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Rt Hon Michael Jabez Foster MP
Chairman, Joint Committee on the draft Constitutional Renewal Bill
House of Commons
London
SW1A 0AA

15 May 2008

Dear Michael

JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

The White Paper on *the Governance of Britain – Constitutional Renewal* sets out the Government's proposals for reform of the role of the Attorney General and the Government's rationale for those proposals. However, to assist the Committee further in its consideration of the aspects of the draft Bill which relate to the role of the Attorney General, I enclose notes on the following matters:

(a) **Consents to prosecution**: Clauses 7-10 of, and Schedule 1 to, the draft Bill amend the prosecution consent functions of the Attorney General. However, the attached note explains in a more discursive manner the proposals in the draft Bill.

(b) **Annual report:** Clause 16 of the draft Bill requires the Attorney General to prepare and lay before Parliament a report on the exercise of his/her functions on an annual basis. The attached note gives an overview of what the annual report might contain. As the primary purpose of the annual report is to enhance Parliament's ability to hold the Attorney General to account, the Government is particularly interested in the views of the Committee as to what the annual report should cover.

I look forward to working with the Committee on its inquiry into the draft Bill.

Yours ever
Patricia

BARONESS SCOTLAND QC

Memorandum from the Attorney General's Office – CRB 25 Annex (i)

Prosecution consent functions of the Attorney General

This note sets out some additional background on the function of the Attorney General to consent to the prosecution of certain offences. The note then sets out the Government's provisional recommendations for reform of the Attorney's prosecution consent functions. The note also provides further detail as to why the draft Constitutional Renewal Bill contains both a list of specific amendments to the prosecution consent functions of the Attorney General and a power to amend other functions by way of secondary legislation.

Background to the prosecution consent functions of the Attorney General

In principle, any person can seek to institute criminal proceedings. However, for certain offences, consent must be obtained to the institution of proceedings. In some cases the consent of the Attorney General is required. In other cases, the consent of the Director of Public Prosecutions or other person is needed.

The requirement to obtain consent enables a consistent approach to be taken to decisions to prosecute where the assessment of whether a prosecution is in the public interest may be thought – or was perhaps in the past thought – to be particularly difficult; and it ensures that private prosecutions cannot be brought without proper grounds.

A number of consent provisions were created before the three main prosecuting authorities (the Crown Prosecution Service, the Serious Fraud Office and the Revenue and Customs Prosecutions Office) existed and when the office of the Director of Public Prosecutions handled a comparatively narrow range of cases.

Currently, there are over 100 provisions which require the Attorney's consent to prosecution[1].

<u>Rationale for conferring a consent function on the Attorney General:</u>

There are varying rationales for a consent mechanism. There are also various reasons for conferring the consent function on the Attorney General rather than another person (for example, the DPP). The main reasons why the requirement to obtain the consent of the Attorney for a prosecution is included in legislation are outlined in the Law Commission's report on Consents to Prosecution[2]. However, it is not always apparent why a particular consent function has been conferred on the Attorney, especially where the legislation which has conferred the function dates back a number of years.

Proposals for reform

Schedule 1 to the draft Constitutional Renewal Bill contains a number of amendments to the prosecution consent functions of the Attorney General. The list of amendments in Schedule 1 is supplemented by the power in clause 8 of the draft Bill to amend other prosecution consent functions of the Attorney by way or order. (Clause 8 is discussed further below.)

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[1] The Attorney General's Office has conducted a comprehensive Lexis search of all public general Acts and all secondary legislation to identify provisions which require the consent of the Attorney.

[2] See in particular paragraph 3.27 of *Consents to Prosecution* LC255.

The Annex to this note identifies which prosecution consent functions of the Attorney are to be abolished (Category 1), retained by the Attorney General (Category 2), transferred to the Director of Public Prosecutions or other Director (Category 3, sub-divided into 3 sub-categories).

Status of the proposals to amend the consent functions: Note that as the White Paper on the *Governance of Britain* made clear, (see paragraph 92), further work is needed to determine how each prosecution consent function of the Attorney General should be categorised. *The list of amendments to the prosecution consent functions detailed in the draft Bill and annex to this note is therefore provisional and liable to be revised in light of further discussions with the prosecuting authorities, the comments received via the pre-legislative scrutiny process and further work being carried on by the Law Commission in relation to offences in connection with bribery.*

Prosecution consent functions not dealt with by the draft Bill/this note: Under the package of reforms to the role of the Attorney General proposed in the White Paper on the *Governance of Britain,* the Attorney General will retain functions in relation to contempt of court. Some of these functions take the form of a requirement to obtain the consent of the Attorney for prosecution of an offence which relates to breach of reporting restrictions or otherwise for conduct which amounts to a contempt of court. These consent functions are not addressed by this note.

This note does not deal with provisions which require the consent of the Attorney General for proceedings brought in Northern Ireland. When the provisions of the Justice (Northern Ireland) Act 2002 come fully into force, the prosecution consent functions of the Attorney General which give rise to particularly difficult public interest considerations, in particular considerations of national security or international relations (which are both excepted matters under the Northern Ireland Act 1998) will be transferred to the Advocate General for Northern Ireland. This post will be held concurrently by the Attorney General for England and Wales. The other prosecution consent functions of the Attorney General will be transferred to the Director of Public Prosecutions for Northern Ireland.

Amending prosecution consent functions by secondary legislation: The Government proposes that the vast majority of provisions which provide for the consent of the Attorney should be amended (where amendment is needed) by primary legislation. As noted above, the draft Constitutional Renewal Bill contains a list of amendments to the prosecution consent functions of the Attorney General with a view to transferring those functions to the DPP (or other prosecutor) or, in some cases, abolishing the function (see Schedule 1 to the draft Bill).

However, some of the Attorney's prosecution consent functions are in secondary legislation or legislation which has been or is due to be repealed. In line with general drafting practice, it is not thought to be appropriate for amendments to legislation of this kind to be included on the face of the Bill.

In addition, while the Attorney General's Office have conducted a full search of existing legislation, it is possible that a further prosecution consent function might be

identified in the future. Taking a power would enable an amendment to be made to such a provision.

In light of this, clause 8 of the draft Bill confers a power on the Attorney General to amend other prosecution consent functions of the Attorney General. This power will be used to amend the prosecution consent functions which are contained in secondary legislation or which have been, or are to be repealed. The power will also be used to amend any consent functions which have been overlooked.

Attorney General's Office
15 May 2008

ANNEX

PROVISIONAL PROPOSALS FOR THE AMENDMENT OF THE PROSECUTION CONSENT FUNCTIONS OF THE ATTORNEY GENERAL

Category 1: Abolition

(Where it is no longer thought to be necessary for the possibility of a prosecution to be constrained by the requirement to obtain consent)

Agricultural Credits Act 1928 section 10 (restriction on publication of agricultural charges)

Agriculture and Horticulture Act 1964 section 20 (any offence under the Act – relates to the grading and transport of fresh horticultural produce)

Marine Insurance (Gambling Policies) Act 1909 section 1 (prohibition of gambling on loss by maritime perils)

Water Industry Act 1991 section 211 (offences in relation to sewerage offences derived from other Acts)

Category 2: Retention by the Attorney

(Functions which give rise to particular public interest considerations, including national security and implications for international relations.)

These have been grouped along the following lines:

(i) Offences which are especially likely to raise issues relating to national security;

(ii) Offences which are especially likely to raise issues relating to international relations;

(iii) Offences which are particularly likely to raise other issues relating to the public interest.

Note that there is a high degree of overlap between categories (i), (ii) and (iii). Categories (i) and (ii) have been merged in the analysis below. It should be recognised that a number of offences included in Category 2(i) and (ii) below will also give rise to more generalised issues relating to the public interest.

<u>2 (i) + (ii) Offences which are especially likely to raise issues relating to national security or international relations</u>

Anti-Terrorism Crime and Security Act 2001 sections 55 (offences under section 47 re use of nuclear weapons and section 50 re assisting or inducing certain weapons-related activities overseas), **81** (offences under section 79 re disclosures relating to nuclear security and section 80 re disclosures relating to uranium enrichment technology) **and 113B** (offence under section 113 (use of noxious substances or things to cause harm and intimidate)

Aviation and Maritime Security Act 1990 section 1(7) (endangering safety at aerodromes serving international civil aviation) and **section 16** (offences under Part II of the Act relating to the safety of ships)

Biological Weapons Act 1974 section 2 (offence under section 1 –developing certain biological agents and toxins and biological weapons)

Chemical Weapons Act 1996 section 31 (offences under sections 2 re using chemical weapons or section 11 re construction premises or equipment for producing chemical weapons)

Criminal Law Act 1977 section 9 (trespassing on premises of foreign missions, etc).

Geneva Conventions Act 1957 section 1A (offences under section 1 re grave breaches of the Convention)

International Criminal Court Act 2001 sections 53 (offences under section 51 re genocide, crimes against humanity and war crimes, and section 52 re conduct ancillary to matters covered by section 51) and **54** (offences against the administration of justice by the ICC)

Internationally Protected Persons Act 1978 section 2 (proceedings for offences which would not be offences but for s1 of the Act (attacks and threats on protected persons))

Nuclear Explosions (Prohibition and Inspections) Act 1998 section 3 (offence under section 1 - causing of a nuclear explosion)

Nuclear Material (Offences) Act 1983 section 3 (offences under sections 1 and 2 which would not be an offence but for the provisions of this Act, disregarding certain other enactments. Offences are acts involving nuclear materials abroad which if done in the UK would constitute one of the listed offences; and offences involving preparatory acts and threats both in the UK and abroad.)

Official Secrets Act 1911 section 8 (in relation to any offence under the Act)

Official Secrets Act 1989 section 9 (consent required for all offences under the Act with the exception of that under s.4(2) where the consent of the DPP will suffice)

Protection of Trading Interests Act 1980 section 3(3) (failure to comply with a requirement imposed by s1(2), to inform the Secretary of State of any requirement placed on a company by a foreign government which may affect UK trade, or to knowingly contravene any directions given under s 1(3) or s 2 (1), directions in relation to ignoring the anti- UK trade requirements of foreign governments outside of the latter's territory, including the production of information to overseas courts and governments)

Serious Crime Act 2007 section 53 (prosecutions where conduct likely to take place outside England and Wales)

Suppression of Terrorism Act 1978 section 4(4) (offences which but for but for s4 would not be an offence. Section 4 extends the UK courts' jurisdiction in respect of offences committed outside United Kingdom. The offences include murder, kidnapping, false imprisonment, nuclear offences and firearm offences.)

Taking of Hostages Act 1982 section 2 (hostage-taking)

Terrorism Act 2000 sections 63E (offences under sections 63B, 63C and 63D re terrorist attacks abroad by or on UK nationals) **and 117** (certain offences under the Act which have been committed for a purpose connected with the affairs of another country)

Terrorism Act 2006 section 19 (Attorney, rather than DPP, consent needed for offences under the Act if offence committed for a purpose connected to the affairs of another country)

United Nations Personnel Act 1997 section 5 (offences which, disregarding certain enactments, would not be offences apart from sections 1-3 of the Act. Offences include attacks on UN workers outside the UK, attacks outside the UK on premises or vehicles associated with the UN or threats to carry out such offences)

Offences under secondary legislation relating to sanctions (where the consent of the Attorney is required for the prosecution of offences, other than summary offences) (See for example Article 2 of the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 SI 1996/3171)

2(iii) Offences which are particularly likely to raise other issues relating to the public interest

No additional offences identified

Category 3A: Transfer to DPP (or other prosecutor) with safeguards

(Consent functions which are not to be abolished or retained by the Attorney but which relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director but decision on consent will have to be taken by the Director personally, or by a person authorised by the Director to take the decision.)

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

** indicates that the consent function is to be transferred to the DPP and Director of SFO, exercisable concurrently.

Aviation Security Act 1982 section 8(1)(a) (offences under Part I excluding those contained within sections 4 and 7. Offences include hijacking, destroying , damaging or endangering the safety of an aircraft, other acts endangering or likely to endanger the safety of the aircraft, ancillary offences)

Criminal Justice Act 1988 section 135 (torture)

Income and Corporation Taxes Act 1988* section 766 (offences under s 765 re requirement for Treasury consent for certain transactions)

Landmines Act 1998* section 20 (Offences under section 2 re participation in the use, development, production, acquisition, possession or transfer of an anti-personnel mine)

Official Secrets Act 1920 section 8(2) (no summary proceedings for a misdemeanour under the 1911 or the 1920 Act except with the consent of the Attorney)

Prevention of Corruption Act 1906 section 2(1)** (offence under section 1 re corrupt transactions with agent)

Public Bodies Corrupt Practices Act 1889 section 4(1)** (any of the corruption related offences under the Act)

Solicitors Act 1974 section 42(2) (failure to disclose the fact of being struck off or suspended)

War Crimes Act 1991 section 1(3) (offences of murder, manslaughter or culpable homicide, irrespective of the nationality of the accused at the time of offending, if that offence was committed between 1/9/39 and the 5/6/45 in Germany or in the German occupied territories, and constituted a violation of the wars and customs of war)

Category 3B: Transfer to DPP (or other)

(Consent functions which are not to be abolished or retained by the Attorney but which do not relate to offences for which a prosecution is likely to raise particularly difficult issues. Consent to be transferred to DPP or other Director without requirement to be taken personally by Director or authorised person.)

