HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by JUSTICE

Draft Constitutional Renewal Bill

1. JUSTICE welcomes the publication of this bill in draft form. The Bill covers important issues and should be improved by the debate facilitated by its publication in draft.

2. JUSTICE makes the following comments.

Part 1: Demonstrations in the Vicinity of Parliament

3. JUSTICE welcomes the repeal of s132-8 Serious Organised Crime and Police Act 2005. In our briefing on the original bill, we expressed our 'grave concerns' and 'serious reservations' on the lack of proportionality in these provisions. They have proved contentious, disproportionate and all too susceptible to ridicule.

Part 2: The Attorney General and Prosecutions

4. JUSTICE believes that the directors of prosecution services should be responsible for all decisions in relation to individual cases. We, therefore, welcome, in principle, the removal of many of the Attorney's powers relating to prosecution.

5. The powers of the directors should extend to decision-making on all matters even those relating to considerations of national security. In our view, the Attorney-General's powers should be restricted to the making of a submission on national security in an appropriate case to the relevant director. This is important to remove a repeated source of political controversy that led to the fall of the Ramsay MacDonald government in 1924 and has, more recently, threatened both Thatcher and Blair administrations. It is regrettable that the government has accepted the general argument of the

independence of the prosecuting services but excepted issues of national security - precisely those which caused the difficulty in so many of the causes celebres.

6. The Bill gives the Attorney greater powers to stop investigation and prosecution than she currently holds. We argue, in effect, for the position as it relates to serious fraud cases at the moment - with decision-making by the Director of the Serious Fraud Office and a clearer power of submission, on behalf of the government, by the Attorney.

7. Para 89 of the Government's green paper acknowledges that the number of cases where directions would be given are very small and 'even in cases which give rise to considerations of national security the Attorney General may consider that it unnecessary to do more than to discuss the matter with the relevant prosecution authority'. Whatever the formal arrangements, it is likely that there will be considerable informal contact between the Attorney and the directors. This is unavoidable and, provided respective roles are fully understood, is desirable.

8. The legitimate concerns of the directors in deciding on prosecution or investigations should include considerations of national security. There is no reason to think that the directors will not take seriously such a responsibility.

9. National security is a legitimate consideration in relation to decisions to prosecute or investigate. However, the powers of the Attorney should be limited to those of making a formal submission on the grounds of national security to the appropriate director. This could be balanced by a formal statutory duty on the directors to examine and take into account considerations of national security. Thus, in the extreme (and almost unthinkable) case of a director whose decision on national security was unreasonable, the Attorney could take court action - thus, providing a degree of protection from an unreasonable refusal. This would preserve the power of the Attorney to influence prosecution decisions where national security was manifestly proven to be at risk.

10. Accordingly, JUSTICE welcomes:

(a) The restricted definition of 'superintendence' of the three directors of prosecution services in clause 2(1), Schedule 1 and clauses 7-11.

(b) The abolition of the 'nolle prosequi' power in clause 11.

(c) The protocol between the directors and the Attorney in clause 3.

(d) The tenure provisions for the directors of prosecution services in clauses 4-6.

11. JUSTICE considers that the 'power to intervene to safeguard national security' in clause 12 should be restricted to a power to make submissions on national security and, consequently 'give a direction' should be replaced by 'make a written submission' in clause 12(1). If felt necessary, an additional provision could be added as clause 12(1)(d) which required any prosecutor and the Director of the Serious Fraud Office to take account of national security in decisions respectively to prosecute and investigate. The reporting provisions and the information requirements in Clause 14 and 15 should be amended to reflect this restriction. The requirement of Parliamentary reporting in Clause 16 should remain.

12. Even if the principle were accepted that the Attorney General should have the final say on the prosecution of cases involving national security, it is not appropriate that this extend to the stifling of mere investigations by the Director of the Serious Fraud Office as envisaged in Clause 12(1)(a).

13. Accordingly, the consequential notifying powers in clause 13 should be deleted.

14. Implicit in the provisions of the draft bill is that the Attorney will remain with her current roles both as minister of the government and as its chief legal adviser in addition to the superintendence function over prosecution. JUSTICE believes that this is inherently unsatisfactory.

15. The Attorney must be given more independence from government if the postholder is to remain its chief legal adviser.

16. There are a variety of ways in which the role of the Attorney might be given more independence. These range from the creation of the post as a statutory, non-ministerial one, as in Israel, to various modifications of the current position. In our view, the principle of the need for greater independence should be agreed and further consultation take place on how this is achieved.

17. There are advantages in the current position where the legal adviser to the government is in Parliament but the accountability that this gives can be overstated. It is becoming increasingly unlikely that the Attorney will, ever other than exceptionally, be a member of the House of Commons. Therefore, the elected chamber will only be able directly to hold the Solicitor General to account, not the Attorney. A statutory legal adviser could be held accountable through a Parliamentary Committee in the same way as the Ombudsman.

