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Select Committee on the Constitution

11th Report of Session 2009–10

Constitutional Reform and Governance Bill

Report

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Constitutional Reform and Governance Bill

CHAPTER 1: INTRODUCTION

The Development of this Bill

1. The Constitutional Reform and Governance Bill was introduced into the House of Commons on 20 July 2009, immediately before the summer recess. Its second reading debate in the Commons took place on 20 October 2009 and its Committee stage in the Commons commenced in early November and was completed in February 2010.[1] The Bill was passed by the Commons on 2 March. Its second reading debate in the House of Lords is scheduled to take place on 24 March 2010.

2. The Bill had a long gestation. It was preceded by a Green Paper of 3 July 2007,[2] by a White Paper of March 2008,[3] and by a Draft Constitutional Renewal Bill of March 2008. The Draft Bill was subject to detailed pre-legislative scrutiny by a specially appointed Joint Committee on the Draft Constitutional Renewal Bill, which reported in July 2008.[4] The Government's much delayed response to the Joint Committee's report was published on the same day as the Constitutional Reform and Governance Bill, in July 2009.

3. As introduced, the Bill included provisions concerning the following areas: the civil service, the ratification of treaties, membership of the House of Lords, demonstrations in the vicinity of Parliament, human rights claims against devolved administrations, courts and tribunals, national audit, and transparency of Government financial reporting to Parliament. The constitutional implications of these provisions are considered in Chapter 2 of this report.

4. During its passage through the House of Commons the Bill was substantially amended. These amendments are significant both in number and in constitutional importance. **When it was introduced the Bill contained 56 clauses and nine Schedules. By the time the Bill arrived in the House of Lords it contained 95 clauses and 15 Schedules. Many of the Bill's new provisions were added on the final two days of Committee in the Commons and at Report stage in that House: that is to say, late in the legislative process**. The new provisions include: clauses on a referendum on the voting system used for parliamentary elections; substantial amendment to the Parliamentary Standards Act 2009; new provisions concerning the tax status of MPs and members of the House of Lords; and amendments to the Public Records Act 1958 and the Freedom of

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1 For a detailed consideration of the Bill as introduced, see House of Commons Library Research Paper 09/73; for analysis of how the Bill was amended during the Committee stage of its passage through the House of Commons, see House of Commons Library Research Paper 10/18.

2 The Governance of Britain (Cm 7170).

3 The Governance of Britain—Constitutional Renewal (Cm 7342).

4 HL (2007–08) 166; HC (2007–08) 551.

Information Act 2000, as well as other matters. It is to be noted that none of the new provisions was included in the Draft Constitutional Renewal Bill or in the White Paper that accompanied it. The constitutional implications of these provisions are considered in Chapter 3 of this report.

5. Chapters 2 and 3 of this report examine the substance of the Bill. In Chapter 4 we turn our attention to issues of process. It will be seen that **we are seriously concerned that the consequence of the Government's management of the Bill is that neither House of Parliament will be able to scrutinise the Bill as thoroughly as is appropriate for measures of constitutional reform**.

6. The Draft Constitutional Renewal Bill included provisions that proposed reform of the constitutional position of the **Attorney General**. These provisions were dropped from the Bill. The Draft Bill would have maintained the Attorney General as a Minister within the Government. Whether the Attorney's legal and political functions should be split proved a contentious matter, with witnesses giving sharply different points of view in evidence to the Joint Committee. A minority of six members of the Joint Committee would have preferred such a course to be adopted, but the majority broadly supported the provisions in the Draft Bill. In 2008 we published a report setting out the arguments for and against reform.[5] In his statement upon the publication of the Bill, the Lord Chancellor and Secretary of State for Justice, Jack Straw MP, said that, "the significant, necessary reforms to the role of Attorney General are being achieved without the need for legislation."[6]

7. The Draft Constitutional Renewal Bill was published alongside a White Paper on *The Governance of Britain*.[7] Both developed out of the Green Paper which the Government published within a week of Mr Brown becoming Prime Minister.[8] In addition to the matters provided for in the Draft Bill the White Paper also contained detailed policy proposals on **war powers**, **flag flying**, and **reform of the Intelligence and Security Committee**.[9] The White Paper contained further, less detailed, suggestions for a wider **review of the royal prerogative**, on **the granting of passports**, on **public appointments**, and on **Church of England appointments**. The Constitutional Reform and Governance Bill contains no provisions with regard to these matters. In some cases this may be because reform does not require legislation; in others, however, it suggests that the Government no longer intends to introduce further reform. **We will not comment on this occasion on all of these matters, but we would like to draw the issue of war powers to the attention of the House**.

8. The Committee has a long-standing interest in war powers. In our 2006 report, *Waging war: Parliament's role and responsibility*, we recommended that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the UK to war, intervention in an existing conflict or to environments where there is a

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5 Reform of the Office of Attorney General, 7th report for 2007–08, HL 93.

