

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

*Memorandum by the House of Lords Delegated Powers and Regulatory Reform Committee*

Draft Constitutional Renewal Bill: delegated powers

1. This memorandum responds to your invitation of 13 May to the Delegated Powers Committee to contribute to your Committee's scrutiny of the draft Constitutional Renewal Bill. The Committee considered the draft bill at its meeting this morning. We have been assisted by a memorandum by the Ministry of Justice about the delegations in the draft bill.
2. We value the opportunity to contribute to the pre-legislative scrutiny of this draft bill and set out below an overview of our opinion on the proposed delegations. In making these observations, our opinion should not be taken to prejudge our position should a bill be introduced: we will report to the House at that stage on whether its provisions inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny. I should also note that we have considered each issue purely as a question of delegation and not of policy.

Documents to be laid before Parliament subject to no procedure

3. The bill requires a number of documents to be laid before Parliament (subject to no procedure) and we have considered whether four of these provisions amount to delegations of legislative power. The documents are the protocol for the running of prosecution services at clause 3 and the codes of conduct for the civil service, diplomatic service and special advisers provided for by clauses 30 to 33. As currently drafted, the protocol which would result from clause 3 appears to us to be a non-binding statement of how the Attorney and each of the Directors will usually relate to each other when carrying out the functions allocated to them elsewhere in statute, rather than a document which would create enforceable rights or duties. The codes of conduct provided for by clauses 30 to 33 appear to us to be management documents. None of these documents, as currently provided for, thus appears to us to amount to a delegation of legislative power. If, by time of introduction, the Government intend more than this, we would welcome that clarification.

### Henry VIII powers

4. The draft bill contains eight delegated powers, including the usual commencement order power (clause 44). There are four Henry VIII powers in clauses 8 and 43 and in paragraphs 18 and 70 of Schedule 3, all of which are affirmative: we consider clause 43 below, but the others do not seem inappropriate in terms of their scope or parliamentary procedure.

### Civil Service Commission: additional functions - clause 40

5. Clause 40 enables the Minister for the Civil Service and the Civil Service Commissioners to make arrangements for the Commission to carry out functions in relation to the civil service in addition to those conferred on it by Part 5 of the draft bill. The memorandum does not address the purpose of this power and, in view of clauses 26(4)(b) and 40 (2), we would expect it to do so were such a provision to appear in a bill before the House.

### Power to make consequential [1] provision - clause 43

6. Clause 43 enables provision (including transitional, transitory or saving provision) to be made by order in consequence of the bill, and subsection (2)(a) enables the order to amend, repeal or revoke any provision made by or under an Act. Such an order is subject to the negative procedure unless it amends or repeals an Act, in which case it is affirmative. This is well preceded and not inappropriate. We suggest that the power at clause 43(2)(a) should expressly be confined to the amendment of Acts passed before or in the same session as the bill. While that paragraph does not include the words "whenever passed", the specific power conferred by clause 8(1) is limited to the amendment of an "existing enactment", which might raise the inference that the unqualified reference to "an Act" in clause 43(2)(a) is intended as a reference to any Act. It should also be made clear whether incidental or supplementary provision may be made under subsection (1).

GOODHART

14 May 2008

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[1] For the nature of consequential provision see Craies on Legislation, 8th Edition (Ed Greenberg), paragraph 14.3.11.