May 2009 c1418
178 *Ibid*
179 Lord Moonie: HL Deb 3 June 2009 c209; Lord Snape: HL Deb 21 May 2009 c1426
180 HL Deb 20 May 2009 c1418
181 Library Standard Note SN/PC/5148, *Resignation, suspension and expulsion from the House of Lords*

The Bill

Clause 27 allows for the removal of peers from the House of Lords. Clause 27 (1) states that the Bill applies to "excepted" hereditary peers (i.e. those who sit in the House of Lords) and life peers, if certain conditions are met. These conditions are:

(a) if the peer has been convicted of a serious criminal offence, has been sentenced to be imprisoned or detained for the offence for more than a year or indefinitely and is so imprisoned, or would be if the person were not unlawfully at large. The Bill applies regardless of whether the offence, subsequent conviction and imprisonment have occurred in the UK or elsewhere. (Schedule 3, Part 1 (1));

(b) if the peer is declared insolvent (Schedule 3, Part 1 (2));

(b) if an expulsion resolution is passed in relation to the peer under clause 28 of the Bill;

(c) if the peer resigns under clause 29 of the Bill.

The peer would no longer be a member of the House of Lords once the relevant event had taken place. They would not be entitled to receive writs of summons to attend the House, and any writ of summons previously issued would no longer have any effect. If the peer was one of the remaining hereditary peers sitting in the Lords, after their expulsion the number of hereditary peers sitting in the Lords would decrease by one (as would be the case under clause 26 upon the death of a remaining hereditary peer).

A similar procedure exists for Members of Parliament under *Representation of the People Act 1981.* This provides for the disqualification of any person who is detained anywhere in the British Islands or Republic of Ireland (or who is unlawfully at large at a time when he would otherwise be detained) for more than a year for any offence, that the election or nomination of such a person shall be void, and that the seat of that Member shall be vacated. In addition, under the *Enterprise Act 2002* which replaced the *Insolvency Act 1986* in relation to England and Wales, a person who has a bankruptcy restriction order in effect over them is disqualified from membership of the House of Commons.

Clause 28 allows the Standing Orders of the House of Lords to make provision for the passing of an expulsion or suspension resolution by the Lords. The suspension resolution may cover a period which crosses two Parliaments by removing the entitlement to receive a writ of summons at the beginning of a new Parliament.

Clause 29 allows hereditary peers sitting in the Lords and life peers, at any time, to resign from the House of Lords. In order to resign, the peer must give notice to the Clerk of the Parliaments. The note must be signed by the resigning peer and by two witnesses. The Clerk of the Parliaments must then sign a certificate of receipt and send a copy to the resigning peer and the Lord Chancellor. The resignation takes effect on the signature of the certificate.

Clause 30 would allow a person who has resigned from the House of Lords, or has been expelled or disqualified, to disclaim their peerage. Notice of the disclaimer must be given to the Lord Chancellor, and signed by the former member and by two persons as witnesses. On receipt of the notice, the Lord Chancellor must sign a copy of the receipt and send a copy of it to the former member. The disclaimer takes effect on signature of the certificate. Where an excepted hereditary peer disclaims their title, the peer (and his or her spouse or children) lose all rights, interests, titles, privileges and precedence associated with the title. The *Explanatory Notes* give the example of the title of Lady for the wife of a male peer or the title of 'Honourable' for the children. The peer would also cease to be disqualified by virtue of the peerage from voting at elections to the House of Commons and being, or being elected as, a

member of the Commons. The Bill makes similar provisions for former life peers who disclaim their titles.

Clause 31 provides that if a peer who is not a member has taken part in proceedings, the proceedings would not be invalidated. The *Explanatory Notes* use the example of a peer who has concealed an overseas conviction which would mean that he or she was not a member of the House. The clause also states that the Bill does not apply to the bishops who sit in the House of Lords as they are ex officio members rather than peers. As such, they lose their seats when they step down from their episcopal office and the internal discipline procedures within the Church of England apply in the case of any misconduct.

5.4 Comments on the provisions

Much interest in the Government's proposals has been directed towards the provision which would allow peers to resign from the House of Lords, leaving it open for them to be elected to the House of Commons. According to press reports, the Conservative Party have indicated that they would oppose such a measure.[182]

In a response to the proposals in the Bill (including the ending of by-elections for hereditary peers), Dr Meg Russell of the Constitution Unit, UCL, argued that although the "incremental" reforms announced were welcome, they could be strengthened. In particular, amongst her suggestions was that:

> A clause to ensure that peers retiring cannot stand for the House of Commons for at least five years would stop the Lords being weakened by becoming a jumping off point for ambitious politicians. Such a clause has been widely backed over the years by bodies making proposals on Lords reform.[183]

It was reported in August that Jack Straw had indicated that he either intended to introduce an amendment to have this effect, or support a backbench amendment which would do the same. The *Financial Times* has reported that:

> …on Wednesday it emerged that Mr Straw was to amend the legislation – due before the Commons in October – inserting a clause to prevent politicians "chamber hopping" between the red and green benches.
>
> Government officials say Mr Straw wants a quarantine period – probably five years – between a peer's resignation and any attempt to win a seat as an MP in the Commons.
>
> "This is absolutely nothing to do with Peter Mandelson," said one official. "The idea of a cooling-off period is an idea which we mentioned in a white paper last year. It is something of an omission that it is not in the current bill."
>
> Mr Straw is expected either to table an amendment to the bill inserting the quarantine clause or to accept an amendment if tabled by another MP.[184]

However, a report in the *Financial Times* in October 2009 stated that:

> Jack Straw, justice secretary, has revealed he will not impose a five-year "quarantine period" for unelected life peers who want to switch to the Commons, as had been suggested by his office…

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182 "We'll block Mandelson's Commons return", *Telegraph,* 10 August 2009

183 "Lords reform: Today's incremental reforms welcome", Press Notice, Constitution Unit, UCL, [on 7 October 2009)

184 "Straw blocks Mandelson escape from Lords", *Financial Times,* 26 August 2009

> Mr Straw told the Financial Times that … he had never planned to accept such an amendment to cover existing life peers, claiming it was 'an Aunt Sally'.[185]

The clauses on retirement of peers may alleviate some concerns about the growing size of the second chamber. The House of Commons Justice Committee commented in their July 2009 report, *Constitutional Reform and Renewal* that:

> The present Prime Minister has appointed 11 people to be life peers so that they could serve as ministers or as an adviser to the Government, some of whom have already given up ministerial office but remain members of the House of Lords. These measures accentuate a trend towards an appointed second chamber, contrary to the view expressed by the three main parties and by the House of Commons. Moreover, it is likely to lead to a continuous trend in future governments appointing peers to rebalance the numbers and this is unsustainable.[186]

The Constitution Unit has pointed to what they consider to be a "notable omission" from the Bill. They point out there is no provision to put the House of Lords Appointments Commission on a statutory basis:

> The Commons Public Administration Committee has called for this, but ministers probably feared accusations of "cementing" an appointed House if they proposed it.[187]

There has been little comment made on the proposals to end the by-elections for hereditary peers. Shortly before the Bill was published, but after the Government's intention to legislate on this matter became clear, the Conservative MPs Andrew Tyrie and Sir George Young published a report on reform of the Lords. They argued that the retention of the hereditary peers in the House of Lords was an anachronism:

> The second peculiarity of our current arrangements is that the anachronistic hereditary principle has proved surprisingly tenacious. The Blair-Cranborne deal in 1998 to retain 92 hereditaries ensure that the change was far less radical than outward appearances suggest. It secured the retention of roughly half the active hereditary peerage; most of those ejected to oblivion rarely if ever attended. It also created a new and serious abuse: by-elections conducted by hereditaries to fill vacancies caused by deaths of their colleagues. Lord Steel has described the absurdities involved in the process: "we [the Liberal Democrats] had six candidates for a by-election and four voters. Before the Great Reform Bill of 1832, the rotten borough of Old Sarum had at least 11 voters. In the Labour Party, there were 11 candidates and only three voters, and we had the spectacle of the Clerk of the Parliaments declaring to the world that a new Member had been elected to the British Parliament by two votes to one".[188]

6 Protests around Parliament

6.1 Background

The general law on marches and demonstrations

The *European Convention on Human Rights* confers a number of relevant rights, including the right to freedom of expression (article 10) and the right of peaceful assembly (article 11). However, these rights are not absolute, and the police inevitably have to balance competing interests when dealing with demonstrations. The rights of protestors have to be considered

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185 "Pathway back to Commons opens for Mandelson", *Financial Times,* 2 October 2009

186 Justice Committee, *Constitutional Reform and Renewal,* 29 July 2009, HC 923 2008-09, para 58

187 See Constitution Unit, *The Monitor,* Issue 43, September 2009, p2

188 Andrew Tyrie MP, Rt Hon Sir George Young Bt MP, Roger Gough (editor), *An Elected Second Chamber: A Conservative View,* July 2009, p12

alongside those of the general public and, sometimes, the rights of those who are the target of protest, or those holding counter-demonstrations.