6 Ministry of Justice press release, 20 July 2009.

7 Above, note 3.

8 Above, note 2.

9 On this last matter, see the Intelligence and Security Committee, *Annual Report for 2007–08*, Cm 7542, paras 9–16.

risk that the forces will be engaged in conflict.[10] In its March 2008 White Paper the Government published a draft resolution giving Parliament a formal voice in the process by which the Government deploys HM Armed Forces in armed combat overseas. The draft resolution was subjected to detailed scrutiny by the Joint Committee on the Draft Constitutional Renewal Bill; we gave evidence to the Joint Committee in which we argued that the resolution ought to give a greater role to the House of Lords, ought to provide for retrospective approval where appropriate, and ought to provide for a process of re-approval where the nature, scale or objectives of the deployment alter. The Joint Committee was however supportive of the Government's position. In October 2009 the Government stated that it was "preparing" a detailed -draft resolution "setting out the processes the House of Commons should follow in order to approve any deployment of the Armed Forces" in conflict overseas.[11] In his most recent evidence to us the Lord Chancellor and Secretary of State for Justice stated that work on the draft resolution had proved to be "complicated" but was continuing.[12] **We regret this ongoing delay and we call on the Government to publish this resolution as soon as possible**.

[10] See 15th report (2005–06) *Waging War: Parliament's Role and Responsibility*, (HL Paper 236), para 108. See also 3rd report (2006–07) *Waging War: Parliament's Responsibility—Follow-up*, (HL Paper 51).

[11] Ministry of Justice, *Review of Executive Prerogative Powers*, October 2009, para 37.

[12] 10th Report (2009–10) (HL Paper 80).

CHAPTER 2: THE BILL'S ORIGINAL SUBJECT MATTER

The Civil Service

9. Part 1 of the Bill concerns the civil service. It puts aspects of the civil service on a statutory footing for the first time. While every Part of this Bill contains provisions that may be viewed as being constitutional in subject-matter, and without intending to downgrade the significance of any of the Bill's many and diverse provisions, **it is Part 1 of the Bill—the placing of the civil service on a statutory footing—which, from a constitutional point of view, is among the most important features of this Bill**.

10. Placing the civil service on a statutory footing has been anticipated since the Northcote-Trevelyan report of 1854 and has in recent times been strongly advocated by the House of Commons Public Administration Select Committee (PASC), among others.[13] The Government published a consultation paper on the matter in 2004.[14] The Bill puts the Civil Service Commission on a statutory footing, confers on the Minister for the Civil Service the power to manage the civil service,[15] requires the Minister to publish a code of conduct for the civil service and sets out some minimum requirements for the code (including obligations of political impartiality, integrity, honesty, etc). The Bill provides for the principle of appointment on merit on the basis of fair and open competition, and sets out some exceptions where this principle will not apply. Separate provision is made for special advisers. The Bill does not extend to MI5, MI6, GCHQ or the Northern Ireland Civil Service. Subject to these exceptions, the Bill removes prerogative powers governing the *management* of the civil service, but prerogative powers will be retained in relation to security vetting.

11. The provisions in the Draft Constitutional Renewal Bill concerning the civil service were subjected to detailed pre-legislative scrutiny by the Joint Committee. They were also scrutinised by PASC.[16] Both committees broadly welcomed the Government's proposals, but both identified a number of areas where the legislation might usefully go further. While the Bill contains some modest adjustments to the provisions of the Draft Bill, there is no major change of policy.

12. The Joint Committee was concerned about the following issues:

    (a) the absence of an outright statutory definition of the civil service; (*this is unchanged in the Bill*)

    (b) the effects of excluding MI5, MI6 and, especially, GCHQ from the Bill; (*this is unchanged in the Bill*)

    (c) whether the financial and operational independence of the Civil Service Commission were adequately safeguarded: the Joint Committee recommended that the Commission be required to report annually to Parliament on the adequacy of its funding; it

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13 See the House of Commons Public Administration Select Committee, 1st Report (2003–04) *A Draft Civil Service Bill: Completing the Reform*, (HC Paper 128).

14 A Draft Civil Service Bill (Cm 6373).

15 In respect of the diplomatic service this power is conferred on the Secretary of State.

16 House of Commons Public Administration Select Committee, 10th Report (2007–08), *Constitutional Renewal: Draft Bill and White Paper*, (HC Paper 499).

further recommended that the Bill should require the Commissioners to be appointed on merit on the basis of fair and open competition;

(*the Civil Service Commission will report annually, its report will be laid before Parliament, and its reports may include remarks on funding; Schedule 1 to the Bill includes the requirement that Commissioners should be appointed on merit on the basis of fair and open competition; it may be noted that PASC is of the view that the powers of the Civil Service Commission should be extended; see further paragraph 39 and appendix 1, below*)

(d) whether the Bill was sufficiently clear in requiring that Ministers should have no involvement in the appointment or dismissal of individual civil servants; (*the Bill has been redrafted to clarify this*)

(e) the Committee recommended that the requirement on Ministers to give fair consideration and due weight to advice from civil servants be dealt with in the Ministerial Code and not in statute; but it further recommended that there should be a statutory requirement that the Ministerial Code be laid before Parliament; (*such requirements on Ministers are contained in the Ministerial Code; there is no provision in the Bill requiring the Ministerial Code to be laid before Parliament: the Bill is concerned not with the Ministerial Code but with the Civil Service Code and the Code of Conduct for Special Advisers*)