* indicates that the consent function is to be transferred to the DPP and Director of RCPO, exercisable concurrently.

** indicates that the consent function is to be transferred to the DPP and Director of SFO, exercisable concurrently.

Adoption and Children Act 2002 section 99 (offences under section 9 re failure to comply with regulations in relation to adoption services or section 59 re disclosure of information)

Building Act 1984 section 113 (offences created under the Act require the consent of the Attorney unless the proceedings are brought by the party aggrieved or the local authority/body who has the duty to enforce the relevant provision)

Care Standards Act 2000 section 29 (offences under Part II, unless the prosecution is brought by the National Care Standards Commission or the Secretary of State (where he is for the time being exercising the functions of the Commission) or the National Assembly for Wales. Offences include operating an establishment which requires a licence without a licence and making false descriptions of establishments and agencies)

Cancer Act 1939 section 4(6) (publication of an advertisement consisting of an offer to treat, prescribe for, or give advice in relation to the treatment of, cancer)

Children and Young Persons (Harmful Publications) Act 1955 section 2(2) (printing, publishing, selling, or letting of , or having in one's possession for the purposes of the selling or letting, works to which this Act applies: works likely to fall into the hands of children which reveal, in mostly picture form, the commission of crime, acts of violence or cruelty and incidents of a repulsive or horrible nature)

Counter-Inflation Act 1973 section 17(9) (offences under the Act. Repealed by s33(4), Sch. 2 Competition Act 1980 as from 1st January 2011)

Criminal Law Act 1977 section 4(2) (consent required for conspiracy to commit an offence for which consent is required)

Customs and Excise Management Act 1979 section 147* (consent for offence under Customs and Excise Acts unless prosecution instituted by order of Commissioners) *This is to be repealed on a day to be appointed by virtue of CJA 2003 s41 & 332, Sch 3 para 50 and Sch 37 pt 4*

Explosive Substances Act 1883 section 7(1) (offences under the Act including offence under section 2 re causing an explosion likely to endanger life or property, section 3 re attempt to cause an explosion, or making or keeping explosive with intent to endanger life or property, section 4 re making or possession of explosives under suspicious circumstances, and section 5 re accessories)

Highways Act 1980 section 312 (offences under sections 167, 177, and those provisions referred to in Schedule 22 of the Act)

Housing Act 1985 section 339 (offences under Part X when the local authority is being prosecuted. Part X relates to overcrowding and related matters)

Law of Property Act 1925 section 183 (fraudulent concealment of documents and falsification of pedigrees)

Law Reform (Year and a Day Rule) Act 1996 section 2(1) (Consent required for the institution of proceedings for a fatal offence: murder, manslaughter, infanticide or any other offence of which causing another's death is a component; and aiding, abetting, counselling or procuring another's suicide.)

Merchant Shipping Act 1995 sections 15 and 143 and Schedule 3A (offences in relation to fishing vessels and pollution and safety regulations)

Mines and Quarries Act 1954 section 164 (offence under section 151 re fencing of mines and quarries)

National Health Service Act 2006 section 269 (offences in relation to notices of births and deaths)

National Health Service (Wales) Act 2006 section 200 (offences in relation to notices of births and deaths)

Prevention of Oil Pollution Act 1971 section 19 (offences under the Act unless proceedings brought by harbour authority or, in certain cases, the consent of the Secretary of State or a person authorised by him has consented. Offences relate to the discharge of oil into the waters of a harbour in the United Kingdom and failure to comply with a requirement of a harbour master, or in respect of obstruction of a harbour master)

Public Health (Control of Disease) Act 1984 section 64 (consent required for offences under the Act or byelaws made under the Act unless prosecution brought by the party aggrieved, the local authority/body who has the duty of enforcing the provision or the person who made the byelaw. A constable may also take proceedings in certain cases)

Public Health Act 1936 section 298 (in relation to any offence under the Act unless proceedings taken by a party aggrieved, a council or a person whose function is to enforce the provisions in question)

Public Order Act 1936 section 2(2) (prohibition of quasi-military organisations)

Public Order Act 1986 sections 27, 29L (incitement to race/religious hate offences)

Serious Organised Crime and Police Act 2005 section 128 (trespass on designated sites)

Shipping and Trading Interests (Protection) Act 1995 section 7 (for offences in relation to coastal shipping)

Theatres Act 1968 section 8 (offences under sections 2, 5, 6 of the Act, or under the common law in relation to the publication of defamatory material in the course of a play. Offences include presenting or directing in public a play which is obscene, contains threatening, abusive or insulting words likely to stir up hatred against a group of the population due to their colour, race, ethnic or national origins, or contains threatening, abusive or insulting words with intent to, or where the performance taken as a whole is likely to, cause a breach of the peace)

Vehicles (Crime) Act 2001 sections 14 and 30 (offence under Parts 1 and 2 unless proceedings brought by a local authority or a constable)

Water Act 1945 section 46 (offences under the Act unless proceedings are brought by the Minister of Health, a local authority, statutory water undertakers, or person aggrieved. Offences include offences under byelaws made under powers granted by the Act and provision of false information) (Repealed with savings by Water Act 1989.)

Article 9 of Channel Tunnel (Security) Order 1994 SI1994/570

Category 3C: Transfer to Director of Service Prosecutions

Armed Forces Act 2006 sections 61 and 68 (prosecutions brought outside time only with the consent of the Attorney). **(See also section 326** (disapplication of requirement to obtain the consent of the Attorney) which will need modification)

Memorandum from the Attorney General's Office – CRB 25 annex (ii)

Annual report to Parliament by the Attorney General

Clause 16 of the draft Constitutional Renewal Bill provides that the Attorney General must prepare and lay before Parliament on an annual basis a report on the exercise of the functions of the Attorney General. This note outlines what that report might include.

Limits on the information which may be included in the annual report: Note that, in relation to a number of the functions of the Attorney General, there will be limits on the information which can be included in the annual report. This is reflected in clause 16(2) of the draft Bill. In particular:

- Information in relation to criminal cases: Where the Attorney exercises a function in relation to a particular criminal case, it may not be appropriate for the annual report to include information about the particular case. It will be particularly important that the annual report does not include information which would prejudice the investigation of a suspected offence or proceedings before a court.
- Information which is legally privileged: The annual report will not generally include information about legal advice that the Law Officers have provided or other material for which a claim to legal privilege could be maintained.
- Information with implications for national security or international relations: Information the disclosure of which would prejudice national security or would seriously prejudice international relations will also generally not be included in the annual report.
- Personal data: It will generally be inappropriate to include personal data in the annual report.

Overview: A summary of the report, drawing out key themes and noting key events.

Introduction

The Law Officers have various roles:

- Upholding the Rule of Law, including as Chief Legal Adviser to the Government
- Acting independently of Government in the public interest
- Superintending the Law Officers' Departments; and
- Being Criminal Justice Ministers.

The annual report will provide an account to Parliament and to the public of what the Law Officers have done each year.

Exercise of functions in relation to the prosecuting authorities which are superintended by the Attorney under statute (CPS, SFO and RCPO): A summary of the operation of the superintendence relationship including:

- the strategic objectives and priorities which have been set, and an account of how they have been met;
- summary of co-ordination of general or cross-cutting issues;
- account of financial management and vfm.

Exercise of functions in relation to other prosecuting authorities (including the service prosecutors and Departments who exercise prosecutorial functions): To include:

- a summary of the operation of the non-statutory superintendence relationship with the Director of Service Prosecutions;
- account of proceedings at the Service Justice Board;
- summary of co-ordination of general or cross-cutting issues.

Exercise of functions in relation to criminal prosecutions: A summary of the exercise of the Attorney's functions acting in the public interest in relation to criminal proceedings. Will include functions in relation to:

- the referral of unduly lenient sentences;
- referral of points of law; and
- consents to prosecution.

Likely to include statistics as to number of cases dealt with including, in relation to unduly lenient sentences, the proportion of cases referred by the Attorney General which have resulted in an increased sentence.

Exercise of other functions in the public interest: A summary of the exercise of the Attorney's other public interest functions including functions in relation to:

- charities;
- family law;
- contempt of court;
- inquests;
- power to restrain vexatious litigants; and
- devolution.

In relation to casework, likely to include statistics of cases dealt with and their outcome.

Exercise of functions in relation to litigation: A survey of the functions of the Attorney General in relation to civil and criminal litigation. Likely to include details of:

- management of panels of Counsel (including Treasury Counsel) to represent the Crown in civil and criminal proceedings, including action taken to promote diversity of the panels;
- litigation in which the Attorney has intervened/participated on a public interest basis;

- litigation in which the Attorney has, at the request of the court, appointed an advocate to the court;
- role of the Attorney General in appointing special advocates;
- litigation in which the Attorney General or Solicitor General has appeared in person;
- litigation brought by the Attorney at the relation of a person who would not otherwise have standing (relator actions);
- intervention in legal proceedings to assert the rights of Parliament.

Exercise of functions in relation to oversight of the Treasury Solicitor's Department and the Government Legal Service

Including a summary of the key trends in work undertaken by the GLS during the year; details of staffing and skills; diversity.

Exercise of functions in relation to the legal profession: A summary of the Attorney's activities in relation to the legal profession including:

- activities in relation to pro bono;
- activities of the Attorney in capacity of leader of the Bar.

Criminal Justice Minister

Summary of cross-cutting initiatives, policy developments and system reforms led or championed by the Law Officers in their role as Criminal Justice Ministers. A report on outcomes of partnership work to reduce crime and to deliver a more effective, transparent and responsive Criminal Justice System for victims and the public.

International activities: A summary of the Attorney's role including activities to promote the rule of law overseas and overseas visits.

Parliamentary activities: A summary of the Attorney's role in Parliament. Likely to include:

- detail of statements made by the Law Officers to the House;
- details of appearances of the Law Officers before Parliamentary Committees;
- role of the Law Officers in taking Government legislation through Parliament;
- overview of PQs dealt with by the Law Officers;
- overview of correspondence from Parliamentarians handled by the Law Officers (not to include substantive content of correspondence except in appropriate cases).

Functions in relation to Northern Ireland A summary of the exercise of the functions of the Attorney General in capacity as Attorney General for Northern Ireland including:

- exercise of functions in relation to the Public Prosecution Service;
- exercise of functions in relation criminal prosecutions;

- exercise of other functions in the public interest;
- exercise of functions in relation to litigation.

Attorney General's Office
15 May 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Peter c. Beauchamp (Ev 11)

The Constitution and War-Making Powers

Thank you for your letter of May 16 2008.

I would like to submit my evidence hereunder.

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War Powers.

In the unending_experiece over Iraq and to some extent over Afghanistan. and with the actions of the Prime Minister then prevailing it is up to us to see that there can be no

repetition of the undemocratic mistakes then made by closing

off the room for them. However from the tone of the guidance provided with the questions to consider, it is easy to

imagine that a consensus of laissez faire has now prevailed.

Q37, I really doubt if the resolution route is the right

one. Statutory legislation is needed and should be tabled as soon as possible. This will be particularly important with

our armed forces ever-reducing and adopting more and more a training posture (and certainly being unable to maintain an overseas role in strength).

Q38. No the draft Resolution does not give Parliament

sufficient control over decisions.

(i.and ii and iii.) No. This is just repeating the mistakes

of the past.

(iy) This would be too late and the damage would have been done. i.,ii and iii if allowed would have done the damage.

(v) Yes, the Prime Minister should certainly report on the situation to Parliament.

(vi) No but there should be regular reports to Parliament on

developments as necessary.

(vii) They should participate in a Standing Defence Committee outlined below.

A Standing Defence Committee to include some Cabinet and

Opposition members, representatives of both sides of the

House of Lords and representatives of all three services

would be chaired by the Prime Minister, who would of course

be their spokesperson in Parliament. It is likely that

certain meetings would be held in camera as agreed by

leaders Of each of the three sectors suggested.

(If our armed forces are to be still further diminished,

amounting to little more than ultra'-defensive strength, this extra-Houses Standing Defence Committee would seem even more appropriate. When necessary the Prime Minister would come to the House and report the Committees deliberations and proposals.

Q39. Yes it is appropriate and the likely merits and repercussions should of course be considered by the above Committee in advance. (This Committee would of necessity take over the roles of previous defence committees whose heads of security would also be represented.)

Q40. 'Conflict decisions' should be clearly reiterated to

include 'advance overseas deployment'.

Moreover 'UK Forces' should be clearly defined as 'Non- Special Forces' but to include 'RAF aircraft in all roles'.

19 may 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Constitution Unit, School of Public Policy, University College London (Ev 07)

Summary

The Constitutional Renewal Bill needs to be viewed in a wider context. The changes it introduces are not nearly as big as the Labour government's earlier constitutional reforms, nor as big as those promised and still to come. It introduces a series of small but desirable reforms, whose central theme is to strengthen Parliament. In some respects the reforms do not go far enough:

· There could be closer scrutiny of the civil service, and greater independence for the Civil Service Commissioners

· The model resolution on War Powers should specify the size of the forces to be committed, and timescale of the operation

· Parliament should scrutinise appointments of the most senior judges (Supreme Court, and heads of division in the Court of Appeal)

· Parliament should consider establishing a dedicated committee to scrutinise Treaties.