The police have certain common law powers to deal with demonstrations, but there are also statutory provisions governing marches (referred to as "public processions") and static demonstrations (or "assemblies") in sections 11-14 of the *Public Order Act 1986.* In brief, the organisers of *marches* generally need to give advance notice to the police, although this requirement does not apply if it is not "reasonably practicable to give any advance notice".[189] The police can impose conditions on the march if they reasonably believe that it will result in serious public disorder, serious damage to property or serious disruption to the life of the community. They can also impose conditions if they believe the purpose is to coerce by intimidation. The chief officer of police can also apply to the local authority to have a march banned (although the banning order would have to have the consent of the Home Secretary).[190] The position is different for *assemblies*, where there is no need to give prior notice. However, section 14 of the 1986 Act does allow a senior police officer to impose conditions on the place, duration and size of the demonstration – again where they believe there will be serious public disorder, serious damage to property, serious disruption to the life of the community or where the purpose of the assembly is intimidation.

A question which has generated considerable controversy in recent years is whether or not Parliament requires different arrangements to control demonstrations in its vicinity. Arguments in favour of special legal protection include the particular need for elected representatives to be able meet freely, the fact that Parliament is a natural focus for protest, leading to large numbers of (sometimes competing) demonstrations, and special security and heritage considerations. Arguments against special controls include the importance to protestors of demonstrating in locations where their protest will best be heard, the significance of Parliament Square as a place to express views near the seat of democracy, and the risk of democratic disengagement if controls are too draconian.

Special provisions around Parliament

For many years, additional provisions for the area surrounding Parliament (apart, that is, from byelaws)[191] took the form of Sessional Orders (in the Commons) and Stoppages Orders (in the Lords) instructing the Metropolitan Police Commissioner to make sure that the passageways to and from Parliament are kept free of obstruction. The Lords still passes a Stoppages Order at the beginning of each session,[192] but the last such Sessional Order in the Commons was passed on 17 May 2005.[193] In response to the Orders, the Commissioner of the Metropolitan Police gives directions to constables under section 52 of the *Metropolitan Police Act 1839*.

In 2003, the Procedure Committee conducted an inquiry into whether the Commons Sessional Order was appropriate in the light of recent experience of demonstrations. This review was triggered by complaints about protests, most notably the long-term demonstration by Brian Haw, initially against Government policy in Iraq.[194] This protest began on 2 July 2001, and has continued for eight years. The complaints centred on its long-standing and "visually unattractive" nature, but also on the use of loud hailers by demonstrators

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189 Section 11

190 In London, the Commissioner of the Metropolitan Police can directly seek the consent of the Home Secretary for a banning order – see section 13(4) of the 1986 Act

191 See for example the Greater London Authority *Trafalgar Square and Parliament Square Gardens Byelaws 2000*, as amended, available from the *Trafalgar Square Byelaws* page of the GLA website [on 7 October 2009] and City of Westminster, *Byelaws for Good Rule and Government (No. 2)*, November 2001

192 For the most recent, see House of Lords Minutes of Proceedings, 3 December 2008 [on 7 October 2009]

193 HC Deb 17 May 2005 c28

194 Further information on the protest is available on Mr Haw's website [on 7 October 2009]

generally.[195] Legal action had been taken against Mr Haw in 2002 on the grounds that he was obstructing the pavement, but the High Court ruled that this was not an unreasonable obstruction in view of the inaccessibility of the pavements in Parliament Square to pedestrians.[196]

The Procedure Committee published its report in November 2003, and this pointed out that directions under the 1839 Act did not, in fact, confer any extra legal powers on the police at all.[197] Evidence from the House authorities and the police indicated that legislation was necessary, and the Government's response, published in May 2004, recommended the introduction of a Bill to prohibit long-term demonstrations and to ensure access to the Parliament.[198] The Procedure Committee's report was debated on 3 November 2004.[199]

The Government consulted on changes in a 2004 green paper on policing,[200] and provisions were included in the *Serious Organised Crime and Police Bill* which was introduced in November 2004. The Bill received Royal Assent on 7 April 2005.

The Serious Crime and Police Act 2005 (SOCPA)

The provisions governing protests in the vicinity of Parliament are contained in sections 132-8 of the Act. They set up an area, defined by regulations,[201] of up to one kilometre from Parliament Square. Within this area, a special legal framework governs static demonstrations so that section 14 of the *Public Order Act* is disapplied.[202] However, the restrictions do not apply to processions or marches; they only apply to static assemblies which are also demonstrations.

Section 132 makes it an offence to organise a demonstration in a public place, to take part in such a demonstration, or to carry on lone demonstration without authorisation. A person seeking authorisation must give written notice to the Commissioner of the Metropolitan Police, at least six days beforehand if "reasonably practicable" or failing that at least 24 hours beforehand. This contrasts with the position in the *Public Order Act*, under which there is no requirement for advance notice of a public assembly.

It is important to note that, once the Commissioner receives the correct form of notification, he must give authorisation for that demonstration.[203] However, he can impose any conditions which he reasonably things are necessary to prevent various specified problems. The power to impose conditions is considerably wider than the equivalent power which applies to demonstrations elsewhere under section 14 of the *Public Order Act*. The problems which the police conditions can aim to prevent include things like "serious public disorder" and "serious damage to property", which are also specified in section 14. However, in the vicinity of Parliament, the conditions can also be to prevent hindrance "to any person wishing to enter or leave the Palace of Westminster" or to the "proper operation of Parliament", and unlike in section 14 of the 1986 Act, "disruption to the life of the community" would not have to be serious to attract restrictions.

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195 Procedure Committee, *Sessional Orders and Resolutions*, 19 November 2003, HC 855 2002-03, para 17
196 *Westminster City Council v Brian Haw (2002)* [2002]EWHC 2073 (QB)
197 Procedure Committee, *Sessional Orders and Resolutions*, 19 November 2003, HC 855 2002-03
198 Procedure Committee, *Sessional Orders and Resolutions: The Government's Response to the Committee's Third Report of Session 2002-03*, 20 May 2004, HC 613 2003-04, paras 21-22
199 HC Deb 3 November 2004 c370
200 Home Office, *Modernising Police Powers to Meet Community Needs*, August 2004, site visited 8 February 2008
201 *The Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005* SI 2005/1537
202 Section 132(6)
203 Section 134(3)

Resistance to the new provisions

The provisions were controversial from the start. During the Bill's passage through Parliament, the Joint Committee on Human Rights described the clauses in question as "a sledgehammer to crack a nut".[204] The provisions were openly challenged by free speech activists: for example, Stephen Blum and Aqil Shaer were prosecuted for staging picnics on Parliament Square in an attempt to exploit the ambiguity surrounding what the police could regard as a "demonstration" under the Act.[205] Protestors, including the comedian Mark Thomas, tried to overwhelm the police authorisation process by applying for permission for large numbers of simultaneous "lone" protests.[206] There were a number of controversial prosecutions under the Act, notably those of Maya Evans and Milan Rai for an unauthorised protest involving reading aloud the names of British soldiers and Iraqi citizens killed during the conflict in Iraq.[207]

Brian Haw's demonstration continued despite the legislation. In July 2005, he won an application for judicial review, successfully arguing that the notice and authorisation regime did not apply to him because his demonstration had begun before section 132 of the Act had come into force.[208] This was overturned on appeal in May 2006.[209] In the meantime, Mr Haw had applied for permission to continue his demonstration, and received it on condition that his display of placards was no more than three metres wide. When he did not comply, he was prosecuted, but magistrates ruled that the Commissioner's powers could not be delegated to more junior officers, and that the conditions lacked clarity. In August 2007, the High Court overturned the first of these findings on appeal, but upheld the second.[210]

The Liberal Democrat peer, Baroness Miller of Chilthorne Domer, introduced a Private Member's Bill in the Lords on 23 November 2006 to repeal a number of offences which impose restraints on public demonstrations, including demonstrations in the vicinity of Parliament. The Bill made no further progress after its second reading.[211]

Proposals to repeal the provisions

In his statement on constitutional reform on 3 July 2007, the Gordon Brown announced his intention to repeal the relevant sections of SOCPA:

> While balancing the need for public order with the right to public dissent, I think it right—in consultation with the Metropolitan police, Parliament, the Mayor of London, Westminster city council and liberties groups—to change the laws that now restrict the right to demonstrate in Parliament Square.[212]

The Governance of Britain Green Paper stated that the Government was aware of "strong views" on the issue and that it would be consulting on changes.[213] The Home Office published a further consultation document in October 2007.[214] One option proposed was an

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[204] Joint Committee on Human Rights, *Scrutiny: First Progress Report*, HL 26/HC 224 2004-05, para 1.138

[205] "You can be arrested for picnicking now", *Independent*, 7 April 2006; "Parliament protestors lose appeal", *BBC News*, 20 December 2006

[206] "So many causes, so little time", *Guardian*, 12 October 2006

[207] Their convictions were upheld on appeal – see *Blum and others v Director of Public Prosecutions and others* [2006] EWHC 3209 (Admin), CO/2218/2006, CO/2849/2006, CO/2894/2006 AND CO/5557/2006

[208] *R (on the application of Brian Haw) v (1) Secretary of State for the Home Department (2) Commissioner of Police of the Metropolis (2005)*, [2005] EWHC 2061 (Admin)