(f) the Constitution Committee (and the House of Commons Public Administration Committee) gave evidence to the Joint Committee to the effect that the Draft Bill was insufficiently clear in enshrining the constitutional principle of the political neutrality of the civil service; the Joint Committee disagreed, and thought that this matter was sufficiently robust in the Draft Bill; (*the relevant clause of the Bill is Clause 7, which is in the same terms as the equivalent clause in the Draft Bill*)

(g) the Joint Committee welcomed a suggestion by the Lord Chancellor that the Draft Bill could be amended to provide a wider duty on civil servants to Parliament alongside the duty to serve the Government of the day; (*no such duty appears in the Bill*)

(h) the Joint Committee was concerned that a number of the exceptions to the principle of appointment on merit were too broadly drawn;

(*there has been one (immaterial) change to the drafting but the relevant clause, Clause 10 of the Bill, is in material terms the same as it was in the Draft Bill; it is to be noted that while the principle of appointment on merit appears in the Bill, the principle of promotion on merit does not: see further paragraph 39 and appendix 1, below*)

(i) the Joint Committee was concerned that the code on special advisers should make it explicit that special advisers may not authorise expenditure; recruit, manage or direct civil servants; or exercise statutory powers. (*this is now provided for in clause 8(5) of the Bill*)

13. The Constitution Committee submitted written evidence to the Joint Committee on the Draft Bill. We stated that while we were pleased the Government had "stopped their prevarication", we were on the other hand "unconvinced that these important reforms can receive the attention and

scrutiny they require, either inside or outside of Parliament if they continue to be part of a larger bill dealing with a range of other important issues". As we report in Chapter 4, below, subsequent events have unfortunately proved that we were right to be so concerned. Additionally, we were of the view that "there are constitutionally significant gaps in what is proposed" giving the following as examples: "the constitutional obligation for a politically neutral civil service ought to be enacted in primary legislation, as should an obligation for civil servants to act lawfully". We expressed the view that it is insufficient for such requirements to be placed only in a code.[17]

14. **While, in broad terms, we welcome the provisions contained in Part 1 of this Bill, there are a number of respects in which they could and should go further.** We return to some of these matters in Chapter 4 of this report.

The Ratification of Treaties

15. Part 2 of the Bill concerns the ratification of treaties and places the Ponsonby rule on a statutory footing. This means the following: a treaty must ordinarily be laid before Parliament before it can be ratified; the House of Commons has 21 days during which it may resolve that the treaty should not be ratified; if the Commons passes a resolution to such effect, a Minister may recommend (giving reasons) that the treaty should nonetheless be ratified, in which case the House of Commons has a further 21 days during which it may resolve that the treaty is not ratified. This process may continue indefinitely. If the House of Lords (but not the Commons) resolves within the first 21 day period that the treaty should not be ratified, it may nonetheless be ratified if the Minister explains to Parliament why this should be so. Thus, the House of Lords has the power to delay ratification for a maximum period of 21 days; the House of Commons has the power to delay ratification indefinitely, but only if it continues every 21 days to resolve that a treaty should not be ratified. This is all contained in clause 24. In certain circumstances the 21 day period may be extended; in other circumstances, the parliamentary powers in clause 24 will not apply. Additionally, some forms of treaty are excluded from the scheme. The Joint Committee on the Draft Constitutional Renewal Bill was broadly supportive of these provisions in the Draft Bill.

16. It may be that these reforms could usefully go further, however. A number of witnesses to the Joint Committee suggested that the real issue lies in seeking to improve parliamentary scrutiny of treaties. Parliament currently has little power to overcome the will of the executive to conclude a particular treaty and few treaties are actually debated under the Ponsonby rule. **In the light of these concerns, the House may wish to consider the following matters:**

- **Should greater efforts be made to ensure that sufficient parliamentary time is made available for the scrutiny of treaties?**
- **Should the Bill require the Government to provide an explanatory memorandum for all treaties? (Such EMs are currently supplied, but this is only a convention.)**

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[17] Our written evidence to the Joint Committee is published as Ev71: Joint Committee on the Draft Constitutional Renewal Bill, HL (2007–08) 166, Vol II, pp 372–75.

- **Should treaties be scrutinised by an appropriate select committee, or should, as the Joint Committee recommended, a new Joint Committee on Treaties be established?**

Membership of the House of Lords

17. Part 5 of the Bill concerns membership of the House of Lords. It makes one change to the House of Lords Act 1999, abolishing the elections by which hereditary peers are currently replaced. Thus, the number of "excepted hereditary peers" in the House of Lords will cease to remain at 90 and will instead diminish one by one.[18] This Part of the Bill also contains new provisions concerning the removal of members of the House of Lords. The House is given new statutory powers to expel or suspend its members.[19] Provision is likewise made for resignation from the House.