Political context

1.1 In March 2008 the government published its plans for legislation to take forward the next stage of its constitutional reform programme. These plans were first announced by Gordon Brown in the Green Paper The Governance of Britain in his first week as Prime Minister in July 2007. There can be no doubt about Gordon Brown's longstanding interest and commitment to constitutional reform (Hazell et al, 2007 ch 1). The political difficulty Brown faces is that the big constitutional reforms have all been done. Devolution to Scotland, Wales and Northern Ireland, the Human Rights Act, removal of the hereditary peers from the House of Lords, freedom of information, and the new Supreme Court were all introduced under premiership of Tony Blair. These reforms leave some loose ends and unfinished business, which the Brown government is planning to address; but there is bound to be a sense that Brown's constitutional reforms are less substantial than Blair's.

1.2 This is reflected in the Constitutional Renewal Bill, which contains a range of small reforms, none of great significance. They are the things which can be legislated for now. Other, bigger reforms are in preparation, but in slower time, because they are politically more difficult and need more consultation. The government is planning a further White Paper on Lords reform, further

proposals to control party funding, a Green Paper on a British bill of rights, and a wide ranging consultation exercise on a British statement of values. Further publications on these can be expected from the government in the summer of 2008.

Parliamentary Scrutiny of Public Appointments

2.1 Other changes are also in train which do not require legislation. The most significant of these are the plans for greater parliamentary scrutiny of public appointments. Following the initial list of half a dozen public appointments suggested last July in The Governance of Britain (para 77), the government added 25 more posts in January 2008, and the Liaison Committee added 40 more in March (Liaison Committee 2008). A lot more thought has also been given to the procedure for pre-appointment scrutiny hearings (PASC 2008, House of Commons Library 2008). If all these appointments are opened up to parliamentary scrutiny, the overall effect will be much greater than the changes to the civil service in Part 5 of the draft bill. But because the changes do not require legislation, no one has yet noticed.

Constitutional Renewal Bill

3.1 The main theme connecting the disparate items in the Constitutional Renewal Bill is reforming the Royal Prerogative and strengthening Parliament. It might more properly have been called the Parliamentary Reform Bill; or the Strengthening Parliament (Miscellaneous Provisions) Bill. It contains a small number of relatively modest reforms, all worthwhile, but none of them justifying the ambition of the bill's title. In order of importance, the proposed changes are as follows:

• Civil Service : placing the Civil Service on a statutory footing by enshrining in statute the core values of the Civil Service, and giving the Civil Service Commissioners a statutory basis.

• Role of the Attorney General : abolition of the Attorney General's general power to halt a trial on indictment by entering a nolle prosequi. Narrowing the Attorney's power to give a direction to the prosecuting authorities to cases of national security. Requiring the Attorney General to submit an annual report to Parliament.

• War Powers: the Government will propose a House of Commons resolution which sets out in detail the processes Parliament should follow in order to approve any commitment of Armed Forces into armed conflict.

• Judicial Appointments : reducing the role played by the Lord Chancellor in judicial appointments below the High Court.The Government also proposes to remove the Prime Minister from the process for appointing Supreme Court judges.

• Church Appointments: reducing the role played by the Prime Minister in the appointment of bishops and senior church appointments.

• Treaties : formalising the present procedure to ensure a treaty cannot be ratified unless a copy of it is laid before Parliament for a defined period of 21 sitting days.

• Managing Protest around Parliament : repealing sections 132-138 of the Serious Organised Crime and Police Act 2005, to remove the requirement to give notice of demonstrations in the designated area around Parliament.

Statutory regulation of the Civil Service

4.1 The Civil Service has been managed under the Royal Prerogative by Orders in Council. The Committee on Standards in Public Life, the Civil Service Commissioners and the Public Administration Select Committee (PASC) have all recommended that it should be put on a statutory footing. The government resisted. In January 2004 PASC published a draft Civil Service Bill (PASC 2004b), and later in 2004 the government launched a consultation on its own draft Bill. But the government failed to find legislative time to enact the Civil Service Bill, and declined to publish the responses to the consultation. The responses are now summarised in Part 5 of CM 7342-3 (The Governance of Britain: Analysis of Consultations).

4.2 Part 5 of the draft Constitutional Renewal Bill places the Civil Service and the Civil Service Commissioners on a statutory footing. The opportunity has been missed to place on a statutory footing the other constitutional watchdogs sponsored by the Cabinet Office: the office of the Commissioner for Public Appointments, the House of Lords Appointments Commission, the Committee on Standards in Public Life and the Advisory Committee on Business Appointments. To these should now be added the Independent Adviser on Ministers' Interests. Like the Civil Service Commissioners, these bodies are currently appointed, financed, housed and staffed by the Cabinet Office. PASC recommended that they should all be put on a proper statutory footing, with a more collegiate set of arrangements, and stronger parliamentary involvement in their governance arrangements. This was to be through an arms length body with parliamentary representation, a Public Standards Commission (PASC 2007a). The Government response of November 2007 promised to examine the PASC conclusions on establishing permanent structures for such ethical watchdogs as part of the Governance of Britain process (PASC 2007b); but it has evidently decided not to embark on comprehensive reform.

4.3 It makes little sense to single out the Civil Service Commissioners (CSC) for special treatment and do nothing about the other Cabinet Office bodies. Under the new statutory regime the CSC staff with a staff of eight will have to establish separate human resources and payroll functions, annual accounts etc. They could have shared these functions with the other Cabinet Office bodies (which all have tiny staffs), if they had all been put on a statutory basis. Alternatively, Part 5 of the draft bill could have created an umbrella body, or prototype statutory framework for each body, into which the other bodies could have been slotted in due course.

4.4 The Civil Service Commissioners are to be an executive non-departmental public body, funded by the Cabinet Office and appointed on the recommendation of the Minister for the Civil Service. They must uphold the principle of appointment on merit, on the basis of fair and open competition, and publish a set of recruitment principles. The Bill also enshrines the core civil service principles of integrity and honesty, objectivity and impartiality. The main vehicle for managing the Civil

Service will continue to be the Civil Service Code and the Civil Service Management Code. Civil servants can complain to the Commissioners if they believe they are being required to act in breach of the Code, but the existing Code requires them to exhaust internal lines of appeal first, and that requirement is likely to be retained.

4.5 The draft Bill also provides for separate codes for the diplomatic service, civil servants serving the Scottish Executive and Welsh Assembly Government, and Special Advisers. All the detail is left to these codes, with the Bill providing a broad statutory framework. It thus leaves room for considerable flexibility, and should not impede any further civil service reform. In some respects there is too much flexibility, and parliamentary scrutiny could be tightened in the following respects:

Appointment of First Civil Service Commissioner. In addition to consulting the leaders of the two main opposition parties, the government should also be required to consult the chairman of PASC. Appointment should be by resolution of each House.

Dismissal of Commissioners should require resolutions of both Houses.

Codes should be subject to parliamentary approval. The bill merely requires the codes to be laid before Parliament. They should be subject to the affirmative resolution procedure, so that Parliament can debate the codes.

Ministerial Code should also be approved by Parliament. The Ministerial Code is an important counterpart to the Civil Service Code. It is reviewed by each incoming Prime Minister. The revisions they make are important but little noticed. The new Code should be laid before Parliament and made subject to parliamentary approval. This will not in any way undermine the Prime Minister's role as the ultimate arbiter of breaches of the Ministerial Code.

Limit on number of Special Advisers. There should be a cap on the number of Special Advisers, just as there is a statutory cap on the number of Ministers under the Ministers of the Crown Act. The PASC bill provided for a cap on numbers to be approved by a resolution of each House (PASC 2004b).

Power of Civil Service Commissioners to undertake inquiries. The Civil Service Commissioners should have power to undertake inquiries without a complaint being made. PASC, CSPL and the CS Commissioners all supported this in consultation on the government's earlier draft bill. The draft Bill provides for such inquiries but only with the agreement of the government and the Head of the Civil Service. The government should not be able to block an inquiry if the Commissioners believe that one is justified.

Commissioners for Scotland and Wales. There should be Commissioners appointed specificially to represent Scotland and Wales (cf Equality Act Schedule 1 for analogous provisions for the Commission for Equality and Human Rights)

4.6 No one should expect Part 5 of the Bill to transform the standing of the Civil Service, or halt the gradual erosion of its power and influence. That started under Mrs Thatcher and continued under Tony Blair. It is attributable to a wide range of factors which have served to erode the confidence

and authority of the Civil Service. Not all of these are necessarily negative: it was time to end the Civil Service monopoly of advice. But the pendulum has swung too far the other way. One central problem is the attitude and behaviour of certain Ministers, who exclude civil servants from proffering advice and discussion of that advice. The tone is set by the Prime Minister. If the Prime Minister is in the habit of excluding civil servants from key meetings, of sometimes excluding relevant ministers, of not encouraging proper advice or a written record, it is not surprising if some Ministers follow the same exclusionary behaviour in the way they treat their ministerial colleagues and run their own departments.

Role of the Attorney General

5.1 The government's main concern was to restore public confidence in the role of the Attorney General, following three controversies which had dogged Lord Goldsmith QC, Attorney General from 2001 to 2007. These were over his advice on the legality of the invasion of Iraq in 2003; the decision in Dec 2006 to stop the Serious Fraud Office investigation into BAE's alleged bribes to secure a defence contract with Saudi Arabia; and the controversy over whether the Attorney should be involved in the decision whether to bring prosecutions in the 'cash for peerages' affair.

5.2 In July 2007 the government issued a consultation paper (CM 7192) on the role of the Attorney General, which asked whether:

• the Attorney General should continue to be both the Government's chief legal adviser and a Government Minister

• the Attorney General should remain as superintending Minister for the prosecution authorities

• the legal advice of the Attorney General should be made public

• the Attorney General should attend Cabinet only where necessary to give legal advice

• a parliamentary select committee should be established specifically to scrutinise the Attorney General.

5.3 Ten days before, on 17 July 2007, the Constitutional Affairs Committee of the House of Commons (CASC) produced a report on The Constitutional Role of the Attorney General (HC 306). It concluded that there were "inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office". CASC effectively recommended the abolition of the office of Attorney General, saying that "the current duties of the Attorney General be split in two: the purely legal functions should be carried out by an official who is outside party political life; the ministerial duties should be carried out by a minister in the Ministry of Justice".

5.4 Responses to the government's consultation did not support this radical conclusion. There were 52 written responses. Of those who responded on this point, three quarters (27 out of 38) favoured the Attorney General remaining as the chief legal adviser to the government, and continuing to be a Minister. There was also strong support for the Attorney retaining the function of superintending the main prosecution authorities (Crown Prosecution Service, Serious Fraud Office, and Revenue and Customs). The majority of respondents also favoured the Attorney General attending Cabinet only when necessary to provide legal advice, and retaining a general presumption that the Attorney's legal advice should not be disclosed.

5.5 In line with these views, the government has concluded that the Attorney should remain the government's chief legal adviser, should remain a Minister, and a member of one of the Houses of Parliament. (There is a growing convention that the Attorney General is a member of one House, and the Solicitor General a member of the other). In keeping with previous convention, the Attorney will attend Cabinet only when required. The only changes proposed are that:

• the Attorney General may not give a direction to the prosecuting authorities in relation to an individual case (except in cases of national security)

• the requirement to obtain the consent of the Attorney General to a prosecution in specified cases will, in general, be transferred to the DPP or specified prosecutors

• the Attorney General's power to halt a trial on indictment by entering a nolle prosequi will be abolished

• the Attorney General must submit an annual report to Parliament.

5.6 The decision whether to establish a new Select Committee on the Attorney General has been left to Parliament. It is unlikely that either House will wish to establish a new Committee, so the Attorney will continue to be scrutinised by the Constitution Committee in the House of Lords, and the Justice Committee in the Commons.

5.7 In April 2008 the Lords Constitution Committee published their own report into Reform of the Office of Attorney General (HL 93). It sets out the background to the controversies which had dogged Lord Goldsmith, and analyses the arguments for and against reforming the office, drawing on two divergent opinions published as Annexes to the report from Professor Anthony Bradley and Professor Jeffrey Jowell QC. Without coming to strong or clear conclusions, the report does not support CASC's call for radical reform. With two former Attorneys General (Lord Lyell and Lord Morris) on the Committee, their sympathies appear to lie in favour of retaining the status quo. The report concludes with a powerful argument against the CASC (and Jeffrey Jowell) model of having the Attorney become an independent legal adviser outside the government:

Lord Morris of Aberavon, appearing before the Constitutional Affairs Select

Committee, quoted the words of former Attorney Sam Silkin QC on this point: "to whom would [an] independent non political law officer be accountable? If there were no minister through whom he could be accountable we should have to invent one and, if there were, we would have returned full circle, for accountability without control is meaningless and whatever minister was answerable for an independent law officer would in practice have to control him, else we should have the semblance of accountability and not the reality, and in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament". Lord Mayhew of Twysden's conclusion was categorical: "I do not see how [the Attorney] can be accountable to the Parliament unless he is a member of it, and I think it is absolutely essential for public confidence reasons that he should be".