[209] *R (on the application of Brian Haw) v (1) Secretary of State for the Home Department (2) Commissioner of Police of the Metropolis (2006)*, [2006] EWCA Civ 532

[210] *Director of Public Prosecutions v Brian Haw (2007)* [2007] EWHC 1931 (Admin)

[211] HL Deb 26 January 2007 cc1368-9

[212] HC Deb 3 July 2007 c818

[213] Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007

[214] Home Office, *Managing Protest around Parliament*, 25 October 2007

alignment of the different regimes applying to marches and assemblies, and the document also consulted on whether special provisions were, in fact, necessary for demonstrations around Parliament. An analysis of the consultation responses was published alongside the Constitutional Renewal White Paper in March 2008. This made it clear that the vast majority of respondents were in favour of a straightforward repeal of the relevant provisions of the *Serious Organised Crime and Police Act 2005*.[215]

Select committee scrutiny of the proposals

Clause 1 of the draft *Constitutional Renewal Bill*, published with the White Paper, contained provisions to repeal sections 132-138 of SOCPA. In its report, the Joint Committee on the Draft Constitutional Renewal Bill agreed that the SOCPA provisions should be repealed in view of the widespread opposition. Whilst strongly endorsing "the general presumption that protest must not be subject to unnecessary restrictions", it acknowledged the need for this to be balanced against safeguarding the proper functioning of Parliament. Its conclusions on the question of access were as follows:

> 35. As a general rule there should be unrestricted access to the Houses of Parliament for Members, staff and the public, but there must also be a willingness to accept some disruption during large scale protests. As a minimum, there should be one point of entry at each end of the Houses of Parliament open to both pedestrians and vehicles, particularly to enable disabled users to gain access. Our provisional view is that Black Rod's Garden entrance and the main entrance to Portcullis House are best suited to accommodate pedestrian access, while Carriage Gates and Peers Entrance are the most appropriate for vehicles.[216]

It was concerned that the police might not have adequate powers to maintain this level of access, however.

On the question of noise, the Committee said that the reasonable use of loudspeakers should be allowed, but that to deal with exceptional occasions when they caused serious disruption, there was a need "either to develop or make better use of existing powers". At a minimum, there should be a statutory power to move an individual.[217] It noted that opinion was divided on the question of permanent or overnight protests, and called for a comprehensive review of this. The Committee considered that the *Public Order Act 1986* gave sufficient powers to the police to impose conditions on protests on security grounds, and supported the removal of the legal requirement to obtain prior permission for protests.[218]

The Joint Committee on Human Rights also endorsed the proposed repeal as part of a wider report into policing protest.[219] In addition, the report recommended the removal of the requirement for prior permission, and that the Government should work with the relevant authorities over managing noise levels. It saw no good argument to support the introduction of arbitrary limits on the duration of protests, but felt that the police should be able to impose conditions on protests to facilitate protests by others.[220]

The Government's response to the Joint Committee on Human Rights was published in May 2009. This expressed agreement with many of its recommendations on protests around Parliament, although it did not think that special powers to facilitate multiple protests were

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215 Ministry of Justice, *The Governance of Britain – Analysis of Consultations,* Cm 7342-III, 25 March 2008
216 Joint Committee on the Draft Constitutional Renewal Bill, *First Report*, 31 July 2008, HL 166/HC551 2007-08
217 *Ibid*, para 48
218 *Ibid*, paras 45-72
219 Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest*, 23 March 2009, HL 47/HC 320 2008-09, para 127
220 *Ibid,* paras 128-134

necessary.[221] In its response to the Joint Committee on the Draft Constitutional Renewal Bill, published alongside the Bill in July 2009, the Government was again mainly in agreement with the recommendations made.[222]

Recent controversy

In April 2009, the policing of the G20 protests in London, in which newspaper vendor Ian Tomlinson died, generated considerable controversy over the policing of demonstrations. Also in April 2009, Tamil protestors staged a demonstration in Parliament Square, which ended up lasting several weeks. Initially the protestors did not obtain permission, but they subsequently sought and received authorisation for a 50 people to protest under the name of British Tamil Students in the north-east corner of Parliament Square.[223] On occasion, the numbers exceeded that amount, and other Tamil organisations jointed the protest. The Joint Committee on Human Rights revisited its enquiry on policing protest in the light of these events, and concluded:

> The careful management of the Tamil protest in our view struck an appropriate balance between protecting the right of the Tamils to protest in Parliament Square and the need to maintain access to Parliament for Members, staff and the public. It is notable that we received no evidence from individual Tamils or their organisations complaining about how their protest was handled by the police. The protest did cause inconvenience to some, but this is a small price to pay for living in a vibrant democracy.[224]

However, concern about the inconvenience caused to Members and the public led to a number of questions in the Commons and the Lords. On 13 May, Speaker Martin announced that he was in talks with relevant authorities:

> **Mr. Speaker:** Before I proceed with the business of the House, I wish to make a statement about demonstrations in Parliament square and issues of control and access to the House.
>
> First, let me make it clear to the House that I support the right to demonstrate, but as right hon. and hon. Members have made clear through points of order the recent demonstration by Tamils has caused disruption to the work of the House and to individuals and organisations seeking access to it. It has also involved considerable cost to the House and to the police and exposed many issues of health and safety.
>
> In the light of those difficulties, and given the distribution of responsibilities for Parliament square between various authorities, I can tell the House that I have arranged a meeting with the Minister for Security, Counter-Terrorism, Crime and Policing, the deputy Mayor of London responsible for policing, the leader of Westminster council and an assistant commissioner of the Metropolitan police to discuss how demonstrations in the square can be better regulated so that the functioning of Parliament is not impeded and the health and safety of individuals is not

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221 *The Government Reply to the Seventh Report from the Joint Committee on Human Rights Session 2008-09 HL Paper 47, HC 320 Demonstrating respect for rights? A human rights approach to policing protest*, Cm 7633, May 2009

222 Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009

223 Metropolitan Police, personal communication, 12 June 2009

224 Joint Committee on Human Rights, *Demonstrating Respect for rights? Follow-up*, 28 July 2009, HL 141/HC 522 2008-09, paragraph 44

> breached. I shall come back to report any progress that we can make to resolve this highly unsatisfactory situation.[225]

Further background information on this issue is provided in Library Standard Note, *Protests around Parliament*.[226]

6.2 The Bill

Clause 32 of the Bill, like clause 1 of the draft *Constitutional Renewal Bill*, repeals the sections of SOCPA which impose controls on demonstrations and the use of loudspeakers in the vicinity of Parliament.[227] The *Explanatory Notes* usefully summarises the effect of this repeal:

> Repeal of sections 132 to 138 of the 2005 Act means that it will no longer be a requirement to give notice of demonstrations in the designated area and there will no longer be an offence for such demonstrations to be held without the authorisation of the Metropolitan Police Commissioner. There will no longer be an offence under the 2005 Act for a person to use a loudspeaker in the designated area; the use of loudspeakers will continue to be governed by section 62 of the Control of Pollution Act 1974 and section 8 of the Noise and Statutory Nuisance Act 1993. Repeal of sections 132 to 138 of the 2005 Act also means that there will no longer be a designated area around Parliament as set out in the Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005 (S.I. 2005/1537). Additionally, repeal will restore the applicability of section 14 of the Public Order Act 1986 (imposition of conditions on public assemblies) to a public assembly in the vicinity of Parliament.[228]

However, unlike the draft Bill, clause 32 goes on to give effect to a schedule amending the *Public Order Act* 1986. This schedule contains regulation-making powers which would allow a senior police officer[229] to impose conditions. Under the SOCPA provisions, these conditions would apply both to public processions and to public assemblies.[230] The conditions would have to be those which, in the officer's reasonable opinion, were necessary for ensuring that "specified requirements", set out in a statutory instrument. The requirements are not defined in detail, but under new section 14ZA(3), they would have to be "requirements that must be met in relation to the maintaining of access to and from the Palace of Westminster." The schedule states that the requirements in the order could cover the number or location of entrances which must be kept open with access routes for pedestrians and vehicles, but they could also include other things not described in the Bill. The order would be able to confer discretions on the senior police officer.

There are also provisions for a statutory instrument to specify the area around Parliament in which the conditions would apply. Unlike the SOCPA provisions, the designated area in which the restrictions apply cannot at any point be more than one kilometre from Parliament Square.[231] By contrast, in this Bill, the limit is 250 metres from Parliament Square.

The Statutory Instrument would be subject to negative resolution procedure.

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225 HC Deb 13 May 2009 c857
226 Library Standard Note SN/HA/3658,*Protests around Parliament*
227 sections 132-138
228 *Explanatory Notes*, paragraph 200
229 Defined in sections 12 and 14 of the *Public Order Act 1986* as being the most senior officer present in the case of processions or assemblies taking place, or the Chief Officer in the case of planned assemblies or demonstrations – see new section 14ZA(9)
230 New section 14ZA(1)
231 SOCPA, section 138(3)

Because section 132 of SOCPA would be repealed, section 14 of the *Public Order Act 1986* (see above) would once again apply to demonstrations around Parliament. Presumably for the avoidance of the kind of doubt which arose in legal proceedings involving Brian Haw, new section 14ZC makes transitional provisions which make it clear that both section 14 and the new provisions would apply to processions and assemblies "which started, or were organised" before the schedule comes into force.