18. Since the House of Lords Act 1999 there have been numerous committee reports, five white papers, and two votes in each chamber on further reform to the membership of the House of Lords, but this Bill is the first legislation on this subject introduced by the Government since that Act.[20] In *Building Britain's Future*, published in June 2009, the Government stated, "we will pursue the final phase of Lords reform by bringing forward a draft bill for a smaller and democratically constituted second chamber".[21] In his evidence before us on 24 February 2010, Mr Straw informed us that "a great deal of drafting has taken place" and that he hoped to publish "draft clauses for the reform of the House of Lords, which are essentially the guts of a Lords Reform Bill, in the next two or three weeks".[22] Further proposals are anticipated but no draft clauses had been published at the time of going to print.

Demonstrations in the Vicinity of Parliament

19. Part 7 of the Bill repeals sections 132–138 of the Serious Organised Crime and Police Act 2005, regulating demonstrations in the vicinity of Parliament. New powers replace these sections. These new powers are contained in a Schedule to the Bill, not in clauses: see Schedule 9. The new powers, to be inserted as section 14ZA of the Public Order Act 1986, confer considerable discretion on the Secretary of State and on senior police officers, but they remove the requirement imposed by the 2005 Act that notice be given of all demonstrations in the vicinity of Parliament. This contrasts with the Draft Constitutional Renewal Bill, which would have repealed sections 132–138 of the 2005 Act without replacing them with new powers.

Convention Rights

20. Part 8 of the Bill introduces a one-year time bar in respect of legal proceedings in which actions are brought on grounds of Convention rights

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18 The Bill as introduced makes no amendment to the 1999 Act as regards the Earl Marshal or the Lord Great Chamberlain.

19 For the House's current powers in this regard, see the recent report of the House of Lords Committee for Privileges, *The Powers of the House in respect of its Members*, HL (2008–09) 87. The House agreed to this report on 20 May 2009: HL Deb, col 1418.

20 The most recent white paper on this subject was published in July 2008: see Ministry of Justice, *An Elected Second Chamber: Further Reform to the House of Lords*, Cm 7483.

21 Cm 7654, p 29.

22 Oral evidence, 24 February 2010, Q 2.

against the Scottish Ministers, the Northern Ireland Ministers or the Welsh Ministers. The Convention Rights Proceedings (Amendment) (Scotland) Act 2009, an Act of the Scottish Parliament (which reversed an aspect of the majority decision of the House of Lords in *Somerville v. Scottish Ministers* [2007] UKHL 44) already provides for such a one-year time limit in respect of the Scottish Ministers, but questions had been raised about the appropriateness of that Act. This Bill repeals that Act and replaces it with a fresh provision (clause 62). At the same time, the Bill brings Northern Ireland and Wales into line with the position in Scotland. There has always been a one-year time bar for like actions brought under the Human Rights Act: in this sense the amendments concerning Scotland, Northern Ireland and Wales bring the position with regard to the devolved administrations into line with the position originally taken under the Human Rights Act.

Courts and Tribunals

21. Part 9 of the Bill makes modest changes to the system established by the Constitutional Reform Act 2005 for the appointment of judges. It also contains provision for salary protection for members of tribunals and for certain office-holders in Northern Ireland. The provisions remove the Prime Minister's role in the process for appointing Supreme Court judges. The Draft Constitutional Renewal Bill, in addition to this reform, had contained a series of further changes to judicial appointments. The Joint Committee on the Draft Bill was of the view that these changes were premature, the system put in place by the Constitutional Reform Act 2005 not yet having been in operation for any great length of time. The Government withdrew these further changes from the Bill.

Audit

22. Part 10 of the Bill concerns audit. It places the Comptroller and Auditor General (C&AG) on a statutory footing and limits the term of office to ten years (non-renewable). The C&AG continues to be a corporation sole, and continues to be an officer of the House of Commons. The office-holder may not be a member of the House of Lords. The Bill provides that the C&AG "has complete discretion in the carrying out of the office's functions" (clause 69(6)). Clause 72 provides for resignation or removal from the post. Additionally, the National Audit Office (NAO) is incorporated. Extensive provision is made for interaction between the C&AG and the NAO: this is largely contained in Schedule 11. The Bill's explanatory notes describe this in the following terms: the Bill "provides for the establishment of a new corporate body, the new NAO, whose functions will include providing resources for the C&AG's functions, monitoring the carrying out of those functions and approving the provision of certain services. In common with most other corporate structures, the NAO will have a majority of non-executives and will be led by a non-executive chair. The C&AG will be the NAO's chief executive, but will not be an NAO employee."

23. Estimated expenditure must be submitted annually to the Public Accounts Commission which, having regard to any advice given by the Treasury or by the House of Commons Public Accounts Committee, must review it and must lay it before Parliament, with modifications if necessary. The C&AG and NAO are placed under a statutory duty "to do things efficiently and cost-effectively", having regard to relevant professional standards (clause 77).

24. These reforms have been introduced in the light of extensive reconsideration since 2007 by (and at the invitation of) the Public Accounts Commission of the governance structure of the C&AG and the NAO.[23] **What precisely the relationship will be between the NAO's chair and its CEO (i.e., the C&AG) remains to be seen. Whether this new relationship will impact adversely on the C&AG's accountability to Parliament through the Public Accounts Committee likewise remains to be seen**.[24] Mr Amyas Morse was appointed C&AG in January 2009; Sir Andrew Likierman was appointed chair of the NAO in December 2008.[25] The clauses in Part 10 of the Bill are based on draft clauses drawn up by the Public Accounts Commission (with revisions from parliamentary counsel) and have the Commission's broad support.