18. At the very minimum, the Attorney's roles as legal adviser and executive minister should be more clearly split. Thus, the Attorney as one of the troika of ministers responsible for the criminal justice system. We believe that there must be much greater separation of the political and the legal role of the Attorney. The difficulties that have arisen in the past are not met simply by restriction of the Attorney's powers of prosecution - particularly if the contentious role of a decision-making in relation to national security is actually extended.

19. Whatever the arrangements for the Attorney General, there should be a statutorily specified range of occasions when his advice is published - thought this should not be a general requirement. For example, advice on the use of armed force should be published to inform debate in Parliament. Arrangements for the certification of bills as compatible with the Human Rights Act would be improved if the Attorney made the ministerial statement required by s19 Human Rights Act that the legislation complies with the Act, rather than the minister concerned with the Bill.

Part 3: Courts and Tribunals

20. JUSTICE agrees with:

(a) The removal of the Lord Chancellor from the selection of posts below that of the High Court (Clause 19 and schedule 3, part 5). Indeed, JUSTICE originally argued for a Judicial Appointments Commission on such a 'hybrid' model for the Commission.[1]

(b) Amendments to appointment procedures (Schedule 3, part 2). However, s64 Constitutional Reform Act 2005 should be expanded in the terms set out below in paragraph 13 ie the Judicial Appointments Commission should be required to have an overall strategy to improve diversity in the judiciary. Accordingly, it should be seen not simply as responding to those who apply for posts but for proactively encouraging applications.

(c) The removal of the Lord Chancellor's powers to require the Judicial Appointments Commission to reconsider a recommendation (Schedule 3, Part 4).

21. JUSTICE disagrees with:

(a) The substitution of the Lord Chancellor for the Prime Minister from the provisions relating to the appointment to the Supreme Court (Schedule 3, part 1). Appointments to the Supreme Court require consultation with representatives of the devolved jurisdictions (s27(2) Constitutional Reform Act 2005). Since the jurisdiction of the Supreme Court is the whole of the United Kingdom, it is appropriate for the Prime Minister to make recommendations to the Queen rather than the Lord Chancellor of England and Wales.

22. JUSTICE is currently unpersuaded by:

(a) The need to establish a panel to represent potential candidates for judicial appointment (Schedule 3, part 3). This carries the danger of adding a layer of bureaucracy. A better alternative might be to extend the duty on the Judicial Appointments Commission to encourage diversity by statutorily requiring the commission to publish, consult upon and agree a policy on how it intends to carry out that duty. In particular and as a practical matter, the commission needs to have statutory authority for having a proactive strategy eg of using tribunal and lower judicial posts to encourage younger entrants to the judiciary from more diverse backgrounds and developing a career path through the judiciary for those entering it at a much younger age.

(b) The benefit of giving a power to the Lord Chancellor to obtain medical reports on candidates (Schedule 3, part 6). It would seem more consistent with the greater powers to be given to the Judicial Appointments Commission if it required the medical reports. If the call for such reports is causing delay then they could be obtained at the shortlisting stage.

Part 4: Ratification of treaties

23. JUSTICE supports the provisions in clauses 21-24 on the ratification of treaties which, effectively, put into statutory form the 'Ponsonby Rule', formulated in 1924 and operated since 1929. The House of Commons Information Office noted that this has 'gradually hardened into constitutional practice, observed in principle by all governments, except in special cases, for instance in an emergency'.[2]

24. The wording of the clause 22, which gives the Secretary of State power to ratify a treaty without Parliamentary approval might be slightly tightened with the addition of the following words after 'exceptionally' in s22(1) 'by reason of urgency'.

War Powers and the prerogative

25. JUSTICE regrets the absence from the bill of any statutory requirement for approval of the use of the armed force. It favours the introduction of a statutory requirement in similar terms to that for the approval of treaties and with the same emergency exceptions, in circumstances:

Where it is proposed to commit the United Kingdom to direct participation in any way, international armed conflict or international peace-keeping activity.[3]

Parts 5: Civil Service

26. JUSTICE makes no observations on Parts 5 of the draft bill.

Part 6: Final Provisions

27. Clause 43(1) allows ministers 'by order' to 'make such provision as the Minister or Ministers consider appropriate in consequence of this Act'. Clause 43(2) states that such an order may 'amend, repeal or revoke any provision made by or under an Act'. Clause 43(4) requires the affirmative resolution for a statutory instrument that amends or repeals primary legislation.

28. These provisions to amend and repeal other legislation are too widely drafted and should be reworded in terms that require any amendment of another stature to be 'solely for the purposes of making consequential or incidental provision in connection with a provision of this Act'. Additionally, it would be good practice to limit this power to the extent that it allows amendment or repeal of primary legislation to a period of a year from the coming into force of the Act.

JUSTICE is an all-party human rights and law reform organisation which seeks to advance human rights, access to justice and the rule of law. It is the British section of the International Commission of Jurists.

June 2008

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[1] In its Response to Constitutional Reform: a new way of appointing judges November 2003

[2] P3, Factsheet P14, November 2006

[3] This formulation is taken from Clause 3(4)(a)(i) Executive Powers and Civil Service Bill proposed by Lord Lester of Herne Hill QC in December 2003.