HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the House of Lords Constitutional Committee

Introduction

1. In the Committee's 7th Report of Session 2006-07, The Governance of Britain (HL 158), we acknowledged that the Government's reform agenda has "profound constitutional implications which will require detailed consideration" (para 3). We therefore welcome the opportunity to contribute to the work of the Joint Committee by commenting on some aspects of the Draft Constitutional Renewal Bill and the accompanying White Paper.

2. In due course, when the bill is introduced to the House of Lords, we will carry out our usual detailed scrutiny of its provisions and report to the House. In this memorandum we confine our remarks to five main areas on which we feel able to comment at this stage. These are: the process by which constitutional change is being implemented and the scope of the draft bill; the proposals in Part 2 of the draft bill on reform of the Attorney General; the proposals in Part 3 on judicial appointments; the proposals in the White Paper on war powers; and the proposals in Jack Straw's statement of 25 March 2008 in relation to the Law Commission.

Process and Scope

3. We welcome in general the process by which the Government are taking forward their proposed reforms. The Green Paper in July 2007 (Cm 7170), the subsequent consultation papers-on managing protest around Parliament (Cm 7235), the role of the Attorney General (Cm 7192), war powers and treaties (Cm 7239) and judicial appointments (Cm 7210)-and most recently the White Paper, draft bill and analysis of the consultation responses (Cm 7342) have laid the ground for effective pre-legislative scrutiny. Legislation introducing constitutional changes of first-class importance ought in our view always to be subject to wide consultation, to be published in draft and to be subject to pre-legislative scrutiny. This has not always happened in the recent past.

4. While we have no doubt that the Joint Committee, which met for the first time on 6 May 2008, will discharge its role effectively, we note that it has been asked to report to each House by 18 July 2008. The Cabinet Office's Guide to Legislative Procedures accepts that "a committee will normally require at least 3-4 months to carry out its work" (para 18.1). Given the wide scope and general importance of the draft bill, we are disappointed that only two months have been allowed for pre-legislative scrutiny.

5. The draft bill, though relatively short, deals with five completely separate areas of proposed reform: demonstrations in the vicinity of Parliament (Part 1); the Attorney General and Prosecutions

(Part 2); courts and tribunals (Part 3); ratification of treaties (Part 4); and the civil service (Part 5). Whatever may be the underlying themes of the Government's Governance of Britain reform programme, the draft bill is in truth a miscellaneous provisions bill. While we accept that a single bill may be the most convenient vehicle for implementing those aspects of the reform programme that require primary legislation, we are concerned that there is a risk that in this conglomerate of topics, the separate parts-each important in its own right-may be subject to less effective scrutiny than might otherwise be the case.

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6. The inclusion of civil service reform as Part 5 of the draft bill is of particular concern to us. On the one hand, we are pleased that the Government have stopped their prevarication over when to bring forward legislation on this aspect of the constitution. On the other hand, we are unconvinced that these important reforms can receive the attention and scrutiny they require, either inside or outside Parliament, if they continue to be part of a larger bill dealing with a range of other important issues. A separate Civil Service Bill is in our view needed. The draft bill should be amended to give effect to this. This is not merely a matter of process but also of substance. While we have not carried out any detailed scrutiny of the provisions of the draft bill relating to the civil service, it is plain to us that there are constitutionally significant gaps in what is proposed. For example, the constitutional requirement for a politically neutral civil service ought to be enacted in primary legislation, as should an obligation for civil servants to act lawfully. It is in our view insufficient for such requirements to be placed in a code.

Part 2 of the draft bill: the attorney general

7. We trust that our recent report Reform of the Office of Attorney General (7th Report of Session 2007-08, HL Paper 93) will prove to be a useful handbook for the Joint Committee. It is accompanied by evidence from Baroness Scotland of Asthal and papers from two constitutional experts with sharply divergent views (Professor Anthony Bradley and Professor Jeffrey Jowell QC). Without seeking to resolve the debate on the future of the Law Officers-that will ultimately be a matter for each House-we give an account of the role of the Attorney General and offer analysis of the main arguments for and against change in three distinct areas: legal advice, prosecutions and criminal justice policy. We also consider the question of accountability.