Transparency of the Government's Financial Reporting

25. Part 11 concerns the transparency of the Government's financial reporting to Parliament. It amends the Government Resources and Accounts Act 2000 so as to allow the Treasury to issue direction about the way departments prepare Supply Estimates and to direct that such Estimates include information relating to "designated bodies".[26]

26. **The provisions outlined in paragraphs 17 to 25 raise a number of constitutional concerns which, in the normal course of legislative scrutiny, we would have raised in correspondence with the Government before coming to a conclusion. In this instance however we are unable to pursue this course of action due to the lack of time made available for scrutiny of this bill in this House.**

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23 See Public Accounts Commission, 13th report, (2006–07) (HC Paper 915); and 14th report, (2007–08) (HC Paper 328) ('the Tiner review').

24 On these matters, see Public Accounts Commission, *Corporate Governance of the NAO: Response to Sir John Tiner's Review*, (2007–08) (HC Paper 402).

25 See Public Accounts Committee, 12th Report for 2008–09, HC 256 (February 2009).

26 See further, House of Commons Liaison Committee, 2nd Report (2008–09) *Financial Scrutiny: Parliamentary Control over Government Budgets*, (HC Paper 804).

CHAPTER 3: THE BILL'S ADDITIONAL SUBJECT MATTER

Referendums and a Referendum on the Voting System

27. Several provisions on referendums, and on a particular referendum on the voting system used for parliamentary elections, were added to the Bill on the sixth and final day of the Committee stage in the House of Commons (9 February 2010). These provisions (as further amended at Report stage) are contained in Parts 3 and 13 of the Bill (clauses 29–37 and 88–89).

28. We have been conducting an inquiry into referendums and we will publish our report shortly. During the course of our inquiry we have taken oral and written evidence from a broad range of witnesses, including from the Electoral Commission. In oral evidence given on 3 February 2010, Jenny Watson, Chair of the Electoral Commission, indicated to us that there were five sets of improvements that, in the Commission's view, could usefully be made to the statutory framework governing referendums (the Political Parties, Elections and Referendums Act 2000, or PPERA). It is to be noted that this statutory framework has yet to be tested in the context of a UK-wide referendum. The only referendum thus far to have been held under PPERA is the 2004 referendum on the North East regional assembly. Ms Watson's identified areas of improvement were as follows:

- The creation of Regional Counting Officers as a layer in between the Chief Counting Officer and local counting officers;

  (*this is provided for in clause 33 but only in relation to the proposed referendum on the voting system for parliamentary elections*)

- The prohibition on the Government being able to produce promotional material during a referendum period (at present such a prohibition is in force for the final 28 days leading up to a referendum, but not otherwise);

  (*the relevant provision of PPERA—section 125—would remain unamended as the Bill stands*)

- The creation of a "generic conduct order which would effectively lay the rules for future referendums";

  (*this is provided for in clause 37*)

- The aggregation of spending limits for permitted participants in a referendum campaign;

  (*this is provided for in clause 89, which amends the relevant provision of PPERA*)

- The conferral on the Electoral Commission of new powers to promote public awareness;

  (*this is provided for in clause 32 but only in relation to the proposed referendum on the voting system for parliamentary elections*)

29. **Of the five areas of improvement identified by the Electoral Commission, two are fully addressed in the Bill, two are addressed in the Bill but only in respect of the proposed referendum on the voting system for parliamentary elections, and one is not addressed in the Bill.**

30. Clause 29 of the Bill requires a referendum to be held before 31 October 2011 on whether the "first past the post" system used for parliamentary elections should be replaced by an "alternative vote" system ("AV"). The Secretary of State will be under a duty to present to Parliament a Command Paper describing the AV system to be considered, the overall features of which are specified in clause 29(4). It will be for the Secretary of State (by order made by statutory instrument) to specify the question to be asked in the referendum. This is in accordance with the statutory framework established by PPERA. PPERA requires the Secretary of State to consult the Electoral Commission on the wording of a referendum question (among other matters) but it does not require the Secretary of State to follow the Commission's advice if the Commission advises that the question be redrafted or is the wrong question. **As we will recommend in our forthcoming report on *Referendums in the United Kingdom*, rather than the Government determining the wording of the question, the Electoral Commission should be given a statutory responsibility to formulate the referendum question, which should then be presented to Parliament for approval.**

Amendments to the Parliamentary Standards Act 2009

31. The fifth day of the Committee stage in the House of Commons (1 February 2010) was dominated by Government amendments designed to amend the Parliamentary Standards Act 2009 in order to give effect to a range of recommendations from the Committee on Standards in Public Life.[27] These provisions are contained in Part 4 of the Bill (clauses 38–52) and in Schedules 4–6. Their effect is very substantially to rewrite the Parliamentary Standards Act 2009, underscoring the concerns we expressed in our reports on that measure at the time of its enactment last summer.[28] We twice reported to the House that the Bill which became the Parliamentary Standards Act was rushed, and that the "excessively speedy policy-making" which resulted in the Act was open to a range of serious and substantial constitutional and other objections. The amendments now proposed to be made to the Parliamentary Standards Act 2009 address a number of these objections, as follows:

- The Independent Parliamentary Standards Authority (IPSA) is placed under statutory duties with regard to efficiency, cost-effectiveness and transparency (clause 40);
- The IPSA's powers with regard to MPs' salaries are clarified (clause 41);
- Provision is made such that determinations as to claims and allowances are subject to appeal to the First-tier Tribunal (clause 43);
- The IPSA's powers under section 8 of the 2009 Act with regard to the MPs' code of conduct on financial interests are removed (matters concerning MPs' financial interests are the responsibility of the Parliamentary Commissioner for Standards, not the IPSA);

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27 See Committee on Standards in Public Life, MPs' Expenses and Allowances: Supporting Parliament, Safeguarding the Taxpayer, Cm 7724, November 2009.

28 See our reports, 17th Report (2008–09) *Parliamentary Standards Bill*, (HL Paper 130); and 18th Report (2008–09) *Parliamentary Standards Bill: Implications for Parliament and the Courts*, (HL Paper 134).

- The office, created by the 2009 Act, of Commissioner for Parliamentary Investigations is abolished and is replaced by a new Compliance Officer. The investigatory and sanctioning powers of the Compliance Officer are fully specified in the Bill (clauses 45–46 and Schedules 4–5). Likewise, procedural safeguards and rights of appeal are appropriately set out in the Bill, unlike in the 2009 Act;
- Provision is additionally made whereby the IPSA and the Compliance Officer must draw up a joint statement as to how they will work with a variety of other relevant bodies, including the Parliamentary Commissioner for Standards, the Director of Public Prosecutions and the Metropolitan Police Commissioner (clause 47).

32. In short, the Parliamentary Standards Act 2009 will look substantially different after these amendments are made. **While we welcome these amendments we remain of the view that, from a constitutional perspective, it would have been strongly preferable for sufficient time to have been taken by the Government and provided to Parliament so that the law could have been properly drawn up in the first place. Having substantially to rewrite an Act of Parliament so rapidly after its enactment is as powerful an indicator as any that in this instance the legislative process was flawed.**

The Tax Status of MPs and Members of the House of Lords

33. Like the amendments to the Parliamentary Standards Act 2009 the amendments concerning the tax status of MPs and members of the House of Lords were added to the Bill on the fifth day of the Committee stage in the Commons (on 1 February 2010). The provisions are contained in Part 6 of the Bill (clauses 59–60). The clauses received the support of the Opposition and were added to the Bill without a division. The effect of the provisions is that MPs and members of the House of Lords (as defined) are deemed to be "ordinarily resident and domiciled" for tax purposes. Members of the House of Lords not wishing to have this tax status are given three months to give written notice to this effect to the Clerk of the Parliaments. The consequence of such notice being given is that the member concerned shall not be entitled to receive writs of summons to attend the House. The provisions in clauses 59–60 do not have retrospective effect.

Public Records and Freedom of Information

34. Two partly related sets of amendments were introduced at Report stage in the House of Commons (on 2 March 2010) concerning the Public Records Act 1958 and the Freedom of Information Act 2000 (FOIA). These provisions may be found in Part 12 of the Bill (clauses 85–86 and Schedule 15). Clause 85 replaces the "thirty year rule" under the 1958 Act with a "twenty year rule". Clause 86 gives effect to Schedule 15, which amends FOIA in several respects. Some of the amendments to FOIA are to reduce various periods of thirty years to periods of twenty years, thus bringing the scheme of the FOIA into line with the change to the Public Records Act effected by clause 85. In addition, however, Schedule 15 makes a wholly unrelated amendment providing that "communications with the Sovereign, the heir to the Throne, and the second in line to the Throne" become an absolute exemption under the Act. Such communications are currently exempted from the Act, but the exemption is qualified: that is to say, is

subject to a public interest test. Clauses 85 and 86 were added to the Bill without a division.

35. The Dacre Review on public records reported in January 2009. It recommended reducing the thirty year rule in the Public Records Act 1958 to a fifteen year rule. The Prime Minister announced in June 2009 that the Government would seek to implement a twenty year rule.[29] Yet the Government's formal response to the Dacre Review was not published until 25 February 2010[30] and, as we have seen, the relevant amendments were not introduced until the Report stage of the Bill's passage in the House of Commons. This is yet another example of delay and last-minute amendment which has been a feature of this Bill.

Other Amendments

36. Among other amendments made to the Bill in the House of Commons are the following:

- Clauses 21–23. These clauses have the effect of incorporating within the Bill the provisions of the Crown Employment (Nationality) Bill, a private member's bill sponsored by Andrew Dismore MP (the Chairman of the Joint Committee on Human Rights). The provisions replace current restrictions on the employment of non-nationals in the civil service with new, more narrowly defined powers exercisable by the Secretary of State to restrict only certain prescribed posts or classes of posts to nationals.
- Clause 87. This is a tidying-up measure. Some doubt had arisen over the effect of the Electoral Administration Act 2006 on the Act of Settlement and, in particular, whether there had been any unintended alteration made to the eligibility of Commonwealth and Republic of Ireland citizens to sit in the House of Lords. Clause 87 clarifies that the relevant provision of the 2006 Act has no such effect and applies only to disqualification in respect of the House of Commons.
- Clause 90. This was an Opposition amendment, which the Government supported, that amends the parliamentary election rules such that, as a general rule, returning officers should ensure that the counting of votes commences within four hours of the close of polling.