War Powers

6.1 Ever since the Iraq war in 2003 there has been growing agreement on the need for parliamentary authorisation before any future commitment of armed forces overseas. The Lords Constitution Committee recommended a new convention to this effect in their 2006 report on Waging War: Parliament's role and responsibility (HL 236, July 2006). The government accept the need for approval, and in their consultation paper on War Powers and Treaties (CM 7239, October 2007) asked whether the mechanism for seeking parliamentary approval should be set out in a parliamentary resolution or prescribed in statute.

6.2 The government have now decided to go for a parliamentary resolution, and a draft resolution is appended to the Green Paper (Cm 7342-1 at 53). We have no objection to that, nor to the exceptions proposed for urgent or secret operations. The key question is the information supplied to Parliament before any debate on whether to go to war. The draft resolution leaves that to the discretion of the Prime Minister, requiring him to supply "the information about objectives, locations and legal matters that the Prime Minister thinks appropriate in the circumstances". We think that the Prime Minister should also supply information about the size of the forces to be committed, and the expected timescale of the operation.

Judicial Appointments

7.1 In The Governance of Britain the government proposed to surrender or limit its powers over the appointment of judges, and asked whether Parliament should have a stronger role in relation to judicial appointments. More detail was offered in the subsequent consultation document on Judicial Appointments (Ministry of Justice 2007). The government now proposes to retain the Lord Chancellor's involvement in the appointment of High Court judges and above, but leave the appointment of Circuit judges and below to the Judicial Appointments Commission (JAC). To prevent an accountability gap, the JAC would become more tightly accountable, to the Lord Chancellor and to Parliament.

7.2 We welcome the government's decision to retain its involvement in senior judicial appointments. It is very important for the Lord Chancellor to retain such a role, for reasons of accountability, and in order for the government to retain trust and confidence in the judges. If the final decision were left to the JAC, the government would be excluded from the process, and would be less inclined to respect the judiciary or defend them when they came under attack. But we agree that there is no need for the Prime Minister to be involved, and his post box role can be removed. The Lord Chancellor can submit names direct to The Queen.

7.3 More controversially, we believe that there should be a role for Parliament in relation to very senior judicial appointments (Supreme Court justices, the Lord Chief Justice and other heads of division in the Court of Appeal). We recognise there is little support for this at present, not even in Parliament. But the same arguments for subjecting senior public appointments to parliamentary scrutiny apply also to the senior judiciary. In brief,

· It is now recognised that in landmark cases the top courts effectively have law making powers. Appointment to such powerful positions should be subject to parliamentary scrutiny.

· Parliament nowadays has little contact with the judges. The senior judges are largely unknown to MPs. Supreme Court justices will be unknown to the Lords once the law lords have departed. There is value in a formal presentation of the senior judges to Parliament, to foster continuing dialogue.

· The top judges should meet the body vested with the constitutional power to dismiss them. Senior judges can be removed only by resolution of both Houses of Parliament.

These arguments are developed at greater length in our submission to the Constitutional Affairs Committee inquiry into Judicial Appointments (CASC 2004, vol 2 Ev 121).

7.4 Two final points about the Judicial Appointments Commission. First, the arguments for a single non-renewable term (which the government has accepted for the Civil Service Commissioners, and similar watchdogs) apply with equal force to the JAC. Second, the early operation of the JAC has brought out the political difficulties when a watchdog like the JAC has a high degree of independence but limited accountability. There have been operational difficulties and unacceptable delays. The Lord Chancellor still feels responsible for the overall system of judicial appointments, but has few levers to improve matters. The White Paper proposes he should be given a power to set

targets and give directions to the JAC. We would support this, provided that it is accompanied by close scrutiny by parliamentary committees (the Lords Constitution Committee, and Commons Justice Committee), and power for the JAC to issue a special report at any time if it feels that it is being improperly pressured by the Lord Chancellor. The JAC should not be made accountable for individual decisions, but it does need to be made more accountable for its overall performance.

Church and State

8.1 The White Paper (paragraphs 254 -6) confirmed the proposals in The Governance of Britain that the government should withdraw from any active involvement in senior Church of England appointments. When appointing bishops the Prime Minister has previously received two names, and made a choice. Now he will receive only one name from the Crown Nominations Commission, which he will then forward to The Queen. In future the Church will have the decisive voice.

8.2 This step does not mean disestablishment but the manner of the change does call into question both the Crown's continuing links with the Church of England, and the basis upon which its bishops can remain members of the House of Lords. This is because, for the Crown, the sovereign would no longer be acting on the advice of a responsible minister. As to the bishops, a committee of the Church of England responsible to no external authority would be appointing 26 members of the House of Lords.

8.3 The sovereign's new position can probably be defended adequately. As Supreme Governor, the sovereign can henceforward be seen as a sort of statutory patron where the margin of difference between making appointments and approving/taking note of them can be interpreted generously. But it is harder to reconcile the new position of the bishops with the view upon which the present appointment system - operating since 1976 - was based. Then the Prime Minister insisted that he had to have a real choice, and that was why the Church has had to submit two names on every occasion for episcopal appointments.

8.4 When in the negotiations leading up to the 1976 system the Church suggested they might forward just one name, an analysis for ministers put it

The Sovereign would thus be placed in the anomalous position of being able neither to exercise a personal choice nor to have effective recourse to the normal channels of advice - since the Prime Minister could say only that he had no objection but to endorse the Church's decision. Short of altering the present constitution of the House of Lords, the proposal would also mean that nominations for the membership of that House were being made by a body outside the normal political spectrum and not answerable to Parliament. (TNA HO 304/33, memorandum 24 January 1975)

8.5 These considerations had force then and continue to have force: they call into question continued episcopal membership of the House of Lords on the present basis. The Church of England's wish to continue a role in episcopal appointments for the Prime Minister's Appointments Secretary revealed the Church's concern to maintain some political cover.

8.6 But there was also a further twist. When the Lord Chancellor, Jack Straw, introduced the White Paper and draft Bill on 25 March, he seemed at one point to suggest that the government was prepared to look deeper into the late seventeenth/early eighteenth century religious settlement that still governs church/state relations as well as the personal religion of the sovereign. This arose when he replied to a supplementary question from a Scots Labour MP, Jim Devine, about the future of the Act of Settlement 1701. Jack Straw said

Let me say to my honourable Friend that I speak on behalf of the Prime Minister: because of the position that Her Majesty occupies as head of the Anglican Church, this is a rather more complicated matter than might be anticipated. We are certainly ready to consider it, and I fully understand that my honourable Friend, many on both sides of the House and thousands outside it, see that provision as antiquated. (Hansard, Commons, 25 March 2008, col. 25)

8.7 The Act of Settlement bars the throne to Roman Catholics or anyone who marries one. There have been various attempts in recent years to raise the question of reform or repeal of the Act.[1] None of these initiatives either was allowed to or could make progress. All would in effect imply disestablishment because it would be intolerable to the Church of England to have as Supreme Governor a person whose religious authority recognised neither the validity of Anglican orders nor, therefore, the validity of the Church of England.

8.8 In the past, the Government has always said that it has no plans to end the religious discrimination in the 1701 Act. During the debate on Lord Dubs' Bill, the then Lord Chancellor, Lord Falconer of Thoroton, described the necessary changes in the law as 'complex and controversial' and said that they would raise major constitutional issues which would involve the amendment or repeal of a number of statutes. Moreover:

I should make it clear that this Government stand firmly against discrimination in all its forms, including discrimination against Catholics, and will continue to do so. The Government would never support discrimination against Catholics, or indeed any others, on the grounds of religion. The terms of the Act are discriminatory, but we should be clear that for all practical purposes, its effects are limited... There is a difference between applying new legislation such as the Human Rights Act to existing legislation, and altering legislation which is part of the backbone of our constitutional arrangements. Indeed, this legislation is interwoven within the very fabric of the constitution and has evolved over centuries. It is not a simple matter that can be tinkered with lightly. (Hansard, Lords, 14 January 2005, cols 510-511)

8.9 Jack Straw appeared to go further in saying "We are certainly ready to consider it" [ie ending the discrimination in the Act of Settlement]. The Lord Chancellor has not subsequently been asked how he plans to do this, or when legislation might be brought forward. Although desirable, it is unlikely to be a high priority for the government because of the complexities involved.

Parliamentary scrutiny of Treaties

9.1 The government proposes that the present arrangements for parliamentary scrutiny of Treaties should be put on a statutory footing. Under the present arrangements a Treaty which the government proposes to ratify is laid before Parliament for a minimum period of 21 sitting days prior to ratification. The government has improved the process by providing an Explanatory Memorandum, and forwarding details of Treaties to the relevant Select Committee (for further details see House of Commons Library 2008b). There is no more which the government can do to provide Parliament with the necessary information.

9.2 The challenge now is for Parliament to establish effective scrutiny machinery. Select Committees have shown little interest in scrutinising Treaties, despite the information supplied direct to them. They lack expertise, and there are many other demands on their time. The one exception is the Joint Committee on Human Rights. Its experience suggests that there are important issues in Treaties which deserve parliamentary scrutiny, but that in other subject areas they go unscrutinised. How might the JCHR's good practice be spread more widely? One answer might be a dedicated Treaties committee. The Wakeham Commission proposed such a committee for the Lords (Wakeham Commission, 2000 Rec 56). An alternative might be a Joint Committee of both Houses, as has been successfully established in Australia (Harrington, 2006).

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[1] Lord Forsyth of Drumlean, Conservative, introduced a motion to that effect (Hansard, Lords, 2 December 1999, cols 917-919), Kevin McNamara, Labour, a Treason Felony, Act of Settlement and Parliamentary Oath Bill (Hansard, Commons, 19 December 2001 cols 319-323), and Lord Dubs, Labour, a Succession to the Crown Bill (Hansard, Lords, 14 January 2005, cols 495-513). Edward Leigh, Conservative, sought leave to introduce a Marriages (Freedom of Religion) Bill (Hansard, Commons, 8 March 2005, cols 1392-4), and John Gummer, Conservative, similarly sought permission for a Catholics (Prevention of Discrimination) Bill two years later (Hansard, Commons, 20 February 2007, col. 154-6).

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Lord Goodhart QC (Ev 05)

The Attorney General

I have already made submissions on the role of the Attorney General to the Justice Committee of the House of Commons and to the Government's Green Paper on the Governance of Britain. I will therefore simply resummarise my previously expressed views.

1. The Attorney General's main role should be that of principal legal adviser to the Government.

2. This role requires an ability to give independent advice to the Government. This is inconsistent with membership of the Government.

3. The Attorney General should therefore cease to be a Minister, and should not take part in the formulation of criminal justice policy or undertake other ministerial roles such as taking legislation through either House of Parliament.

4. The presence of the Attorney General in the House of Commons involves a risk of undesirable conflict of interest, in particular between the possibility of giving unpopular advice to the Government and the retention of his or her constituency (or the constituencies of close colleagues) at a future election.

5. The Attorney General should therefore either be appointed to membership of the House of Lords (so long as it retains places for appointed members) or not be a member of either House. If the former, he or she should not vote.

6. The Attorney General should attend Cabinet or Cabinet Committees only when that is necessary for the purpose of giving advice to the Government.

7. If the Attorney General ceases to be a Minister, there is no objection to his or her continuing to have a supervisory role over the prosecution services. Directions relating to national security should be given by the Prime Minister with the consent of the Attorney General.

8. The Attorney General can not act as adviser to both the Government and Parliament, because they may have conflicting interests. The Attorney General, as adviser to the Government, should therefore not be personally accountable to Parliament for his or her advice nor should it normally be disclosed. The Government would of course be accountable to Parliament for action taken on the advice of the Attorney General.

May 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum submitted by Baroness Mallalieu QC (President of The Countryside Alliance) (ev 13)

OVERVIEW

· As President of the Countryside Alliance I have been closely involved with eight major demonstrations which have taken place either within Parliament Square or which have passed through it. The Alliance has, therefore, perhaps unique experience of demonstrations in the vicinity of Parliament over a number of years. All save two were totally peaceful. All involved close co-operation with the police. Where there were disturbances we believe that co-operation had broken down.

· The principal demonstrations were:

December 2000 - A vigil held in Parliament Square during Second Reading of Hunting Bill in the Commons.

15 May 2002 to 22 September 2002 - A round the clock vigil in Parliament Square.

22 September 2002 - The Liberty & Livelihood March. 407,791 people march, with over 100,000 "marching in spirit". This is the largest civil liberties march in modern history culminating in Parliament Square.

16 December 2002 - A march from Hyde Park Corner to Parliament Square for a mass lobby of Parliament, to mark the Second Reading of the Government Hunting Bill in the Commons.

29 to 30 June 2003 - Women's Vigil over two days to coincide with the Report of the Hunting Bill in the Commons.

9 July 2003 - Demonstration involving working dogs, owners and handlers in Parliament Square during the Hunting Bill's Third Reading in the Commons.

15 September 2004 - Demonstration in Parliament Square, arranged at short notice to coincide with All Stages of the Hunting Bill in the Commons.