6.3 Comments on the provisions

The Liberal Democrat Shadow Justice Secretary, David Howarth, has criticised the new provisions, although he noted that his party has been calling for the repeal of the relevant sections of SOCPA for years:

> But, as so often with this government, it is important to look at the small print before declaring premature victory. The offending parts of the Act are indeed being repealed, but that is not the end of the restrictions. The bill also creates brand new powers for the police to impose conditions on demonstrations "to maintain access to and from the Palace of Westminster." The government will also be able to make regulations – without effective parliamentary scrutiny – setting out requirements in relation to access to Parliament. Senior police officers will then be able to impose conditions on the size, duration and location of any protest within 250m of Parliament (again, the exact area will be decided by Ministers with no scrutiny) for the purpose of making sure these requirements are met. Ominously, ministerial regulations under the new powers "may confer discretions on the senior police officer." There is no apparent check on the exercise of these new police powers, but violation of any conditions imposed on a protest will be an offence.
>
> The new proposals are not as downright absurd as the blanket provision they are replacing. But the danger is that all the reform amounts to is reducing the area in which protest is banned. Labour's position turns out to be no better than that of David Cameron, who told Sky News viewers recently that 'enough is enough' with protests around parliament. The idea that protesting around Downing Street and parliament is a fundamental right seems alien to both.[232]

Dominic Grieve, the Shadow Attorney General, gave the following information to various journalists on 19 May 2009:

> We have long called for the repeal of the law criminalising peaceful protest around Parliament by a handful of people. We await the government's proposals for managing much larger demonstrations. We want to see an approach that safeguards free speech at the heart of our democracy, without disrupting the business of Parliament.[233]

On the day of the Bill's publication, the Conservative leader, David Cameron, was reported as saying that a Conservative government would remove Brian Haw's protest:

> A Conservative government would remove the anti-war camp set up outside parliament, Tory leader David Cameron has confirmed.
>
> Brian Haw has camped in Parliament Square for eight years now in protest at Britain's foreign policy. He has survived numerous legal attempts to remove him.
>
> But the Tory leader said enough is enough.

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[232] David Howarth, *A step in the right direction? Or more Government window dressing* 12 August 2009
[233] Personal communication, 25 September 2009

> "I am all in favour of free speech and the right to demonstrate and the right to protest," he told Sky News.
>
> "But I think there are moments when our Parliament Square does look like a pretty poor place, with shanty town tents and the rest of it.
>
> "I am all for demonstrations, but my argument is 'enough is enough'." [234]

7 Human Rights claims against the devolved administrations

7.1 Background

Part 5 of the Bill would insert a time limit for actions against the Northern Ireland Ministers or Departments under the *Northern Ireland Act 1998* or against the Welsh Ministers under the *Government of Wales Act 2006*, where it is claimed that they have acted incompatibly with rights under the *European Convention on Human Rights*. This is designed to tackle an asymmetry that has resulted from the devolution legislation.[235]

Separate arrangements are being made to impose a time limit for bringing proceedings under the *Scotland Act 1998* alleging a breach of Convention rights by Scottish Ministers or a member of the Scottish Executive. For further details see below.

The starting point is that under the three devolution Acts, the relevant Parliament and assemblies have no power to act in breach of the rights set out in the Convention (which was incorporated into UK law by the *Human Rights Act 1998*). Any act by a devolved administration that was deemed by the courts to be in breach of the Convention would therefore be *ultra vires* (and open to legal challenge by a victim of that breach).

The *Explanatory Notes* to the Bill make plain that the reason for these amendments is a decision by the House of Lords in the case of *Somerville v Scottish Ministers* [2007] UKHL 44,[236] in which the court decided that those bringing their claim under the *Scotland Act* were not subject to a specific time limit (or 'limitation period', as it is commonly known in legal parlance), notwithstanding that their claim may be identical in all other respects to proceedings under the *Human Rights Act*.

The case of *Somerville* involved a number of prisoners in Scotland, who were at some stage removed, by order of the governor, from general association with other prisoners. In pleadings, described by Lord Rodger of Earlsferry as "long", "confused and confusing", the appellants argued that the decisions to order their segregation and to authorise their continued segregation were incompatible with their rights under Articles 7 and 8 of the *European Convention on Human Rights* thus they maintained the decisions were (1) unlawful under section 6(1) of the *Human Rights Act 1998* and (2) *ultra vires* by virtue of section 57(2) of the *Scotland Act 1998*.

Under section 7(5)(a) of the *Human Rights Act* (the HRA), proceedings against a public authority under the HRA must be brought before the end of the period of twelve months beginning with the date on which the act complained of took place. The appellants contended that they were not constrained by the time-limit in section 7(5) of the HRA as they had also based their claims on the provisions of the *Scotland Act*. Accordingly they argued that, leaving aside the HRA, the relevant decisions were *ultra vires* under the Scotland Act as they

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234 "Cameron 'will ban parliament demo'", *politics.co.uk*, 20 July 2009

235 For more on the issue of asymmetry in the devolution arrangements generally, see for example: C.M.G Himsworth, *Devolution and its Jurisdictional Asymmetries*, (2007) Modern Law Review, Vol 70, Issue 1, p 31

236 Transcript of Somerville v Scottish Ministers [2007] UKHL 44

breached Convention rights. The Scotland Act contained no equivalent of the time-limit in section 7(5) of the HRA.

The House of Lords ruled (per Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe; Lord Scott of Foscote and Lord Mance dissenting) that the petitioners' case that the acts and failures to act of the Scottish Ministers were outside competence was not subject to the s 7(5) HRA time bar (at paragraph [39]).

In a short case commentary, Rosalind English (a barrister at 1 Crown Office Row and former public law academic) argued that the decision had "the strange consequence of allowing a petitioner to claim damages for Convention violations in Scotland in circumstances where a claimant in England would be time-barred, because, in enacting the two statutes, Parliament has not imposed the same time-limit on proceedings by reference to the Scotland Act as on proceedings under the HRA".[237]

The *Explanatory Notes* state that although the *Somerville* judgment did not deal with claims brought under the *Northern Ireland Act 1998* and the *Government of Wales Act 2006*, those Acts are similarly silent as to the time in which proceedings may be brought and so similar concerns could arise.

7.2 The Bill

Accordingly, **clauses 33 and 34** insert a one year time limit for bringing claims involving Convention rights against actions of Ministers in Wales and Departments or Ministers in Northern Ireland. The *Explanatory Notes* go on to indicate that "similar amendments will, subject to Royal Assent, shortly be made to the *Scotland Act* by the *Convention Rights Proceedings (Amendment) (Scotland) Bill*, which has been passed by the Scottish Parliament."

7.3 Recent amendments to the *Scotland Act 1998*

The *Convention Rights Proceedings (Amendment) (Scotland) Bill* was passed by the Scottish Parliament on 18 June 2009 and received Royal Assent on 23 July 2009 and came into force on 24 July 2009.[238] It amends section 100 (human rights) of the *Scotland Act 1998* by inserting new subsections (3A) to (3E). These impose a one year time limit (or such longer period as the court considers equitable having regard to all the circumstances) for bringing proceedings under that Act alleging a breach of Convention rights by Scottish Ministers or a member of the Scottish Executive. The *Convention Rights Proceedings (Amendment) (Scotland) Act* ensures that the same time limit applies regardless of whether Convention rights proceedings are brought under the *Scotland Act* or the *Human Rights Act 1998*. The time limit will apply to Convention rights proceedings brought under the *Scotland Act* on or after 2 November 2009.

The legislative competence to make the necessary modifications to the *Scotland Act 1998* had been given to the Scottish Parliament by the *Scotland Act 1998 (Modification of Schedule 4) Order 2009, SI 2009/1380.*[239] The draft Order was approved by both the Scottish Parliament and the UK Parliament. It was considered by the Scottish Parliament Justice Committee on 5 May 2009;[240] the House of Commons First Delegated Legislation

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237 Rosalind English, Lawtel Case Note, 26/11/2007
238 *Convention Rights Proceedings (Amendment) (Scotland) Act, 2009 asp 11*
239 *Scotland Act 1998 (Modification of Schedule 4) Order 2009, SI 2009/1380*
240 Justice Committee Official Report 5 May 2009 cc1736-58

Committee on 11 May 2009;[241] and the House of Lords on 19 May 2009.[242] The Order was made by the Privy Council on 10 June 2009.

The Scottish Parliament agreed on 18 June 2009 that the *Convention Rights Proceedings (Amendment) (Scotland) Bill* should be treated as an Emergency Bill. All stages of the Bill were taken on 18 June 2009. No amendments were lodged at Stages 2 and 3.

7.4 Provision for Scotland in the *Constitutional Reform and Governance Bill*

In his written ministerial statement about the *Constitutional Reform and Governance Bill* on 20 July 2009,[243] Jack Straw said that the Bill would:

> …Reconcile the time limit for human rights claims under the Northern Ireland Act 1988 and the Government of Wales Act 2006 with that in the Human Rights Act 1998. Due to the interface between this Bill and parallel provision for Scotland in an Act of the Scottish Parliament which has yet to receive Royal Assent, the same provision for Scotland will be introduced by amendment at the appropriate time.