37. **The provisions outlined in paragraphs 33 to 36 raise a number of constitutional concerns which, in the normal course of legislative scrutiny, we would have raised in correspondence with the Government before coming to a conclusion. In this instance however we are unable to pursue this course of action due to the lack of time made available for scrutiny of this bill in this House.**

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29 See HC Deb, 10 June 2009, col. 979.

30 See Cm 7822.

CHAPTER 4: PROCESS ISSUES

38. This Committee has been consistently concerned about the process of constitutional reform.[31] As explained in paragraphs 1 and 2 of this report, the Constitutional Reform and Governance Bill originated in the admirable process of a Green Paper and a subsequent White Paper and Draft Bill. The Draft Bill, it should be recalled, was the subject of detailed scrutiny by a specially appointed Joint Committee, which reported in July 2008. Nothing then happened for a full year, until the Government response to the Joint Committee's report and the present Bill were published in July 2009. This was the first delay.

39. After a second reading debate in the Commons in October 2009 the Bill was first timetabled for four days of Committee in that House. The first two days were held soon after second reading (on 3 and 4 November) but, after being carried-over into the present session, the next days of Committee did not take place until late January. This was the second delay. The four days of Committee originally programmed grew to six days as various sets of late Government amendments were brought in. As a result, the Committee stage became increasingly protracted and did not finish until February 2010. This was the third delay. The protracted nature of the Committee stage in the House of Commons was not due to the House spending a healthy amount of time debating the detail of the various important constitutional changes which the Bill as introduced would have made (such as the provisions on the civil service or on the ratification of treaties, for example), but was due to the Commons being required to spend its time considering the various rounds of late Government amendments. While both Part 1 (the civil service) and Part 2 (the ratification of treaties) were to some extent debated at Committee stage in the House of Commons in both instances the debates were curtailed. **In both instances this meant that constitutionally significant amendments were unable to be considered**.

40. **This makes it all the more disappointing that this House, too, is in all likelihood to be denied the opportunity to scrutinise the provisions in this Bill properly.** Parliament is likely to be dissolved before the House of Lords can progress its consideration of this Bill beyond second reading. The fault lies with the Government. In the first place there was excessive delay between the publication of the Draft Bill in March 2008 and the publication of the present Bill in July 2009. This was compounded by the protracted nature of the Committee stage in the House of Commons, which was repeatedly extended as the Government tabled numerous rounds of late amendments. **It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament—and especially this House—the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves.**

41. The following is an example. As we commented in paragraph 9 above, while every Part of this Bill contains provisions that may be viewed as being constitutional in subject-matter, it is Part 1 of the Bill—the long overdue placing of the civil service on a statutory footing—which, from a constitutional point of view, is among the most important features of this Bill. Indeed, we argued in our written evidence to the Joint Committee on the Draft

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[31] See, e.g., 4th Report (2001–02) *Changing the Constitution: The Process of Constitutional Change*, January 2002 and 15th Report for (2008–09) *Fast-track Legislation: Constitutional Implications and Safeguards*, July 2009, in which (at para. 106) the Committee expressed its considerable concern about the late tabling of amendments.

Constitutional Renewal Bill in 2008 that these measures were so important that they merited a Bill in their own right, and that it would be more preferable to seek to enact a Civil Service Act than to include civil service reform as one element of a multi-purpose constitutional reform measure.

42. We publish in the appendix to this report three amendments to the provisions of the Bill concerning the civil service, which the House of Commons Select Committee on Public Administration (who have a long-standing interest in civil service reform) would have liked debated but which were not reached. We publish these amendments not in order necessarily to endorse their merits but as examples of the sorts of matters in connection with the civil service that should have been properly and fully considered by Parliament during the passage of this Bill.

43. Given that there is almost certainly no time in the remainder of this Parliament for the Bill to complete its normal passage through the House of Lords, the question of which provisions will find their way onto the statute book and which will be lost will presumably be determined in the "wash-up". Certainly this is the strong indication recently given to this Committee by Mr Straw, when he appeared before us to give evidence.[32] Likewise, the Leader of the House of Commons, Harriet Harman MP, informed that House on 4 March that "If the Constitutional Reform and Governance Bill goes into the wash-up and does not complete its stages in the House of Lords, it will be for the Opposition parties to negotiate with the Government so that we can get through a great deal of what was in the Bill … If the Bill cannot find its way through the Lords, we will make sure at the wash-up that the provisions that the public want get through."[33]

44. "Wash-up" refers to the negotiations in the final days of a Parliament among the usual channels (that is to say, principally the business managers of each of the main political parties) in each House that for all practical purposes determine (or appear to determine) which measures before Parliament will become law and which will not.