· On only two occasions did any public disorder occur. The fact that the vast majority of demonstrations were peaceful and orderly indicates that demonstrations involving Parliament Square do not of themselves pose any greater risk of trouble than demonstrations elsewhere. On the 16 December 2002 disturbance occurred as a direct result of the police, without prior warning, trying to prevent the march from reaching Parliament Square. On the 15 September 2004, when more serious disturbances occurred in Parliament Square, problems of crowd control was exacerbated by inadequate police communications on the ground and some heavy handed tactics. Stewards who identified trouble makers, unrelated to the protestors, who appeared to be inciting an otherwise peaceful crowd, were unable to liaise with police quickly enough to have them removed effectively. There was inadequate communication on the ground - the Countryside Alliance having been refused permission for loud speakers in all corners of Parliament Square in order to communicate with the crowd. Where organisers and police work together and the policing is appropriate and sensitive then trouble is rare.

· The 2005 Serious Organised Crime and Police Act, in respect of Parliament Square has proved ineffective and the Government's intention to repeal these provisions is welcome. The ban on protest without police authorisation (the right to assembly under the European Convention on Human Rights) is unacceptable in a democracy.

· The repeal of these provisions however, should not be used to "harmonise" the differing regimes in respect of marches and static assemblies under the Public Order Act 1986. Such a move would seem inevitably to lead to considerably more control of assemblies across the UK and would place unnecessary limitations on the right to protest. The differences in the existing regimes reflect practical considerations between a moving and static protest.

· Harmonisation could result in the police being able to arrest someone simply for handing out leaflets about a local issue on their high street, even if he was law abiding in every other respect. This is clearly unacceptable.

· A requirement to give notice of protests, in the designated area or elsewhere, is unacceptably bureaucratic and threatens to criminalise spontaneous protest and to make people feel unable or unwilling to participate.

· Censorship of placards/banners, allowed under the 2005 legislation, is absolutely unacceptable unless there is a clear offence of incitement to violence or racial/religious hatred.

· There is a substantial, and growing, array of legislation and provisions already in place, giving the police powers to control protestors throughout the UK. Around Parliament the Sessional Orders are in place to ensure access by parliamentarians and bye laws exist to protect the 'World Heritage Site' of Parliament Square.

· The whole purpose behind a Constitutional Renewal Bill must be to re-engage people with the process of government and to encourage participation in our democracy, not to isolate Parliament from the voice of the people and legitimate protest.

· Lastly, Parliament is world famous not only as a building but more importantly as the "mother of parliaments". Free speech and the right to peaceful protest is an essential prerequisite of a healthy democracy. It is important that these freedoms are seen and understood not just by our own citizens but by those who visit this country, sometimes from countries which do not enjoy these freedoms. However unsightly a protest may be the right to protest must be protected. Parliament's status as a tourist attraction is incidental to its primary purpose and the rights and freedoms which it embodies.

REPEALING THE CURRENT LAW

· The provisions of the Serious Organised Crime and Police Act 2005 are not a reasonable way to deal with demonstrations around Parliament. They are too restrictive of the rights of freedom of expression and assembly and have proven to be ill-defined and hard to implement on a practical level, as legal cases have demonstrated. Both the nature of conditions that can be imposed on demonstrations and the circumstances in which conditions can be imposed are too broadly defined. The rules should revert to those of the Public Order Act 1986.

· The powers under the Public Order Act 1986, the byelaws relating to Parliament Square Garden and the requirements place upon the police under Sessional Orders provide sufficient powers to the police to deal with demonstrations in the vicinity of Parliament.

· Parliament as the seat of our democracy is rightly the focus of protest. It is imperative that the right to free speech is protected and I am unpersuaded that the area around Parliament should be treated differently than anywhere else in the country. Demonstrations, under the 1986 Public Order

Act and other legal provisions give the police ample powers to ensure the security of the public and Parliament and at the present there is no case for additional police powers.

· It should be noted that the current area designated under the 2005 Act does not simply extend to Parliament and Parliament Square but also covers civil service and security service buildings. This was not what the 2005 Act was supposed to cover and indicates a lack of proper distinction between Parliament and Government and is a far greater area than that which would be required to ensure the protection and proper functioning of Parliament. It is unacceptable, for example that people such as Maya Evans and Milan Rai should face criminal sanctions for protesting outside Downing Street by reading out names of Iraqi and British dead killed in the invasion and occupation of Iraq.

ACCESS

· We agree that the business of Parliament must be allowed to continue unhindered and that the police need appropriate powers to ensure that this takes place. The Sessional Orders, which are renewed each session at the Opening of Parliament, require that the Commissioner of the Metropolitan Police ensures that access to Parliament is kept free. Although the Sessional Orders do not confer any special powers of arrest on the police, they are sufficient when taken together with other police powers, including under the Public Order Act 1986, to deal with all ordinary occurrences.

· In considering whether the police actually need additional powers to enforce Sessional Orders, it is important to remember that the Public Order Act 1986 already contains the power for a senior police officer to impose conditions when he or she considers that an assembly may cause "serious disruption of the life of the community". This power would be activated if any serious or prolonged disruption to parliamentarians was reasonably envisaged. Given the variety of access points to the Palace of Westminster and other parliamentary buildings, the obligations on the police under Sessional Orders, when taken together with existing police powers, are more than sufficient to ensure the free movement of parliamentarians and their staff to and from Parliament and to ensure the continued functioning of Parliament during protests. The arguments of the police for additional/specific powers is unfounded in our opinion.

· In the case of persistent obstructions, general powers such as the power to arrest for obstructing a police officer in the execution of his duty, for breach of the peace, or for public order offences would operate. For larger gatherings, the Public Order Act 1986 provides powers to prevent disruptions to the life of the community, for example. In addition, the Greater London Authority has authority over the central gardens and Westminster City Council has responsibility for the pavements, which can be exercised in the event of serious obstructions.

· While understanding the importance of ease of access to parliamentary buildings and especially for divisions, we would suggest that rather than unduly banning or restricting demonstrations Parliament might consider other options to respond to the very rare occasions when a protest might render access to Parliament less easy. Parliamentarians have various options for accessing Parliament which do not all access onto Parliament Square itself. It is also worth remembering that any sizeable assembly due to take place in Parliament Square, of the type capable of causing a hindrance to parliamentarians, would be widely publicised in advance, allowing the opportunity for suitable arrangements to be made by the relevant authorities in Parliament.

· Accepting that the right to demonstrate in a peaceful and responsible way is a key human right and aspect of democracy, Parliament could consider special provisions where a particularly large demonstration has restricted access to the Palace via one or more entrances involving for example greater flexibility in the timing and duration of divisions.

NOISE

· The ban on loudspeakers in the designated area is unacceptable because it makes protest ineffective. It is now almost impossible for people to hear speeches at demonstrations or for large groups of people to be addressed by organisers. This is a significant infringement on freedom of assembly. It also restricts the ability of peaceful protesters to co-ordinate, express themselves collectively and protest effectively.

· There is no doubt that excessive noise impinges on the work of those working within the parliamentary estate. This however is a small price to pay for free speech and it does not prevent work continuing. Moreover, both chambers are sufficiently removed from Parliament Square that it seems unlikely that noise from the Square would make sitting impossible. The same would apply to many other parts of the Palace.

· Moreover the police have powers under the 1986 Act to place conditions on the place and duration of a static demonstration which can be used to ensure that the use of loudspeakers and any inconvenience caused is managed. In any case written permission of the Mayor of London is required in respect of Parliament Square Gardens for the use of a loudspeaker. What is required is a proportionate and proper use of existing powers not draconian restrictions which undermine basic democratic rights.

PERMANENT PROTESTS AND ENCAMPMENTS

· While unsightly and possibly irritating to some parliamentarians tolerating longer term protests is a small price to pay when what is at stake is a fundamental democratic right. Bylaws already exist in respect of Parliament Square Gardens. It is also against the law to block footpaths and public roads. It would seem that the laws and police powers already exist to prevent permanent encampments on Parliament Square or indeed elsewhere. In respect of permanent protests, such as that mounted by Brian Haw, there appears to be a lack of willingness by the authorities to act not an absence of laws which allow them to do so. Between the Mayor of London's byelaws, and other legislation the police could remove him. Perhaps the reluctance of the respective authorities to co-ordinate and use their powers is a healthy indication that the right to protest is seen as more important than legal niceties, or the aesthetics of the area around Parliament. The Countryside Alliance throughout the summer of 2002 held a longstanding vigil and a variety of themed protests, all of which were peaceful and admirably tolerated by the authorities although there must be doubt as to whether they were all within the strict letter of the law.

· The Government has stated that 'we need to ensure that all groups have the opportunity to protest peacefully at the seat of the UK elected Parliament'. Indeed former Prime Minister Tony Blair famously said in a speech at the George Bush Senior Presidential Library on 7 April 2002: "When I pass protestors every day at Downing Street, and believe me, you name it, they protest against it, I may not like what they call me, but I thank God they can. That's called freedom."

· However, the Government also wants this to be consistent with Parliament Square a World Heritage site and visitor attraction. The right to protest is as much a part of that 'heritage' which should be celebrated, as the buildings. Parliament Square is a 'living' place and the presence of protestors is in itself an example to the world that we are a free and democratic society. While Brian Haw's protest is aesthetically unpleasing it has commanded a huge amount of respect worldwide and is an attraction for visitors. As I have said above the freedom to protest is more important than any considerations which relate to Parliament and its environs as a tourist attraction. The right of protest must be safeguarded regardless of World Squares or indeed any other proposals.

· When discussing the Serious Organised Crime and Police Act (Designated Area) Order 2005 on 14 July 2005, Lord Dholakia reminded the House of Lords of the words of Lady Amos, who had said, in response to questions on her Statement about the terrorist attacks in London on 7 July: "On the issue of democratic liberties, which was raised by the noble Lord, Lord Strathclyde, I cannot think of any other country in the world where the demonstration that is going on right outside Parliament this afternoon-right outside my window-would be going on. We should take immense pride in that." [Official Report, 11/07/05; col. 905].

· Following on from Lord Dholakia, Baroness Williams of Crosby argued:

"Parliament is properly described as "the people's house". It is the house of the representatives of the people; it is not a house that belongs to the Government, but a house that belongs in the end to the people. Therefore, there has to be some way in which the people can have access or enable their feelings to be heard by Parliament. That is a duty on Members of Parliament, as much as members of the Government, and I find it extraordinary that we should be segregating members of the public from those that they elected." [Official Report, 14/07/05; col. GC 154].

SECURITY AND PUBLIC SAFETY

· No evidence has been provided that the security risk has been reduced around Parliament as a result of the 2005 Act. A public demonstration poses no more of a security risk than large numbers of tourists. Moreover, the scope of the 2005 Act which criminalises lone protesters undermines the official justification. It is illogical to suppose that a single person demonstration could pose a security risk or indeed hinder the business of Parliament; or compromise the equal right of protest.

· Under the 1986 Public Order Act the police already have specific powers in respect of public safety and these are more than adequate, coupled with powers of arrest.

PRIOR AUTHORISATION

· Sections 11 to 14 of The Public Order Act 1986 cover public marches and public assemblies. A march involves people moving along a route although the law does not define a minimum number of persons who constitute a march. An assembly is defined as two or more persons in a public place in the open air. It was under the 1986 legislation that the various Countryside Alliance demonstrations took place.

Marches

· Under section 11 organisers of marches must give advance notice to the police. Notice must be given six clear days in advance, in writing and must include the date, time, proposed route and name and address of the organiser.

· Notice need not be given if it is not reasonably practicable to do so as in the case of spontaneous marches and if a march is planned at short notice then the organiser is required to deliver notice as soon as reasonably practicable.

· A senior police officer can impose conditions if he reasonably believes the procession may result in:

1. Serious public disorder

2. Serious damage to property

3. Serious disruption to the life of the community

4. Or, that the purpose of the march is to coerce by intimidation.

· Failure to comply with these provisions knowingly and within one's control is a criminal offence.

· Under Section 13 the chief officer of police may apply to the local authority for an order banning a march if he reasonably believes imposing conditions will not prevent serious public disorder. Such an order requires the Home Secretary's consent. In London the Commissioner of the Police of the Metropolis may seek consent for such an order from the Home Secretary directly. It is a criminal offence to participate in a banned march.

· The importance of allowing spontaneous protest has been highlighted in the recent case Bukta and Others v Hungary (2007) in which the European Court of Human Rights found that:

"in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly".

Assemblies

· Unlike marches there is no requirement to give prior notice to the police. In practice organisers usually consult the police to ensure a safely managed event.

· Section 14 does allow a senior police officer to impose conditions on a public assembly for the same reasons as given for marches above. However, conditions may only relate to:

1. Place

2. Duration

3. Number of persons who may assemble

· There is however no power to ban a public assembly, although under Section 14A of the Public Order Act the Chief Officer of Police can apply to a district council for an Order prohibiting the holding of a trespassory assembly i.e. one which is on land to which the public has no, or limited right, of access, and where it is likely to be held without permission of the landowner and is likely to result in serious disruption to the life of the community. A protest in Parliament Square Gardens would be a tresspassory assembly.

· To require notification in all circumstances is overly restrictive. The principle that notification should be given by organisers as soon as possible is desirable but not always practicable.