As set out above, at this point parallel provision for Scotland was in the process of being made. The same provision for Scotland as for Northern Ireland and Wales will be introduced in UK legislation by amendment to the *Constitutional Reform and Governance Bill* during its parliamentary passage.

8 Courts and tribunals

8.1 Background

The judicial appointments system has been subject to substantial change in recent years. The foundation for the current system of judicial appointments was suggested in a Department for Constitutional Affairs consultation paper entitled *Constitutional Reform: A new way of appointing judges*, which was published in July 2003. The Government subsequently took forward reforms in the *Constitutional Reform Act 2005*. [244] The 2005 Act included a number of provisions to increase the separation of powers within the UK constitution. It created a new Supreme Court for the UK (which began operation in October 2009) and made several changes to the role and functions of the Lord Chancellor, who had previously been responsible for judicial appointments.

The 2005 Act established a new Judicial Appointments Commission (JAC) in England and Wales. The JAC was officially launched on 3 April 2006. The Commission is an independent Non Departmental Public Body (a "quango") set up to select judicial office holders. It selects candidates for office on merit, independently of government through fair and open competition. It is expected to encourage a wide range of applicants.

Further reform occurred in 2007, with the passage of the *Tribunals, Courts and Enforcement Act*. The 2007 Act made changes to the eligibility criteria for judicial appointments, designed to encourage a more diverse range of applicants.[245]

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241 1st Delegated Legislation Committee Deb 11 May 2009

242 HL Deb 19 May 2009 cc1360-6

243 HC Deb 20 July 2009 cc104-6WS

244 A background to the system as it operated prior to the *Constitutional Reform Act 2005* can be found in the Library Research Paper entitled *The Constitutional Reform Bill [HL]: a Supreme Court for the United Kingdom and judicial appointments*.

245 Detailed information about all these changes can be found in the Library Standard Note, SN/HA/4717, *Judicial Appointments*

On 25 October 2007, the Government produced a consultation document entitled *The Governance of Britain – Judicial Appointments*. The consultation posed a number of questions and sought views on the existing functions of the executive, legislature and judiciary in relation to appointments. It also considered the scope of transferring functions. The consultation closed on 17 January 2008 and 34 responses were received. In March 2008, the Government published the White Paper and Draft Bill, which, *inter alia*, set out proposals for further changes to the system of judicial appointments.[246] The paper outlined a range of possible options including the complete surrender of the role of the Executive in the appointments process and the introduction of post-appointment hearings before Parliamentary select committees. During the consultation process, the Lord Chancellor stated that his "default setting" was "to leave things where they are because the system was changed only a couple of years ago".[247]

The Joint Committee on the Draft Bill referred in its report to criticism about the JAC, that "inefficiencies and delays" had led to difficulties for candidates and a shortage of judges in a number of courts".[248] They also stated that there had been concern about the lack of measurable progress towards achieving a diverse judiciary. Baroness Prashar, Chair of the JAC, had acknowledged "teething problems" but had described the reforms as a "quiet revolution" as part of which the JAC had made a good start".[249]

The Joint Committee concluded that:

> The Constitutional Reform Act 2005 made fundamental changes to the judicial appointments process by introducing a "carefully calibrated" balance between the roles of the Executive, the judiciary and the newly-created Judicial Appointments Commission. We accept the need to improve the efficiency and performance of the process in light of problems experienced to date, but it is far too soon to propose significant reform, only two years after the changes were introduced. The delicate relationship between judicial independence and democratic accountability for appointments should not be reassessed until the new system is fully established and a comprehensive body of evidence is available to assess its operation.[250]

The Committee did accept, however, the proposal in the paper to remove the Prime Minister's residual role in relation to appointments to the Supreme Court, noting that "the additional check that the Prime Minister used to provide on the Lord Chancellor's nomination is no longer necessary in light of the statutory selection processes introduced by the Constitutional Reform Act 2005".[251]

In response to the Committee's report, the Ministry of Justice stated that the Government remained "committed to nearly all the proposals seen by the Joint Committee even though it will await the passage of time to develop some of these further and separately from the Bill".[252] The Ministry of Justice noted the Committee's concerns about extending the role of Parliament and agreed that "it would not be appropriate to extend Parliament's role to scrutiny of the appointment of individual judges".[253]

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246 *Ibid.*
247 Constitutional Affairs Committee, Meeting with the Lord Chancellor, 9 October 2007, HC 987-ii, QQ 110-112
248 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 136
249 *Ibid.*
250 *Ibid,* para 141
251 *Ibid*, para 145
252 Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009, para 93
253 *Ibid,* para 109

Accordingly, in the *Explanatory Notes* to the Bill, the Government acknowledges that "the proposals remaining in the Bill have been pared down" from those outlined in the abovementioned publications, (although it has stated that it will "continue to review the judicial appointments process as its development progresses").[254]

8.2 The Bill

Part 6 of the Bill would make some amendments to the procedure for appointing Supreme Court judges and would provide salary protection for certain tribunal members (so that their salaries could not be reduced). It would also make certain other minor amendments to the courts and tribunals system (described below).

In addition to tidying up a cross reference to the *Courts Act 1971*,[255] **Clause 35** (in conjunction with **Schedule 5**) would notably remove the Prime Minister from the process of appointments of the President, Deputy President and judges of the Supreme Court. This is designed to further depoliticise the appointments process. While the Prime Minister is not thought to have had substantial influence on judicial selection in recent years, Professor Robert Stevens records that the then Prime Minister, Margaret Thatcher, rejected Lord Hailsham's report of the judges' preference and appointed Sir John Donaldson to be Master of the Rolls in the 1980s, while John Major appointed Sir Thomas Bingham as Chief Justice, in preference to the judges' choice.[256]

As the *Explanatory Notes* indicate, the provisions would have the effect that, when presented with a candidate chosen by a Selection Commission, recommendations for appointment would be made by the Lord Chancellor (instead of the Prime Minister).

Schedule 5 would make amendments to the provisions in section 96 of the *Constitutional Reform Act 2005* (relating to medical assessments those who have been selected for judicial appointments). The amendments would, amongst other things, transfer the responsibility for medical assessments from the JAC to the Lord Chancellor. This had been foreshadowed in the White Paper on the grounds that "medical checks should be carried out earlier in the selection process" and "there was general consensus amongst respondents that this aspect of the appointment process should be quicker."[257] The move was also welcomed by the Committee on the Draft Bill, although it commented that it was questionable whether this proposal actually required legislation.[258]

Schedule 5 would also remove magistrates (Justices of the Peace) from the list of offices that comprise the statutory recruitment and selection remit of the JAC. This change follows an agreement between the Lord Chancellor, the JAC, the Lord Chief Justice and the Magistrates' Association that the JAC will not in future take responsibility for the recruitment and selection of magistrates.

Finally, paragraph 8 to **schedule 5** would amend section 139(4) of the 2005 Act, "to make explicit that information obtained during the appointments or disciplinary process of certain judicial office holders can be disclosed to the police for the purposes of a criminal investigation or criminal proceedings, or for the purpose of preventing crime without the

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254 *Ibid*, para 142

255 The *Explanatory Notes* suggest that the amendment corrects a typographical error in section 21(5) of the *Courts Act* 1971, which deals with the extension of the term of appointment of recorders. Section 21(5) refers to subsection (4) whereas it should refer to subsection (4A).

256 R Stevens, *The English Judges: Their Role in the Changing Constitution*, 2002, p95

257 Ministry of Justice, *The Governance of Britain: Constitutional Renewal*, Cm 7342-I, March 2008, paras 109, 114 and 117

258 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, paras 177-8

necessity for a court order."[259] This proposal was also supported by the Joint Committee that considered the draft Bill.[260]

Clause 36 provides that the salaries of certain tribunal office holders once determined may not be reduced. The *Explanatory Notes* make clear that the "purpose is to provide similar protection for these office holders as is already available to office holders in the courts."

9 National Audit

9.1 Background

These clauses appear in Part 7 of the Bill, as a result of a request from the Public Accounts Commission, and were not in the earlier draft Bill. They create a new corporate governance structure for the National Audit Office, under a new paid post of Chair, which will develop a joint strategy with the Comptroller and Auditor General. The role of the Public Accounts Commission is explained below.

The Exchequer and Audit Departments Act 1866 created the post of Comptroller and Auditor General (C&AG) in its modern form. Although the C&AG was described as an officer in nineteenth century texts, this was not officially recognised until the *National Audit Act 1983*, which established the office as an Officer of the House of Commons, to be appointed by the Crown, but in consultation with the Chairman of the Public Accounts Committee (PAC). Although the Public Accounts Committee (PAC) had been established in 1861, its relationship with the C&AG had been ambiguous. Pressure for reform mounted in the 1970s, and a private member's bill sponsored by Norman St John Stevas, as he then was, and based on a report from the PAC in 1980-81, was eventually enacted, following extensive redrafting by parliamentary counsel. This became the *National Audit Act 1983.*

The 1983 Act:

- created the office of C&AG as an Officer of the House of Commons, to be appointed by the Crown, but in consultation with the Chairman of the PAC The C&AG holds office during good behaviour and can only be dismissed following resolutions of both Houses.[261]

- created an independent National Audit Office, with staff employed directly by the C&AG;

- gave the C&AG complete discretion over discharge of functions, but in determining to carry out an audit examination, he must take into account any proposals made by the PAC; and

- created a statutory Public Accounts Commission to oversee the budget of the NAO and appoint its auditor. It consists of the Chairman of the PAC, the Leader of the House (a Cabinet Minister) and seven other MPs, none of whom can be ministers.