45. As we understand it, the general position is that only non-contested issues are liable to get through in the wash-up; contested issues generally do not get through. It seems that the non-contested issues as regards this Bill include a number of those which were *not* given sufficient, detailed scrutiny in the Commons (the provisions on the civil service are an example because debate on them was curtailed). Many of the provisions on which the Commons spent much of its time do seem to be contested (such as, perhaps, the provisions on a referendum on the voting system) and are therefore at least liable to be lost. **The House may take the view that the consequence of the Government tabling so many late amendments to the Bill is that the parliamentary consideration given in both Houses to the important aspects of constitutional reform which this Bill is likely to effect has been substantially curtailed**.

46. **In any event, we consider it to be extraordinary that it could be contemplated that matters of such fundamental constitutional importance as, for example, placing the civil service on a statutory footing should be agreed in the "wash-up" and be denied the full parliamentary deliberation which they deserve.**

47. **This is no way to undertake the task of constitutional reform.**

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32 Oral Evidence given on 24 February 2010, at QQ 24–27.

33 HC Deb, 4 March 2010, col 1019.

APPENDIX: PASC AMENDMENTS ON THE CIVIL SERVICE (SEE PARAGRAPH 42)

1. **Amendment: Civil Service Commission power to conduct investigations**

To be added to clause 2—

"(3A) The Commission may investigate any matters that are relevant to the functioning of the civil service codes of conduct set out in sections 5, 6 and 8 if it believes it appropriate to do so.

(3B) For the purposes of an investigation under subsection (3A), the civil service management authorities and any civil servant whose conduct is believed by the Commission to be relevant to the investigation must provide the Commission with any information it reasonably requires.".

Explanation

This amendment would allow the Civil Service Commission to conduct investigations without needing to have received a complaint from a civil servant first. It is supported by the Civil Service Commissioners themselves, who wrote to us in October, stating:

"Both your Committee and the Joint Committee on the Draft Constitutional Renewal Bill recommended that the Government considers providing the Commission with the power to initiate investigations. Despite some concerns, about the potential for politicisation and resource constraints, the Commissioners recognise that there may be occasions where it would be right for the Commission to carry out such an investigation: if there were clear evidence of a significant breach of the Code. We would therefore support an approach which gave the Commission, in addition to the duty to consider a complaint from a civil servant, the discretion to investigate matters at its own initiation. We would envisage that the Commission would want to exercise this discretion only in cases where the burden of suspicion was substantial."

2. **New clause: Promotion on merit**

To move the following Clause:—

(1) This section applies to the promotion of civil servants within the civil service.

(2) A person's promotion must be on merit.

(3) The Commission must publish a set of principles to be applied for the purposes of the requirement in subsection (2).

(4) Before publishing the set of principles (or any revision of it), the Commission must consult the Minister for the Civil Service.

(5) In this Chapter "promotion principles" means the set of principles published under subsection (3) as it is in force for the time being.

(6) Civil service management authorities must comply with the promotion principles.

(7) The promotion principles may include provision—

(a) identifying the 200 most senior posts within the Civil Service, and

(b) requiring the Commission's approval to be obtained for a promotion to a post identified by the provision in paragraph (a).

(8) The Commission may participate in the process for a promotion to a post for which its approval is required by paragraph 7(b).

(9) It is for the Commission to decide how it will participate under the provision in subsection (8).

(10) The Commission must carry out whatever reviews of promotion policies and practices it thinks are necessary to establish—

(a) that the principle of promotion on merit is being upheld in accordance with the requirement in subsection (2), and

(b) that the requirement in subsection (2) is not being undermined in any way (apart from non-compliance).

(11) For this purpose, civil service management authorities must provide the Commission with any information it reasonably requires.

Explanation

This new clause would require promotion within the civil service to be on merit, with the Civil Service Commission's involvement in promotions to the top 200 posts set out in statute. Currently, only appointment to the civil service would be statutorily regulated, and this is a loophole which in PASC's view needs to be closed. The Civil Service Commissioners agree, and have written to us that:

"It is a generally accepted principle that civil servants are not only appointed on merit, but also are promoted on merit. As you know the Commissioners believe that Civil Service legislation offers the opportunity to enshrine this principle in statute, and to provide for regulatory oversight of its application."

3. **Amendment: Diplomatic appointments**

To be added to clause 10—

"(6) Provision within paragraph (3)(a) applies only to a selection if—

(a) The Secretary of State has informed the Commission of his intention to apply the provision, and

(b) there would be no more than three people in post who were selected in reliance on paragraph 3(a), were the person to be appointed.".

Explanation

This amendment would limit to three the number of people that the Foreign Secretary could appoint to senior diplomatic posts from outside the diplomatic service without holding an open competition. The exemption is currently far too widely drafted. Although the Government has undertaken to use the exemption only rarely, the purpose of this part of the bill is to put similar undertakings on a more secure, statutory footing, and we believe the diplomatic service deserves statutory protection as much as the rest of the civil service. The Civil Service Commissioners have not expressed a view on this issue, but have highlighted it as one deserving further consideration during the passage of the bill.