8. There are three points we wish to make in relation to the provisions of the draft bill relating to the Attorney.

<u>Legislating on rule of law responsibilities</u>

9. First, the draft bill makes no express provision on the Attorney's role in relation to the constitutional principle of the rule of law. The Constitutional Reform Act 2005 section 1 makes express reference to the Lord Chancellor's role: "This Act does not adversely affect-(a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle". It would in our view be odd for the Lord Chancellor's role to be acknowledged in this way but for the statute book to say nothing about the Attorney's role. Both of these great offices of State have rule of law responsibilities and this should be acknowledged.

10. How might this be achieved? Section 3(1) of the 2005 Act makes plain that "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary" and under section 3(6), the Lord Chancellor must have regard to "the need to defend that independence". Consideration should be given to a similarly worded statement in relation to the rule of law, with all ministers and civil servants having a duty to uphold the rule of law and the Lord Chancellor and Attorney also having a greater duty to defend the rule of law. We see merit in the idea that the Attorney's responsibilities in relation to the rule of law-and possibly the responsibilities of other ministers-should be acknowledged in legislation. The Constitutional Renewal Bill would seem to be a suitable vehicle.

Oath of office

11. The Government are proposing a new oath of office for the Attorney and suggesting that the form of the new oath does not need to be contained in legislation on the ground that the current oath is not prescribed by statute. When new oaths were required for the Lord Chancellor and Lord Chief Justice of England and Wales following the 2005 reforms, amendments were made to the Promissory Oaths Act 1868. A similar approach ought to be taken in relation to the Attorney's oath for reasons of consistency and accessibility. We agree that the oath of office for the Attorney needs to be updated. This should be done through primary legislation rather than executive action. This would also give Parliament a welcome opportunity to debate and approve the oath. This is particularly important if the Constitutional Renewal Bill (contrary to our suggestion) makes no express reference to the Attorney's rule of law responsibilities.

Annual report

12. We welcome the proposal in clause 16 of the draft bill to create a statutory requirement for the Attorney to lay an annual report before Parliament. This would be a useful way of enhancing the accountability of the Attorney.

13. Clearly it will be for Parliament to devise effective procedures for ensuring that the growing number of annual reports relating to the administration of justice are scrutinised appropriately-notably, the annual report of the Judicial Appointments Commission for England and Wales, the Lord Chief Justice's Review of the Administration of Justice in the Courts, the annual report from the chief executive of the Supreme Court and now the annual report by the Attorney. Scrutiny should be approached in a proportionate way that avoids committees of each House merely duplicating the work of others. We do not regard it as part of our remit routinely to carry out oversight of these reports; that is, in our view, a responsibility best carried out by the Commons Justice Committee.

Part 3 of the DRAFT bill: courts and tribunals

14. As a preliminary point, we note that part 5 of schedule 3 to the draft bill (removal of the Lord Chancellor's functions in relation to lower-level judicial appointments) makes a large number of small amendments to provisions contained in the Constitutional Reform Act 2005. In our 14th Report of 2003-04, Parliament and the Legislative Process (HL Paper 173), we recommended that

"where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and this should be included in the Explanatory Notes to the bill" (para 98). It would be helpful if the Government were to produce a Keeling-type schedule relating to part 5 of schedule 3 to the draft bill and to include that schedule in the Constitutional Renewal Bill's Explanatory Notes when it is introduced to each House.

15. Save for one matter, we do not at this point wish to make detailed comments on the substance of the proposals in relation to courts and tribunals. In our 6th Report of 2006-07, Relations between the executive, the judiciary and Parliament (HL Paper 151), we surveyed the changing constitutional landscape in which the judiciary operates. We did not, however, focus on issues relating to judicial appointments.

16. The one point we do want to raise concerns the proposal in part 4 of schedule 3 to the draft bill in relation to the filling of judicial vacancies in England and Wales other than by recommendation of the Judicial Appointments Commission. The provision is a Henry VIII clause which would empower the Lord Chancellor, after consulting the Lord Chief Justice, by order (subject to affirmative resolution in both Houses) to amend schedule 14 to the CRA 2005. Schedule 14 lists the judicial offices which must be filled by recommendations from the JAC. The Explanatory Notes do little to explain why this provision is included; there was no discussion of it in the consultation paper. This provision seems to relate to an idea reported at para 138 of the White Paper, said to have emerged "in discussions with the judiciary and JAC". The policy goal seems to be that some judicial vacancies, especially in the tribunal system, should where possible be filled by redeployment of currently serving judicial officeholders rather than by a competition for a new recruit run by the JAC. The White Paper states "The Government therefore proposes to enable the Lord Chancellor to transfer a number of appointments to the Senior President of Tribunals but with a longstop provision requiring a JAC selection where the deployment arrangement is not possible". As this proposal was not covered in consultation, the Joint Committee will no doubt want to scrutinise it with special care.