The separate existence of the Public Accounts Commission, distinct from the Public Accounts Committee (PAC) in governance arrangements is unusual in Commonwealth Westminster style parliaments, but the model has been followed in Scotland and Wales.[262] The Commission prepares and lays the estimates for the NAO and has overlapping

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259 *Explanatory Notes*

260 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, 12 August 2008, HL 166 HC 551 2008-09, para 192

261 The term 'good behaviour' is used as a shorthand for undertaking the duties of the office. See the *Exchequer and Audits Department Act 1866*

262 See Oonagh Gay and Barry Winetrobe *Parliamentary Audit: the Audit Committee in comparative context* Constitution Unit, UCL. Report for Audit Committee of Scottish Parliament 2003, [on 1 October 2009]

membership with the PAC. For further background see Library Standard Note *The Comptroller and Auditor General.*[263]

The C&AG is not currently appointed on a fixed term basis, but holds office until he indicates a preference for retirement. This provision was introduced in 1866 to protect the office-holder's independence, and therefore avoids the question of criteria for re-appointment after a fixed term expires. When the previous long standing C&AG, Sir John Bourn, was appointed in 1988 under the provisions of the Act, he was confirmed in Parliament after recommendation by the then Chairman of the Public Accounts Committee to the Prime Minister, with no formal recruitment procedure, no advertising, and no open competition. The appointment pre-dated the establishment of the Office of the Public Appointments Commissioner in 1995. Sir John continued in office for 20 years, a tenure not matched in modern times.[264]

In 2007 the National Audit Office released details of the expenses claimed by the C&AG following a Freedom of Information request by the magazine *Private Eye*. Press reports expressed concern that the C&AG's expenses amounted to £365,000 since April 2004 and that hospitality expenses were £27,000 over the same period.[265]

The procedure for accounting for Sir John's expenses was set out by the Public Accounts Commission in its 13th report, which introduced a new review process for expenses. Specific arrangements were made to deal with selecting accommodation, approving travel where the C&AG is accompanied by a spouse, and other expenses. The report went on to announce a review of corporate governance.[266]

9.2 The Tiner review

This review was announced on 11 October 2007 by the Public Accounts Commission, as follows:

> "To identify the extent to which the NAO's corporate governance arrangements are consistent with best practice elsewhere (including the arrangements set out in the Combined Code on Corporate Governance and the Treasury's Corporate Governance in Central Government Departments: Code of Practice) and to propose any necessary improvements, taking account of the need to protect the Comptroller & Auditor General's statutory discretion in carrying out his duties.
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> "The review should focus on the role of the C&AG and his relationship with the NAO, and should cover the role of the NAO's Senior Management Board, whether a separate advisory board would be beneficial, the number of non-executives and the method of their appointment, the method of appointment and reporting arrangements of the Audit Committee, the method of appointment of senior NAO officials, arrangements for determining remuneration, and internal controls, together with any other matters the reviewer or the Commission consider appropriate.[267]

On 25 October 2007 Jack Straw announced that legislative time would be made available to implement the results of the corporate review in course of a statement on the Government's programme of constitutional renewal.[268] On 8 November the PAC announced that John Tiner would lead the review. Mr Tiner was Chief Executive of the Financial Services Authority from

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263 Library Standard Note SN/PC/4595, *The Comptroller and Auditor General*
264 *Ibid,* See Appendix for office holders back to 1834
265 "MPs order reviews into watchdog spending bills",*Telegraph,* 12 October 2007
266 Pubic Accounts Commission 13th report, 11 July 2007, HC 915 of 2006-07 para 2
267 Public Accounts Commission Press Notice 11 October 2009
268 HC Deb 25 October 2007 c408

2003 to 2007.[269] Full details of the Tiner proposals and the response by the Public Accounts Commission is given in Library Standard Note *The Comptroller and Auditor General.*

Sir John Bourn announced his retirement on 25 October 2007 and his term of office ended in January 2008.[270] His deputy, Tim Burr, was appointed as interim C&AG, on the understanding that he would step down once the corporate governance reforms had taken effect. The formal motion to present a humble address to the Crown on Mr Burr's appointment was moved on 23 January 2008 by the Prime Minister and seconded by the chairman of the Public Accounts Committee, Edward Leigh. [271] During the debate, the Chairman of the Public Accounts Committee, Edward Leigh, supported the continuing involvement of the Prime Minister in the process of appointment.[272]

The review was published on 12 February 2008 as the 14th report of the Public Accounts Commission.[273] It found existing corporate governance arrangements inadequate, since the Senior Management Board made only a limited contribution to oversight, and was appointed by the C&AG., with only one non-executive member. Appointments had been made without reference to the Office of the Public Commissioner for Appointments (OCPA) code of practice.

The review benchmarked the governance arrangements against a range of comparator organisations and concluded that there was an "overwhelming case for strengthening the governance of NAO". It made a series of recommendations for change, summarised as follows:

> The NAO should be formed as a body corporate with a governing board comprising a majority of independent non executive directors. Its main functions should be to set the strategy of the Office, support and oversee the work of the C&AG, ensure the Office (including the C&AG) conducts its business in an economic, efficient and effective way and satisfy itself that the systems of governance and internal controls operate effectively and to the highest standards. The Board should have a Remuneration Committee and an Audit Committee comprised entirely of non-executive directors.
>
> The Chief Executive (who would be styled the C&AG) should have complete personal discretion as to the audit judgements he reaches and the presentation of those judgements to the Public Accounts Committee and other committees of Parliament as may be necessary.
>
> Both the Chairman and Chief Executive of the NAO Board would be appointed by Her Majesty the Queen on a motion from the House of Commons. The Chairman and the other non-executives should be appointed for a term of 3 years renewable once. The Chief Executive should be appointed for a fixed term of 8 years which cannot be renewed. [274]

The corporate governance for Auditors General established in the three devolved institutions in Scotland, Wales and Northern Ireland is closely based on the Westminster model, but Mr Tiner was careful not to comment on possible application of his proposals on these devolved models, as this was beyond his terms of reference. Mr Tiner also made no comment as to the designation of the C&AG as an Officer of the House:

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269 Public Accounts Commission Press Notice 13, 8 November 2007, [on 1 October 2009]
270 "Retirement of the C&AG" 25 October 2007 Public Accounts Commission Press Notice 25 October 2007
271 HC Deb 23 January 2008 c1520
272 *Ibid,* c1527
273 HC 328 2007-8
274 Public Accounts Commission 14th report HC 328 2007-8 Summary, para 3

> 61..I am not aware of the background to the C&AG being an Officer of the House of Commons and feel it is a matter for Members of Parliament to consider whether this should continue in the event that my proposals for changing the governance of the NAO are taken forward. It would be consistent with past practice and, in my view appropriate, for the Chief Executive to be appointed by the Public Accounts Commission as the Accounting Officer of the NAO. [275]

Length of term for C&AG

The review argued that a single non-renewable eight year term was the appropriate length of time for appointment as C&AG and proposed the retention of the current arrangements for formal appointment. To make the appointment, Mr Tiner recommended that a new Nominations Committee be formed with a membership including the NAO Chairman and an Independent Assessor from the Public Appointments Commissioner list. He did not specify whether any MPs would also sit on the Committee.[276] In the Scottish Parliament the parliamentary procedure for nominating an Auditor General is by way of a specially constituted selection panel, which will include the Committee's convener, and perhaps other members of the Committee.[277]

Remuneration of C&AG

Tiner recommended changes in remuneration, breaking the current arrangement where there is an automatic link with the salary of a High Court judge, as no longer sufficient to attract the appropriate candidate:

> 66. To reinforce the independence of the C&AG from Government, the current C&AG's level of remuneration follows that of a High Court judge and is paid out of the Consolidated Fund. While I can see that this achieves the objective of independence, I do not believe it benchmarks the position of Auditor General against the appropriate peer group in seeking to attract high quality candidates to the position. I would favour the Chief Executive's remuneration being set by the Public Accounts Commission based on advice by the non-executive members of the NAO Board, which itself would take advice from its Remuneration Committee. The Remuneration Committee would provide an evaluation of the performance of the Chief Executive in the management and leadership of the office and should seek expert external advice on relevant benchmarks in both the public and private sectors.[278]

This arrangement bears similarities to the performance review arrangements established in Scotland for its public officials of Parliament, such as the Scottish Information Commissioner and Scottish Standards Commissioner.[279] The C&AG would also be under an explicit restriction against holding other external paid positions without the agreement of the Public Accounts Commission.