POWERS OF ARREST

· The existing law provides the police with ample powers of arrest. In respect of persistent noise disruption, there are the existing byelaws which cover Parliament Square Gardens and under the 1986 Public Order Act there are provisions which could be used to limit the duration of protests.

June 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Submission from the Mayor of London (ev 14)

Introduction

1. The Greater London Authority (GLA) has been responsible for Parliament Square Garden under the GLA Act 1999 since 2000. The vision for Parliament Square is that it should provide a symbolic and dignified setting for Parliament and the surrounding historic buildings, in keeping with its World Heritage setting. It should be both accessible and meaningful to Londoners and visitors.

2. Currently there are shared responsibilities in relation to Parliament Square. Westminster City Council (WCC) manages the pavements along the east and south of the main grassed area and also the road networks whilst the GLA is responsible for Parliament Square Garden. The Metropolitan Police Service (MPS) are currently responsible for authorising demonstrations within the SOCPA designated area. However, permission is also needed from the GLA under the byelaws if protests are to take place on Parliament Square Garden and WCC regulations will also apply.

3. Excluding the permanent protests in Parliament Square, there have been five public gatherings on Parliament Square Garden with approval from the GLA since the introduction of the Serious Organised Crime and Police Act (SOCPA) from 1 August 2005 until 31 May 2008. The MPS have data on all SOCPA authorised rallies that took place in the vicinity of Parliament.

4. The Mayor fully supports proposals which enhance democracy in London and which serve the interests of all those who live, work or visit the capital.

5. There is a responsibility to manage high quality public spaces as a fundamental part of delivering an urban renaissance in London. Accordingly, the management of a key public space such as Parliament Square Garden requires the promotion of a safe and accessible environment for the benefit of all Londoners and visitors.

Conditions and powers

6. One of the key problems in managing protests under SOCPA is the different bodies involved in the process of granting permissions and managing the Squares. The MPS currently issue permissions for land managed by two separate authorities.

7. In the longer term the GLA would welcome a more coherent means of managing both the pavement and garden space of Parliament Square.

8. Powers should be proportionate to the scale and character of event. Further the imposition of conditions on assemblies and marches should be proportionate and consistent. It may be appropriate to develop criteria to focus on timing, scale, size, and information on organisers requesting permissions, for example.

9. A key concern with regard to conditions of protests to be held on Parliament Square is proportionality and duration. If a protest takes place it will inevitably limit other public uses of the square, and therefore protests should be limited in duration. The Mayor supports the right to peaceful protest, including in the vicinity of Parliament unless there is a quantifiable and justifiable safety or security risk.

Considerations

10. There are proposals to redevelop Parliament Square and create a more accessible, safe and high quality public place. Therefore any discussions on the management of protest on Parliament Square must consider the planned physical changes to the area. Crucially, there are approximately 34 million pedestrians using the Parliament Square area per year and currently approximately 470,000 people access the central garden space every year (source Atkins-Intelligent Space).

11. The proposals for improvements to the Square will include pedestrianisation on the south side to connect with Westminster Abbey, landscape improvements to the central garden and access to the Square opened up from the north, east and west. As a result accessibility will be significantly enhanced and as a minimum projection 34 million pedestrians per year would then be able to cross directly onto Parliament Square Garden. The physical improvements and therefore how the Square is designed, managed and maintained will need to deal with this vast increase in visitor numbers.

12. The nature of the Square will remain as a symbolic and dignified setting for Parliament and the surrounding historic buildings, in keeping with its World Heritage Site surrounds (Parliament Square is adjacent to the Westminster World Heritage Site). There is a clear need to consider the character of space given its connection to the World Heritage Site.

Models for managing demonstrations

13. The Mayor shares the opinion that Trafalgar Square is a good model for successfully managing demonstrations. However the differences in the physical layout and booking processes for Trafalgar Square need to be acknowledged. Trafalgar Square has the benefit of safe pedestrian access to the square, hard landscaped surfaces with distinct standing areas and 'walls' on three sides to create enclosure and decrease the immediate impact of the surrounding road. The GLA operates an approvals process to book Trafalgar Square and liaises with the MPS as required.

14. This application process ensures a balanced range of uses of the square which includes groups wishing to protest, use by visitors, and also minimizes impact on Trafalgar Square neighbours, for issues such as noise control and duration of protest. Importantly, Trafalgar Square has a long and established historical tradition as a place to protest as opposed to Parliament Square, which does not have the same level of historical character. Both the GLA and the MPS recognise these constraints on Parliament Square and currently offer Trafalgar Square as a practical alternative to the use of Parliament Square.

15. Prior to SOCPA, the management and administration of protests on Parliament Square Garden, under the Public Order Act 1986 and GLA byelaws provided a largely effective and simple route for applications to protest. This could be a way forward in managing protest around Parliament whereby the GLA considers application for use and would take advice from the MPS on safety and public order issues.

16. If parts of SOCPA were repealed then the pre SOCPA arrangements of requests for use of Parliament Square Garden would be via the applications process to the GLA. The MPS's response around the suggested revisions to the Public Order Act is supported. The GLA would work with WCC and the Police to manage protests according to respective responsibilities.

17. The Local Government & Public Involvement in Health Act 2007 provides powers for local authorities to implement changes to their byelaws, at present procedural guidance is awaited to enable this. This would provide the opportunity for the GLA to review our current byelaws in light of any changes made to the legislation and the management of protests in the vicinity of Parliament.

Static/permanent protests

18. Whilst the Mayor respects the right of Brian Haw to hold his protest, the Mayor does not agree that Parliament Square Garden should be used as a free campsite, creating an unsightly public health hazard of offence to the thousands of Londoners and visitors who use this public space every day. The amenity of Parliament Square Garden must be protected and remain a sanitary environment for all.

19. It is pivotal that, as at Trafalgar Square, all static protests where possible, depending on size should allow people to actively engage with the Square as a public space at all times. In this way, protests that have been time specific have been able to be more effectively managed than those without. There are different management issues and considerations if duration is 24 hours or longer and if overnight. In accordance with conditions on time, place, numbers and size of protest similar conditions could include duration of protest.

20. The impact on the Authority's ability to manage the permanent protests and camping around Parliament Square has required a significant resource investment to prevent low level disorder issues, to carry out maintenance and to manage special events on the Square. There have been instances of abuse to GLA staff and contractors whilst carrying out their responsibilities and day-to-day duties to look after and manage Parliament Square Garden. GLA staff should not be subjected to any type of harassment or abuse whilst carrying out their duties and the GLA finds such acts entirely unacceptable and takes such abuses very seriously. In addition MPs have made complaints to the GLA regarding noise levels and abuse from demonstrators.

Loudspeakers

21. The GLA is aware of complaints and the current difficulties in managing the use of loudspeakers in the vicinity of Parliament. WCC comments regarding the need to review the current provisions around granting permission for use of loudspeakers is supported, however any changes would need to allow for use of loudspeakers to be granted as part of the conditions for protest where considered necessary. There will need to be exceptions for feasible use of loudspeakers on Parliament Square Garden such as by Police, Emergency Services and where necessary and permissible under protest applications process to the GLA.

22. In terms of restrictions on the use of loudspeakers this is covered in our byelaws pursuant to the GLA Act 1999. The GLA does not have the ability to seize loudhailers or other noise transmitting advices and the GLA may take the opportunity to review the byelaws (Local Government & Public Involvement in Health Act 2007) powers to include scope for loudspeakers and right to seize powers, as per trading under the byelaws, for up to 28 days.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by David H Smith (Ev09)

Summary

I believe that the government's proposals fall far short of what is needed to achieve its stated objectives. Whether the proposals would achieve anything at all depends largely on how far Parliament is prepared to assert itself.

I make proposals for holding government to account effectively. I then discuss the government's proposals in the areas of Treaties and War Powers, in each suggesting ways in which Parliament's role can be strengthened somewhat.

Notes

1. Question numbers quoted below are the paragraph numbers in the Call for Evidence.

Overarching Questions

2. In the introduction to its White Paper the government sets out four key goals. I am concerned particularly with the third of these: "To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account." I believe that the government's proposals fall far short of what is needed to achieve this goal. The draft Bill does address (although inadequately) two important areas of foreign policy, Treaties and War Powers, by limiting the use of the Royal Prerogative. Very large areas of domestic policy are not addressed at all. How far taking an area outside the Prerogative improves accountability depends very much on how far Parliament is prepared to assert itself. I discuss the wider question of how the government could be held to account for all its actions in the next section. (Questions 1 to 3)

Holding Government to Account

3. The measures needed to hold government properly to account might well be beyond the scope of the committee. This section is nevertheless included in order to give a standard against which to judge the proposals.

4. Exchanges on the floor of the House of Commons do not in themselves provide an adequate mechanism for holding government to account. Good committee work is essential. Select committees of both Houses produce some good reports, but improvements could be made.

5. Select Committee work can be divided into two broad classes:

a. Examination of government performance after the event. This is necessary if government is to learn from its mistakes.

b. Examination of government policy, including scrutiny of draft legislation.

6. Much of the burden of examination of performance falls on the Public Accounts Committee, which considers around 50 National Audit Office (NAO) reports per annum and produces its own report in each case. It only has time to hear one day's evidence per report. More of this burden could perhaps be transferred to the departmental select committees. Accounting Officers could be required to report to them as well.

7. National Audit Office reports are often criticised for being too neutral and cautious. I have heard criticism a former senior civil servants who described the NAO as being 'tenacious over detail but inclined to miss the blindingly obvious'. If the burden on the Public Accounts Committee were eased it might be able to co-operate with the Public Accounts Commission in helping the NAO to overcome these deficiencies.

8. The House of Lords has a reputation for good committee work. If reform were completed it could do more. Although not the primary chamber it could ask the following questions of draft legislation:

· Is it likely to achieve the stated objectives?

· Will there be unidentified side effects?

· Is it necessary, or could existing legislation be better applied?

· Is it proportionate?

9. Under the Bill of Rights the House of Commons has the right to call for 'people, papers and records'. It has extended this power to its committees through standing orders. However the government has made its own rules as to what evidence civil servants and ministers should give. Although the House of Commons has never formally accepted these rules, they are in practice accepted. Indeed as the Foreign Affairs Select Committee noted, in contrasting the information provided to the Butler and Hutton inquiries with the meagre information it was able to extract in its investigation into the circumstances leading up to the Iraq War, there is no mechanism by which it could have enforced its rights.

10. Despite all this, select committees can produce some highly critical reports. Few consequences follow however. One possible reason for this is that neither House votes on whether to accept the findings of its committees. If they did, it might just put pressure on the government to implement the findings. On the other hand, so long as both Houses for different reasons bend to the government's will, the effect of adopting such a voting practice might be simply that future reports would be bowdlerised to the point of meaninglessness.

11. There is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. A start could be made by defining War Powers (see paragraph 20).

12. I personally doubt if the House of Commons in particular will ever assert itself to the extent necessary to produce any real improvement, unless radical reforms such as a proportional voting system for the House of Commons combined with a requirement for Parliament to approve ministerial appointments are made.

Civil Service

13. I have not examined the government's proposals in this area in detail. However I believe that the breakdown of the doctrine of individual ministerial responsibility poses questions about the proper relationship between Parliament, ministers and civil servants that have yet to be addressed in the

UK. At some point the UK should look at the workings of the New Zealand State Sector Act 1988. I do not believe that the government's proposals address this issue at all.

Treaties

14. Treaties should not be ratified without an affirmative resolution of each House. However the House of Lords should not be able to withhold its consent for longer than a period consistent with the provisions in the Parliament Act for delaying ordinary legislation. I believe the requirement for parliamentary consent would give UK negotiators slightly more leverage. This answers Questions 31 and 33.

15. If the government requires parliament's consent before ratification then it would be in its interest to arrange parliamentary scrutiny of draft treaties. Such scrutiny should consider what domestic legislation might be required in order for the UK to honour the treaty. It is already the practice not to ratify EU treaties without passing the relevant domestic legislation. This practice should be extended to extradition treaties. The handling of trade treaties is a different matter. Parliament is not currently well informed in advance about the possible implications for domestic legislation. It should be much more assertive in probing this. This answers Questions 32 and 36.

16. The government did not in its white paper make its case for overriding parliament's refusal to consent to ratification in exceptional circumstances in accordance with Section 22 of the draft Bill. If it really believes there might be treaties whose ratification is so urgent that parliament cannot be recalled, then it should give examples. This answers Question 34.

17. If the government wishes to enter into any written agreement with a foreign power or international organisation, but argues that it is not a treaty on the grounds that it will not be bound under international law, then it should be required to obtain an affirmative resolution of both Houses to treat the agreement as other than a treaty. The question of whether international law applies may not be clear. Even if it is clear it would not be bound in law, the other party may be in a position to apply effective sanctions. In particular I believe that trade agreements should be regarded as treaties. The WTO Disputes Settlement procedure is very different from the way that other branches of international law are enforced, and the government may therefore claim that trade agreements negotiated through the WTO do not bind the UK under international law. This partly answers Question 35.

18. A treaty does not normally take effect until both (or all) parties have delivered the appropriate instruments. This exchange of instruments is commonly referred to as ratification. If the government uses the definition in clause 24, subsection (3) of the draft Bill, then it may mislead parliament into believing ratification is complete, when in fact only the UK has signed. It may do

this in order to push through the domestic legislation without opposition. An example is the Extradition Treaty with the USA of 2003 and the Extradition Treaty of the same year. This completes my answer to Question 35.