17. We are concerned by the apparent breadth of the Henry VIII power, which seems far more extensive in its potential operation than is necessary to give effect to the proposed policy. The substance of the proposal also appears to us to have constitutional implications. Powers to redeploy judges always carry with them a risk to the principle of the independence of the judiciary. It is important that there should be effective safeguards so that judicial independence is not compromised.

War powers

18. Although there is nothing in the draft bill about war powers, the accompanying White Paper announces the Government's intentions on this issue and we understand that the Joint Committee will be considering these proposals. The Committee has considered this issue in great depth and produced two reports: Waging War: Parliament's Role and Responsibility (15th Report of Session 2005-06, HL Paper 236) and Waging War: Parliament's Role and Responsibility-Follow-up (3rd Report of Session 2006-07, HL Paper 51). In light of this, we wish to make the following points to the Joint Committee.

19. First, we very much welcome the general thrust of the Government's war powers proposals as set out in the White Paper. Adopting a "detailed resolution" on parliamentary approval of the deployment of troops into armed conflict would, in our view, be an effective way of introducing a new convention similar to that which we recommended in our 2006 report. For the reasons set out

in that report (para 104), we believe that putting the deployment power on a statutory basis would be inadvisable.

20. Second, we have three concerns about the draft resolution contained in the White Paper.

- First, we are concerned that the draft resolution states that the House of Commons "may" send a message to the House of Lords asking for its opinion on a proposed conflict decision. We believe that any resolution should include a requirement that the Commons must (except, perhaps, in certain very carefully defined circumstances) await the opinion of this House in respect of the proposed deployment before making its final decision. Either way, it needs to be established what is meant by the "opinion" of the House of Lords, since this implies a formal decision-which may involve a vote.

- Second, we regret that the draft resolution does not provide for retrospective approval of deployments in cases where forces have been deployed without prior parliamentary approval for reasons of urgency or national security. We reiterate our belief, set out in the 2006 report, that if troops have to be deployed without prior parliamentary approval, "the Government should provide restrospective information within seven days of [the deployment's] commencement or as soon as it is feasible", at which point parliamentary approval should be sought in the normal way (para 110(3)).

- Third, we are concerned that the draft resolution omits any requirement for a re-approval process, even if a deployment's nature, scale or objectives alter significantly. We believe that, in addition to keeping Parliament informed of the progress of deployments, the Government should be required to seek a fresh approval if the nature of the deployment changes substantially. This is vital if 'mission creep' is to be avoided.

LAW COMMISSION

21. There is nothing in the draft bill or the White Paper about the Law Commission, but in his statement to the House of Commons on 25 March 2008, Jack Straw announced that the Government "intend to strengthen [the Law Commission's] role by placing a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's intentions regarding outstanding Law Commission recommendations, and providing a statutory backing for the arrangements underpinning the way in which Government should work with the Law Commission" (col 23). Following Lord Hunt of Kings Heath's repetition of the statement in the House of Lords, Lord Norton of Louth sought clarification about whether the Law Commission proposals were to be included in the Constitutional Renewal Bill. Lord Hunt replied that "we will need to feel our way forward as to how best to take forward Law Commission proposals" (col 474).

22. This Committee strongly supports the work of the Law Commission and has long been concerned about the number of their reports that appear largely to have been ignored or forgotten by the Government. Indeed, our former Chairman, Lord Holme of Cheltenham, wrote to Baroness Ashton of Upholland on 24 October 2007 suggesting that the Government should respond to each Law Commission Annual Report by setting out the reasons for the delay in responding to or implementing any outstanding reports. We therefore strongly support the proposed annual report by the Lord Chancellor and the idea of putting the relationship between the Law Commission and the Government on a statutory basis. We further believe that these provisions should be included in the Constitutional Renewal Bill when it is introduced to Parliament.