Role of NAO chair

The new NAO Board Chair would be responsible for leading the Board and for maintaining relations with stakeholders. The Chair would provide evidence to the Public Accounts Commission in respect of its oversight of the NAO. Clearly, the existence of a new body interposed between the Commission and the NAO will require some new working

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[275] *Ibid*, para 61

[276] *Ibid*, para 64 For background on the concept of Officer of Parliament, see Library Research Paper 03/77 *Officers of Parliament: A comparative perspective*

[277] *Parliamentary Audit: the Audit Committee in comparative context* Oonagh Gay and Barry Winetrobe Constitution Unit, UCL. Report for Audit Committee of Scottish Parliament 2003, [on 1 October 2009]

[278] *Ibid*, para 66

[279] See for example Scottish Information Commissioner press release "Commissioner re-appointed", January 2008 [on 7 October 2009]

arrangements and channels of communication. The new Board should, according to Tiner, include the chair of the Audit Commission, in an attempt to provide 'closer and more formal contact, collaboration and cooperation between these two bodies' The Audit Commission audits and assesses local government and NHS bodies..[280] There has been a long running debate on the value or otherwise of merging the two principal audit bodies in the UK. The review summarises the arguments for and against, concluding that the question of a merger was beyond the terms of reference, but expressing a personal view that a merger at present would delay governance reforms necessary at the NAO.[281] In fact, the Audit Commission later declined to take up an observer place on the Board.[282]

Finally, the review suggested that the reforms would result in a slightly more onerous workload for the Public Accounts Commission which would require the Commission to have the necessary support. [283]

Response from the Public Accounts Commission

The Public Accounts Commission issued its response on 4 March 2008, which was broadly supportive of the Tiner proposals, but concerned to uphold the independence of the C&AG's work on statutory audit.[284]

The Commission recommended a slightly longer single term for the C&AG of 10 years. The Commission also preferred to link the salary to that of a Treasury Permanent Secretary, rather than any bonus system. The response also noted that the C&AG should be subject to the regulation of the Advisory Committee on Business Appointments when leaving the post, to avoid potential conflicts of interest.[285]

The Commission expressed some reservations about the Tiner model for the NAO board:

> 8. There is general agreement that it would be unacceptable if the Chairman were able to constrain the C&AG's audit decisions (including decisions on what audits to conduct) or to act as an alternative figurehead for the NAO, given that the Chairman would not be responsible for what the NAO actually produces, which is audit judgments. With this in mind, we agree to the proposal for a Chairman on the basis that he or she would have only an internal role, and would speak in public only about governance matters, and in particular would not comment on the audit reports or the audit programme of the C&AG. Given that the role would be largely internal, the Chairman's interventions in public would be rare. We would prefer the Chairman to be Chairman of the NAO Board rather than of the NAO, if legally possible. The C&AG would act as Chief Executive of the NAO, would lead the NAO executive, would manage the NAO's resources (as discussed below) and would be the public face of the NAO.[286]

The commentator David Walker has argued that the creation of a strong board would diminish democratic accountability by reducing the direct input of the Public Accounts Commission.[287] *Private Eye* suggested in its review of the work of the NAO in September 2008 that the Public Accounts Commission could have exercised more detailed oversight

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280 *Ibid,* para 73
281 *Ibid*, Chapter 7
282 *Public Accounts Commission 16th report* HC 1027 2007-08, para 16
283 *Ibid*, para 96
284 The Public Accounts Commission, *Corporate Governance of the National Audit Office: Response to John Tiner's Review,* 4 March 2008, HC 402 2007-08
285 For further details see Library Standard Note SN/PC/3745, *Business Appointment Rules*
286 The Public Accounts Commission, *Corporate Governance of the National Audit Office: Response to John Tiner's Review,* 4 March 2008, HC 402 2007-08
287 David Walker "Barking up the wrong tree" April 2008 *Public (Guardian)*

over Sir John Bourn.[288] The Commission made some detailed recommendations on the composition of the Board, recommending a narrow majority of non-executive members.

9.3 Draft clauses for C&AG and NAO

The Government commitment to make the necessary legislative changes was reiterated in the white paper *The Governance of Britain - Constitutional Renewal.*[289] The draft Bill made available as part of the white paper did not contain any draft clauses on the NAO or C&AG. However, the Public Accounts Commission's 16th report, published in August 2008 contained draft clauses drawn up by the National Audit Office, which had been endorsed by the Commission.[290] The main points of the draft clauses were as follows:

- C&AG to continue as Officer of the House, with existing appointments process confirmed, but strengthened by the use of the OCPA Code of Practice on Appointments. Maximum term of office to be 10 years;
- the C&AG's remuneration package to be linked to that of a permanent secretary, but with no performance-based element;
- statutory restriction on employment after leaving office, where a conflict of interest might arise;
- incorporation of the NAO as a statutory body with a non-executive majority and Chairman;
- Chairman of NAO to be Crown appointment for three years, potentially renewable for a further term, and subject to parliamentary approval in same way as the C&AG;
- establishment of non-executive Audit Committee and Remuneration Committee;
- statutory code to specify respective roles of C&AG and NAO Board;
- executive members of NAO Board to be appointed by non-executive members;
- joint presentation of NAO corporate plan by Chairman and C&AG to Board and Commission.

As recommended in the Commission report, the draft clauses weredeveloped by parliamentary counsel. At a meeting on 16 December 2008, the Commission approved the resultant draft, with the only points of disagreement remaining the preference of the Commission to link the pay of the C&AG with the Lord Chief Justice and for a five year employment restriction on former C&AGs.[291]

Advertisements for both the posts of C&AG and Chair of the NAO appeared on 2 October 2008 in the *Financial Times.* The salary for the chair post was given as £50,000 per annum for one day a week. For the C&AG, the suggested salary was in line with that for a Permanent Secretary. The candidate brief noted that it was intended to appoint the Chair firstly, who would then participate in the final consideration of candidates for the C&AG. The selection panel for the C&AG was given as the Chairman of the Public Accounts Committee,

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288 "The Bourn complicity" 4 September 2008 *Private Eye*
289 Ministry of Justice, *The Governance of Britain: Constitutional Renewal,* Cm 7342, March 2008
290 HC 1027 2007-08
291 http://www.parliament.uk/parliamentary_committees/public_accounts_commission/tpacfm161208.cfm

a Treasury Permanent Secretary, Tim Burr as current C&AG and the new chairman of the NAO. The panel for the Chair was identical, apart from the latter.[292]

Sir Andrew Likierman, the former head of the Government Accountancy Service, was appointed Chair of NAO as announced in December 2008.[293] According to *Accountancy Age,* Sir Edward Leigh said he was 'delighted' with the appointment of 'an outstanding candidate with profound knowledge and experience of both the public and the private sectors and with a distinguished academic record' and looked forward to working with him.

On 16 January 2009 the Prime Minister announced that Amyas Morse had been approved as the next C&AG. The press notice from No 10 Downing St noted:

> Mr Leigh chaired the selection panel, with Sir Nicholas Macpherson (HMT Permanent Secretary) representing the Prime Minister and Sir Andrew Likierman. Tim Burr, the current Comptroller & Auditor General sat as an independent observer. [294]

In February 2009 the PAC issued a report which gave details of the selection process and pre-appointment hearing for Mr Amyas which the Committee held on 11 February 2009.[295] Mr Amyas is the first C&AG to come from a chartered accountancy background. During his pre-appointment hearing, Mr Amyas was questioned about the potential for conflict with the new Chair:

> **Q15 Mr Mitchell:** David Heald, who used to be adviser on the Accounts Commission, objected to the appointment of a Chairman which he indicated would diffuse that relationship which is central between the Comptroller and Auditor General and Parliament by bringing an element of executive power. What is your view on the appointment of a Chairman?
>
> ***Mr Morse:*** I actually think that it is going to be extremely positive and I am very comforted that there is a Chairman role. I think it is a very good thing. I am not saying that to be polite, I really believe it, first, in the person of the Chairman, who I have already met and talked to and I am satisfied I am going to get a lot of positive advice. It is asking a lot of someone to be in a sole role.[296]

On 17 March 2009 the Commission took evidence from Sir Andrew Likierman and Mr Burr on the NAO supply estimate. A full transcript is now available on the website.[297] On 20 May the Commission approved the appointment of four non-executive members of the NAO Board, Ruth Evans, Richard Fleck, Dame Mary Keegan and Sir Joseph Pilling, on the recommendation of Sir Andrew, following an open recruitment process. The salary was set at £20,000 per annum for two days a month.[298]

The address to appoint Mr Morse was debated on 20 May 2009.[299] There was no dissension from the decision to appoint him to the post. The Prime Minister said that Mr Morse had agreed to a 10 year non renewable appointment, pending the corporate governance reforms for the NAO. Mr Morse took up his appointment on 1 June 2009.[300]

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292 *Odgers Ray and Berndtson Candidate Briefs for Chair of the National Audit Office and C&AG* October 2008.
293 "Andrew Likierman to chair National Audit Office" 15 December 2008 *Accountancy Age*
294 Appointment of the Comptroller and Auditor General" 16 January 2009 *No 10 gov.uk* [on 1 October 2009]
295 Twelfth report from Public Accounts Committee, HC 256 2008-09
296 *Ibid.*
297 Documents relating to meeting of Public Accounts Commission on 17 March 2009
298 Documents relating to meeting of Public Accounts Commission on 20 May 2009
299 HC Deb 20 May 2009 c1521-1532
300 NAO Board and Leadership Team- the C&AG

9.4 The Bill

The Bill is substantially unchanged in from the draft clauses presented in the 16th report of the Public Accounts Commission. The main policy change relates to the ability of former C&AGs to take up other public sector employment, where the Bill modifies the PAC prohibition. There is substantially more detail on the relationship between the NAO and the C&AG. More generally, there is some reorganisation of clauses and additional material to deal with transitional issues and other incidental matters.