19. None of the above would substantially improve parliament's performance in holding government to account unless it shows a greater degree of independence than of late.

War Powers

20. As stated in paragraph 11, there is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. Parliament's view of the extent and nature of the powers it should grant government in relation to the deployment of the armed forces is bound to change over time. It is therefore desirable that these powers be time limited. The powers initially granted should lapse after 18 months, unless in the meantime parliament had voted to extend them. This vote should be held 12 months after the powers take effect, thus giving the government 6 months to bring forward new proposals in the event that existing powers were not renewed. The draft Bill only covers the deployment of the armed forces outside the UK. Taking this power outside the Prerogative would be a start and could provide a model for the future.

21. Some decisions as to the maintenance, equipment and development of our armed forces are also conducted under the prerogative. The government's powers in these areas ought also to be defined in legislation, but this is probably beyond the scope of the Bill and therefore of this committee.

22. The resolution route to defining War Powers, worded as it is as, "an humble address", is not consistent with the transfer of executive powers from the Prerogative to legislative definition. The provisions of the draft resolution should therefore be included in the Bill, prefaced by the wording,

"Her Majesty graciously surrenders, and Parliament accepts, her authority and responsibilities over the deployment of Her armed forces outside the UK, except that She reserves Her right to recall forces back to the UK in defence of the constitution. Parliament delegates the powers thus granted to it, to the Prime Minister in cabinet, subject to the following conditions..." (Question 37)

23. I would make a general point on Question 38: There are several references in the draft to the Prime Minister's powers. Whatever happened to collective cabinet responsibility? I am aware that it has been the practice to treat defence issues (such as the acquisition of nuclear weapons) in a highly secretive fashion, the cabinet being bypassed. Is this not an opportunity to challenge these practices?

24. In individual cases the Prime Minister or cabinet might have to decide the timing, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 38i)

25. In individual cases the Prime Minister or cabinet might have to decide what information to provide, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 38ii)

26. In individual cases the Prime Minister or cabinet might have to decide whether emergency or security conditions apply, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 38iii)

27. There should be a requirement to seek retrospective approval where exceptional circumstances have been deemed to apply, (Question 38iv). Where Parliament does not believe there is an issue approval could be given without debate.

28. There should be a regular re-approval process. Where Parliament does not believe there is an issue approval could be given without debate. (Question 38 v.)

29. In individual cases the Prime Minister or cabinet might have to decide to deploy special forces without prior approval, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 39)

David H Smith (retired)

26 May 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Gabriel John Spence, retired Civil Servant (Ev 08)

Summary

1. Qualification in 1948 by open written examination under the Trevelyan-Northcote system has empowered me to take a long-term view. The inevitable high costs of the solutions proposed may have untoward effects without solving the underlying problems - an expensive steam-hammer to crack a peanut on the Westminster village floor?

Personal Qualifications

2. I am one of the last senior civil servants who qualified in 1948 for the Administrative Class under the original Trevelyan-Northcote principles of anonymous competitive written examination designed to circumvent the appointment of unqualified candidates. I retired a quarter of a century ago as Deputy Secretary of the University Grants Committee after having served in four separate Departments of State. I am persuaded that a long-term view may assist the Committee to come to a balanced view on this Part of the Bill.

Evidence

3. The section of the of the draft Bill relating to the Civil Service takes us a long way down the road from the maxim of Sir Edward Coke (CJ) that 'an Act of Parliament can do Any Thing' towards the currently-popular doctrine that 'an Act of Parliament should do everything', including perhaps answering the hopes of hard-pressed Ministers that they satisfactorily 'addressed' their problems by laying another weight upon both the Statute Book and the pockets of taxpayers.

4. The provisions are elaborate and expensive, involving the laying before Parliament (with the inevitable complications involved) of codes of conduct both for civil servants and special advisers, and including a whistle-blower's charter (S.32 (6) (b)), probably not unnoticed by lawyers whose commercially-inspired briefs might be diminishing. Any Government hard-pressed to balance budgets will no doubt be well-advised to consider whether the ensuing expenses and demands on Parliamentary time will be justified in relation to the avoidance of problems, abuses, or malfunctions. The risk is that a minor Westminster-village spat could provoke a massive and expensive response which a vulnerable economy would find hard to afford.

5. The main practical effects, apart from cost, are likely to be twofold: the bringing into the public domain of the numbers and costs of paid special advisers, and the projection into the limelight of the hitherto private (though decreasingly so, as the 10p. Tax affair showed) relationships between ministers and their professional advisers. The former might well be achieved with less cost, if less elegantly, by the probings of the tabloid press, and the latter might well affect the quality and character of potential senior advisers who might increasingly look elsewhere for shelter from exposure to political controversy. Advice to Ministers from officials would become less frank and much more hedged by risk of quasi-political or legal exposure.

6. The provisions of the Bill will not affect informal 'special advice' of the kitchen cabinet, 'in and out club' or St. Stephen's Dive character, except perhaps to make it even more conspiratorial. Nor will they ensure that junior Civil Servants receive better in-career training for their political interface, such as is attempted in France through the Ecole Nationale D'Administration.

7. What they will almost certainly achieve is a series of elaborate and expensive controversies conducted in public over the machinery and the way the Government is run. Matters formerly dealt with, if not to the satisfaction of everyone, in an afternoon's heavy meeting behind closed doors, might well be dragged out in the manner of Public Enquiries with Senior Counsel leading the proceedings, and the public footing the bills.

8. The criticisms above do not relate to all of the provisions, and it might well be helpful to regularise and strengthen the position of the Civil Service Commission in the hope that stronger membership might enable it to tackle (or require Departments to tackle) the problem of in-career training for the senior civil service to help to recover and retain the understanding and confidence which must exist between Ministers and their staff. But the work of such a revivified body would be better conducted outside the glare of the political debate.

20 May 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Peter Steadman (Ev 06)

1. INTRODUCTION

The Joint committee considering the draft Constitutional Renewal Bill has invited submissions from interested parties. This document concerns itself specifically with the proposed repeal of sections 132-138 of the Serious Organised Crime and Police Act.

It will be noted that I have provided my own Background and Discussion notes, which may prove informative.

2. SUMMARY OF RECOMMENDATIONS

That Parliament should enact laws to facilitate the following:

§ Sufficient monitoring and police presence in Parliament Square and its environs so as to provide:

Security for all

A facility for peaceful protest;

Unimpeded access for business in Parliament.

§ Repeal sections 132-138 of the Serious Organised Crime and Police Act.

§ Revisit the original recommendations of the Metropolitan Police Commissioner as submitted to the Privileges Committee in July 2003.

§ Reinstate the right of the people to demonstrate spontaneously.

§ Limit the amount of time that a protestor can be 'in situ' in Parliament Square to (say) 18hours in any one day.

§ Not introduce any further control or hindrance in respect of the public's right to freely assemble and demonstrate.

§ Provide funding to groups and individuals so that perceived unconstitutional acts by government or its agents may be challenged in the courts.

§ Recognise that keeping the arteries of freedom and democracy open is a costly and often untidy business.

3. BACKGROUND

People have been protesting in Parliament Square for centuries - by means of mass assembly, lone protest or by marching. Throughout the ages, the citizen viewed Parliament as the place where their collective or lone voice should be heard. It was, after all, the place where the legislators assembled to make laws that affected the people.

In recent years, the desire by the authorities to modify the public's right to demonstrate in Parliament Square was motivated by the actions of a Mr. Brian Haw. Mr. Haw, a protestor opposed to the invasion of Iraq, had been camped on the green opposite the Houses of Parliament on a continuous basis and declared he would stay there until British troops were withdrawn from Iraq. He gathered about him many placards decrying the government's actions and often, and repeatedly, regaled the people in Parliament by means of a loudhailer.

In response to these actions, the Procedures Committee (PC), whilst accepting that MPs were much divided on the issue, nevertheless recommended that:

'The Government should introduce appropriate legislation to prohibit long-term demonstrations and to ensure that the laws about access are adequate and enforceable.'

The Chairman of the committee stated that the evidence given by the Commissioner of Police (CMP) influenced this recommendation as did the evidence of the Sergeant at Arms who reported:

“Mr. Speaker has for some time been concerned about the use of Parliament Square for unsightly and occasionally disruptive demonstrations; and many Members have expressed the view that more recent demonstrations against the war in Iraq have constituted an unacceptable intrusion into their working environment”.

It is clear from reading the minutes of the committee's hearings plus the evidence of the police and their advisers and of The Speaker's representatives, that the drive for new legislation was focused on protecting those who work in Parliament from sustained and voluble protest from Mr. Haw, coupled with a desire that Parliament Square Green (PSG) should not become a home for permanent protestors and their seemingly endless, unsightly, accessories. Moreover, the police blamed lack of enforceable legislation as the reason they had been unable to keep clear all entrances to Parliament during some large protests.

3. BACKGOUND (continued)

Following the PC's recommendations, the government developed it's own, more comprehensive, proposals. There is marked difference between what the CMP judged necessary, what the government initially proposed, and what was eventually enacted.

The sections', as finally drafted, had scant scrutiny in their passage through the Commons. MPs who opposed the legislation complained that, at committee stage, debate was curtailed and that the government often seemed to have no answers to many queries rose. On the day of the third reading of SOCPA, the government tabled new amendments. MPs were given forty-five minutes to debate the clauses, before being asked to vote.

These sections were contested in the courts by civil liberty groups but were eventually upheld by the High Court.

4. THE LAW IN ACTION

After protracted legal battles, which initially favoured Mr. Haw, the High Court ruled in favour of the government and as a result, Mr. Haw's site was much reduced under the direction of the new CMP. Haw was granted permission to stay but forbidden to use a loudhailer.

In the routine enforcement of these laws, the police have arrested, charged and imprisoned people for not having the Commissioners approval for the following actions:

* A lone figure-standing mute in Whitehall dressed as Charlie Chaplin, wearing a glove inscribed with the words 'not aloud'

* Two people standing near the Cenotaph, reading out the names of both The Fallen and the civilians killed in the Iraq war.

*A single demonstrator standing opposite Downing Street with a placard quoting George Orwell.

*Refusing not to display a placard with the four words "the right to protest'.

In addition, ' the sections' were invoked by police when protesting pensioners were told to disperse, and numerous people have been threatened with arrest for variously sitting with a cake iced with the word 'peace'; wearing 'T' shirts with slogans; sporting lapel badges; holding picnics and wearing costumes.

Contrarily, anti-war protestors, who at Christmas, sang carols but carried banners on PSG green without permission, were not approached nor arrested by police. Similarly, a protestor symbolically burning 'Magna Carta' in full view of police was not interfered with. Interestingly, in both these incidents reporters from the national media were present.

The media of many countries have carried the telling image of people carrying blank placards in Parliament Square.

A group, led by Mark Thomas the comedian, applies every month to Charing Cross police station for individual permissions for multiple demonstrations by lone individuals. This is a show of dissent and is designed to demonstrate the waste of police resources resulting from this legislation. In a bizarre twist, the government spokesman in the Lords used the high figure of applications resulting from this stratagem, as proof that people were accepting of the procedure (see appendix A).

Abroad, other, more repressive regimes, point to our new laws prohibiting protest without state police approval, when they are criticised for arresting dissidents who try to demonstrate.

5. KEY QUESTIONS

In formulating this paper, I took into account the points and many of the questions contained in the Home Office pamphlet, but, in addition, I considered the following:

1. The credibility of the claim that the sections impede, deter, or prevent terrorists attacks.

2. The veracity of the statement that, hitherto the police did not have sufficient powers to ensure that people having business in the Houses of Parliament could go about their business unmolested.

3. The fairness, or otherwise, of one man (or one cause), monopolising the whole of the southern edge of Parliament Square Gardens (PSG) facing Parliament, with a display unlimited in size and for an indefinite duration.

4. The desirability that our representatives should be able to silence, or have removed, inconvenient and untidy citizens who wish to demonstrate.

5. Whether or not a citizen should need the approval of the state (or its agents) to protest about the state's activities.

6. Why the government conceived of all the limitations contained in 'the sections' when neither the police nor the PC had requested such sweeping laws.

7. How to cater for the' elf an' saffty' issues that arise from spontaneous demonstrations.

6. DISCUSSION

(1) Preamble

It is curious that nowhere in the paper 'Managing Protest around Parliament' is there an explanation as to why the government introduced such stringent restrictions far in excess of those asked for by the MPC and the PC. The only acknowledgement is the statement that the governments 'proposals were 'partly based' on these recommendations. It would have been useful to know the governments thinking and motivation for such a major redrafting. Particularly when the minister had told the PC that there was nothing she wanted to add or resile from the MPC"s submission (see appendix B).

The other puzzle concerns the Home Office paper. In complete contrast to all the other thousands of words uttered and written on the subject of the sections, not once does the pamphlet ever refer to the root cause of the legislation, for nowhere is Mr. Brian Haw or his permanent encampment ever referred to.

Yet the world knows that Parliament brought in these new laws to remove the nuisance of one man who had found loopholes in the existing legislation. In so doing, many believe they seriously besmirched our reputation for upholding free speech. Laws aimed at one individual or sect, tend to have dire, unintended, consequences, never imagined by the originators.