The Comptroller and Auditor General

Clause 37 allows for the continuance of the office of C&AG, by appointment by Her Majesty on an address from the House of Commons, moved by the Prime Minister. This replicates existing procedure. The clause allows for a ten year non renewable term.

Clause 38 deals with the status of the office of C&AG, which continues as a corporation sole and officer of the House of Commons. It prohibits the office holder from being a peer (the position is already a disqualifying one for the House of Commons) and from taking any other position under the Crown. Clause 38(6) upholds the 'complete discretion' of the C&AG in carrying out the functions of the office, including the right to initiate audits. **Clause 39** allows the C&AG to provide services in the UK and elsewhere.

Clause 40 governs the remuneration package for the post, to be determined jointly by the Prime Minister and the chair of the Public Accounts Committee before the start of the employment term. Any performance related aspect to the remuneration is specifically prohibited. The draft clauses had proposed that the amount be determined by the Public Accounts Commission and that the level of remuneration be set at that for a Permanent Secretary. The *Explanatory Notes* to the Bill explain the policy change as follows:

> 244. Together the powers in this clause allow some flexibility over the terms and conditions which may be offered to the C&AG, to suit the requirements of different possible appointees. As happens for the Directors of Public Prosecutions and of the Serious Fraud Office, the Bill does not specify the level of remuneration itself. The remuneration package may include arrangements for automatic uprating during the term of the C&AG's appointment, for example through a formula or a link to an established uprating mechanism. However, by *subsection (4)*, performance-based incentives are not permitted since they could constrain the operational independence of the C&AG.[301]

This does not address the change in responsibility for setting the package from the PAC to the Prime Minister and Chair of the Public Accounts Committee. However a policy paper from the NAO to the Commission in December 2008 argued that it was reasonable to link responsibility for making the appointment to responsibility for setting the remuneration package.[302]

Clause 41 allows for the resignation of the C&AG, and retains the current terms of dismissal by addresses to the Crown from both Houses of Parliament.

Clause 42 prohibits former C&AGs appointed under the Bill from taking up other public sector employment or consultancy without consulting a person specified by the Public Accounts Commission. The draft clauses had simply prohibited any employment for an unspecified number of years, and the 16th Commission report in July 2008 had noted the

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301 *Explanatory Notes*

302 *The Corporate Governance of the National Audit Office: Setting and Uprating the Remuneration of the C&AG* National Audit Office December 2008

Commission's preference for a lifetime ban.[303] The current clause provides for a prohibition in the first two years after resignation and then for consultation, probably with the Advisory Committee on Business Appointments. Advice from HM Treasury had been that a lifetime ban would be potentially discriminatory on grounds of age, and might deter younger candidates.[304] The possibility of drafting a similar clause for senior civil servants may be a focus of debate in Part 1 of the Bill. The clause specifically allows a former C&AG to take up the post of Auditor General for Wales, or Scotland or Comptroller and Auditor General for Northern Ireland.

The National Audit Office

Clause 43 establishes the NAO as a new corporate body and separate legal entity, compared with the current position, where it is composed of the C&AG and staff appointed by the C&AG. **Schedule 6** provides that the C&AG is the chief executive, but not employee of the NAO. It also provides for the NAO to have nine members- five non executives, the C&AG and three employee members, chaired by a non-executive. The chair is to be appointed by the Crown following an address from the House of Commons moved by the Prime Minister with the agreement of the Chair of the Public Accounts Committee (PAC). Similarly, the appointment may only be terminated by an address of both Houses.

The Chair is initially appointed for three years, in common with non-executive members, but this may be extended for a second term without a formal address. The remuneration package is jointly determined by the Prime Minister and chair of the PAC and is to be paid from the consolidated fund. The remuneration for other non executives is to be set by the Commission, after taking advice from an appropriate person. The draft clauses did not specify a mechanism for remuneration of the Chair. The Commission is given power to restrict other employment by non-executives, whether during or after membership of the NAO. Provisions on employee members include terms of appointment, remuneration and termination of appointment. Part 6 of the Schedule deals with procedural rules, such as quorums for NAO meetings. The draft clauses contained more detail on NAO meetings where votes were required. This has been replaced by a requirement that a quorum cannot be met unless a majority of members present are non executives. Finally, there is a requirement for an external auditor for the NAO.

Relationship between C&AG and the National Audit Office (NAO)

Clause 38(8) signposts the new statutory relationship between the C&AG and the NAO set out in detail in **Clause 44** and **Schedule 7.** The *Explanatory Notes* summarise the main points:

> 302. Schedule 7 contains provisions that govern the relationship between the NAO and the C&AG. These include:
>
> the preparation by the NAO and the C&AG of a national audit strategy;
>
> the obligation of the NAO to provide resources for the carrying out of the C&AG's functions;
>
> the need for the C&AG to obtain the approval of the NAO to perform certain services;
>
> the NAO's duty to monitor and provide advice to the C&AG;
>
> the ability of the C&AG to delegate functions;
>
> the arrangements for dealing with vacancy in office or the incapacity of the C&AG;

[303] Public Accounts Commission Sixteenth Report HC 1028 2007-08 Para 8

powers to charge fees;

the obligation to prepare an annual report; and

the preparation and contents of a code of practice to deal with the relationship between the CA&G and the NAO.[305]

Schedule 7 considerably expands the draft clauses, and specifies the statutory relationship more closely. The joint strategy would in effect act as the business plan for the NAO and C&AG as stated by the *Explanatory Notes.*[306] The strategy must specify the amount of the resources provided by the NAO to the C&AG. The strategy is to be approved by the Public Accounts Commission, which must have regard to advice from the Treasury.

The resources provided to the C&AG fall into two categories: firstly those whose allocation is at the discretion of the C&AG, where the NAO is simply required to provide the resources asked for. This category includes the statutory functions, such as comptroller and auditor functions and value for money examinations. Secondly, the NAO would give approval for funding for other activities such as audit and consultancy services to international bodies.

In paragraph 2, it is the NAO which is responsible for employing staff, procuring services, holding information and procuring services on behalf of the C&AG. The NAO is also given a duty to monitor and provide advice to the C&AG in paragraph 5. Finally, there are provisions to cover the position where there is a vacancy or incapacity in the office of C&AG, to provide for joint reports to the Commission and for a code of practice on the relationship between the NAO and C&AG. It is perhaps noteworthy that the role of the Public Accounts Commission is not specifically considered in the code of practice and this may be interpreted as indicating that its role in monitoring the C&AG is passing to the NAO as a separate corporate body. Instead, the PAC approves the code.

Schedules 8 and 9 makes transitional provisions to preserve continuity between the current NAO and the new one, and set out a series of consequential amendments to legislation.

Clause 50 amends section 25 of the *Government Resources and Accounts Act 2000*. The aim is to simplify the procedure by which the C&AG audits non-profit-making companies which carry out functions of a public nature or receive significant funding from the public purse.

10 Transparency of government financial reporting to Parliament

10.1 Background

Part 8 of the Bill aims to improve the transparency of Government financial reporting to Parliament. At present, there are a number of ways in which the Government reports to Parliament on its expenditure, such as Supply Estimates, budgets and departmental resource accounts. These documents are published on different bases and at different times of the year. This can make the Government's financial reporting difficult to understand.

In the *Governance of Britain* Green Paper, published in July 2007, the Government announced an "Alignment Project" to simplify financial reporting to Parliament.[307] The Treasury set out proposals in March 2009.[308] The House of Commons Liaison Committee

304 Public Accounts Commission NAO Governance Legislation: paper by the Treasury December 2008
305 *Explanatory Notes*
306 *Ibid*, para 303
307 Ministry of Justice, *The Governance of Britain,* Cm 7170, July 2007
308 *Alignment (Clear Line of Sight) Project*, Cm 7567

accepted them in July 2009.[309] There is further background in the July 2009 edition of the Library's Economic Indicators Research Paper.[310]

Part 8 of the Bill deals with one part of the Alignment Project. At present, spending by Non-Departmental Public Bodies and other central government bodies is included in the budget of the parent department but is excluded from Supply Estimates and resource accounts.

10.2 The Bill

Clause 51 amends the *Government Resources and Accounts Act 2000*. This clause allows the Treasury to direct that departments include information relating to their "designated bodies" in Supply Estimates. It also includes a provision which prevents the designation of a body if it is funded solely from the Scottish Consolidated Fund, the Consolidated Fund of Northern Ireland or the Welsh Consolidated Fund.

Clause 52 amends part 5 of the *Government of Wales Act 2006*. It contains measures which aim to simplify financial reporting and accountability to the National Assembly for Wales.

[309] Liaison Committee, *Financial Scrutiny: Parliamentary Control over Government Budgets*, 3 July 2009, HC 804, 2008-09

[310] House of Commons Library Research Paper 09/64, *Economic Indicators*, July 2009, pp ii-v