It may be that we live in the best democracy in the world, but like it or not, we now have a system where a political party not chosen by over 75% of the electorate governs us all. The party in power can - and does - enact laws, which fundamentally change our constitution and our way of life.

It could be argued that, given their share of the vote, our current government has less legitimacy for their legislation than that achieved by the National Socialists in Germany who secured over 40% of the electoral role and had parliamentary majorities when introducing many of their heinous laws.

It is surely right, that people challenge the actions of the executive, because Parliament rarely does. Indeed, the very same MPs who were in favour of the sections will presumably now troop through the lobby having been told to change their minds - such is the power of the executive.

The foregoing, coupled with the low regard politicians are now held, would explain why the number of people seeking to demonstrate will, no doubt, increase. The government should facilitate this healthy outlet of peaceful demonstration in every way that it can; rather than stifle protest by imposing myriad rules and regulations.

To many, the right to unconditional protest is not in the state's gift - they see it as a fundamental right and, learning from history, one that must be defended.

(2) Security

The insistence on obtaining prior permission to demonstrate in Parliament Square cannot be justified on security grounds. For a start, Parliament is not the only 'very obvious target' in London - there are dozens - and the issuing of a piece of paper from a police constable at Charing Cross police station - doesn't in any way guarantee that a protestor (lone or in a group) will not commit terrorist acts in the vicinity.

It is difficult to imagine that seeking permission six days in advance would impede plans for a terrorist attack. Indeed, it could be argued that a permit could provide a perfect cover for nefarious intentions - far better than just turning up with a bomb. In his evidence to the committee, the then CMP never once suggested this system. From the author's personal experience, it is impossible for the police to search and question all PSG visitors and it is quite clear that C.X police do not know whether a permit seeker is genuine. It is therefore difficult to see how issuing of a permit thwarts terrorist activity.

(3) Going about their business

All those with business in parliament, should be able to go about unhindered and they should not be subject to a continuous loud cacophony that would distract them from their jobs.

There has been a stated legal opinion, not rebutted by the government, that even before the introduction of the sections, the police already had sufficient powers to deal with anyone impeding those with business in the House. Indeed, if it were not the case, then it is difficult to imagine how Hon. Members have managed for these past centuries.

The police's claim that the 1839 law was 'toothless' is disputed. It has been suggested that this was but an excuse for the sub-standard policing on one or two occasions when the police, who were dealing with large demonstrations, barred access to Parliament on 'elf an' saffty' grounds.

Furthermore, the avalanche of new powers given to the police over the last decade should have silenced all claims as to the lack of legislative teeth. They now have powers to stop, search and question on a scale unseen since wartime.

The outright ban on loudhailers is far too draconian. It does no harm for our paid representatives to hear protestors. It is not for MPs to silence dissenters. After all, before standing for election, parliamentary candidates should have had the wit to know that loud protests take place outside Parliament, and have done for centuries. This ban should be eased to allow amplification devices to be used in a responsible manner and from time to time.

(4) 'Permanent' Protest

It cannot be right that one protestor can monopolise the whole of the prime site of protest to the exclusion of other causes and do it on a permanent basis. Nor can it be desirable that the whole of PSG becomes a permanent campsite for a particular campaign. There should be no 'permanent' sites in order that others have the opportunity to protest. It is not difficult to facilitate - I would recommend that protestors be limited to (say) 18hours per day. At the end of the allotted time, they would be required to leave the Square and not return for six hours taking all their belongings with them. They would be free to return as often as they wished.

In this way, others would have the opportunity of securing the 'prime' sites for protest and, of necessity; the amount of display material will be self-regulated since it would need to be carried off on a daily basis.

By this device the right to on-going protest is maintained, Parliament is spared 'permanent ' and 'unsightly' protests, and unwieldy bureaucratic systems are avoided.

(5) Prior Permission

In the main, the system that was in place prior to the introduction of the sections, worked well. Of course, some endeavoured to circumvent the regulations, others ignored them totally. And that situation pertains today, and will doubtless occur in the future. There will always be some who will seek to find loopholes, and there will always be loopholes - as the current protestors have proved.

Single or small groups of demonstrators should not be compelled to give advance notification of a demonstration in PSG. The concern expressed about possible multiplicity of single or small protests does not bear scrutiny. As the police will verify, this rarely happens and if it does, it is not necessarily a threat to health and safety. Surely the police have sufficient resources to hand that can deal with any situation in respect of this 'very obvious' target?

Recent history has demonstrated that no amount of legislation is a substitute for adequate and effective policing. That no law will prevent determined people with a sense of injustice, from attempting to influence events - and that peaceful protest is probably the most benign form. This should be encouraged, not stifled by putting obstacles in the way. Prior notification is one such obstacle.

(6) A Pretty Place

It is of course desirable that PSG is kept as attractive as possible - but so should all of London.

Contrary to what the Home Office pamphlet states, Parliament Square is not a World Heritage Site (see appendix E), but if it were, UNESCO would want the centuries old democratic traditions to continue because that is the true heritage. It should not be forgotten that the exercise of democracy and the expression of liberty can often be a costly and untidy business but it is a price we should be willing to pay.

As to enhancing the attractiveness of PSG, many around the world, regardless of their political stance, see something rather noble happening in PSG. It is the actions of one man, who for over five years has maintained his vigil/ protest outside the mother of parliaments. No doubt, historians will contrast this with the fact that our government had originally intended to ban people and demonstrations from the square if they were judged to detract from its aesthetic setting. This proposal was eventually withdrawn, but only because it placed too great a burden on the discretion

of the police to decide what constituted unsightly people or displays. Thus, was one of our ancient liberties so nearly set aside by the sartorial judgment of a junior functionary of the state.

(7) 'Break the law to make the law'

It is all very well for the Home Office to baldly state that the Human Rights Act 'prevents the imposition of excessively strict conditions on an assembly as they would be open to challenge through the courts'. Yet there is no indication as to where the funding for such a challenge would come from.

It could be argued that the only reason this matter is under review is the adverse global media coverage resulting from the enforcement of the sections on demonstrators who deliberately broke the law. It is regrettable that we still have a situation where, consistently, people find it necessary to commit a criminal act to bring perceived injustice to the legislator's attention. Thus, we come full circle, because if the executive make it more difficult for people to air their grievances, as they do by limiting demonstrations, then it may well lead to more law breaking.

The government should consider establishing a commission to which people could apply for funds with a view to challenging legislation in the courts. This would obviate the need to seemingly break the law in order to test the validity of the legislation.

7. CONCLUSION

This administration is to be congratulated for having the courage to reappraise this law so recently enacted. It is to be hoped that if it learns nothing else from this consultation, the government will come to see that legislation rushed through Parliament without full debate and scrutiny, often leads to bad law.

These are fearful times. The public look to their legislators for calm and considered judgment. I hope we now see it.

19 May 2008

Addendum

Letter published in The Sunday Times July 1st 2007

Dear Sir,

'Brown to allow Iraq protests' - June 24Th

It struck me that the headline for your exclusive ('Brown to allow Iraq protests') aptly describes the state we're in. It just shows how far we have travelled - it is front-page news when the government allows people to protest!

Whilst I personally applaud the move, doesn't this starkly illustrate the enfeeblement of Parliament that has occurred in recent times? Clearly, Mr Brown has no doubt that his MPs will do as they are

told; change their minds; and repeal the legislation that their former Prime Minister instructed them to support less than three years ago

Our method of government is beyond presidential. After all, a president's actions are normally constrained by a constitution. Here, our Prime Minister can do anything he likes if his party slavishly allows - and the evidence of the last ten years is that they generally do.

On the very day of your story, Gordon Brown announced in his acceptance speech that he wants the government to 'give more power to Parliament' - note that he sees it within his gift. It would be richly ironic if a man with no mandate (succeeding a Prime Minister backed by less than a quarter of the electorate) undertakes constitutional reform to protect our rights. If he does nothing else, Mr Brown's place in history would be assured if he really does deliver us from a democratic system so fatally flawed that it allows our liberties to be curtailed at the behest of the largest party of the day.

As your article makes clear, he certainly has the power.

19th May 2008

APPENDIX A

Contrary to the fear expressed by many noble Lords that demonstrations would not take place or that in some way democracy was imperilled because of the authorisation requirement, one should note that the opposite appears to have happened: more demonstrations are taking place than before.

Lord Davison of Glen Coa 23nov

APPENDIX B

Mr Burnett: Just very quickly, we have discussed with the Commissioner the business of balance, which you have referred to, and the creation of an eyesore in Parliament Square and the annoyance caused to members and staff by the use of loudhailers. Is there, in general terms, anything you would like to add to or resile from in what the Commissioner said in evidence to us?

NO. .....Hazel Blears July 2003

APPENDIX C

Memorandum by Metropolitan Police

PROPOSALS FOR STATUTORY CHANGE IN CONNECTION WITH SESSIONAL ORDERS

PAPER FOR THE CONSIDERATION OF THE HOUSE OF COMMONS PROCEDURE COMMITTEE

This paper is intended as a brief summary of the views of the Metropolitan Police Service as outlined to the Committee in evidence by Sir John Stevens on 8 July 2003.

1. RECENT DEVELOPMENTS

1.1 A number of recent events have exposed limitations on the current arrangement to protect the business of Parliament and access to the Palace of Westminster.

Problems can be set out under three heads:

1.1.1 Concerns have been raised by Members that on a number of occasions they have been unable to gain access to Parliament due to demonstrations in Parliament Square;

1.1.2 The use of voice amplification devices has disrupted Parliamentary debates;

1.1.3 Some of the protests in Parliament Square have become permanent in nature, in particular that of Mr Brian Haw, exacerbating problems with obstruction and noise nuisance.

1.2 Further the police are concerned with an increased terrorist threat in the area, which has led to the creation of a Government Security Zone intended to reduce the risk to the public in a defined area, which includes the Palace of Westminster.

1.3 These problems have highlighted limitations not only with the use of Sessional Orders but also limitations in the substantive statutory powers available to the police.

2. ISSUES IDENTIFIED WITH CURRENT POSITION

2.1 The method employed to comply with the Sessional Orders (to keep passage through the streets leading the Houses of Parliament free and open and to allow no obstruction to hinder the passage of Members and Lords) is the issue of directions under section 52 of the Metropolitan Police Act 1839. There are a number of problems with the use of Commissioner's directions:

2.1.1 The Act is antiquated and not designed for modern day protests and issues. The age of the provision also means that it was not drafted to take account of the rights to peaceful assembly and freedom of expression.

2.1.2 Disobedience to a direction is not an arrestable offence and section 54 does not create a statutory power of arrest.

2.1.3 Section 52 should only be used "from time to time, and as occasion shall require" and therefore the issue of identical directions at the beginning of every session arguably ultra vires.

2.1.4 As a result of 2.1.1-2.1.4 above, no prosecutions have been brought for many years. The provision therefore lacks teeth.

2.2 Other substantive police powers do not cover the situations that have arisen over recent months. For example, section 14 of the Public Order Act 1986 enables conditions to be imposed on public assemblies. However a public assembly is defined by section 16 as comprising 20 or more persons and the conditions that can be imposed relate only to the place where the assembly takes place, the maximum numbers attending or the maximum duration.

2.3 On a number of recent occasions groups of just under 20 persons have deliberately exploited the number requirement in section 14 to evade its operation. Section 14 also only operates where such assembly may result in intimidation, serious public order, serious property damage or serious disruption to the life of the community. It does not therefore begin to address the main aim of the Sessional Order, which is to ensure good access to the Houses of Parliament ie to prevent obstruction. It also does not address issues around the use of loudhailers at assemblies.

2.4 Sections 33-36 of the Terrorism Act 2000 provide police powers to designate and demarcate a specified area as a cordoned area for the purposes of a terrorist investigation but do not allow for the imposition of such cordons as a preventative measure ie when intelligence is received of an imminent attack on a target in or around the Palace of Westminster, or indeed elsewhere.

3. PROPOSED STATUTORY CHANGES

3.1 Whether any statutory amendment or enactment is to be recommended and how such recommendation would be implemented is of course a matter for the Committee and Parliament. The MPS would wish to be involved in any consultative process.

3.2 The following suggestions are made however to address the issues arising:

3.2.1 On the uppermost level, in the event of intelligence of an imminent terrorist threat, an amendment to the Terrorism Act 2000 to enable preventative cordons to prohibit pedestrian and vehicular access in order to ensure public safety;

3.2.2 An amendment to section 14 of the Public Order Act to:

- extend police powers to protests involving less than 20 persons, where such protests raise the same consideration as to the intimidation or the risk of serious public disorder, serious damage to property or serious disruption to the life of the community;

- enable the imposition of such conditions as are necessary, to bring it into line with section 11 (relating to processions)-this would enable steps to be taken in relation to the use of loudhailers.

3.2.3 An amendment to the Metropolitan Police Act 1839, or a replacement provision, to update police powers to enable access to the Palace of Westminster to be kept clear of obstruction and to prohibit the deliberate or wilful disruption of the business of government by noise amplification devices. It needs to be borne in mind that sections 52 and 54 are not limited to the Palace of Westminster and the MPS is keen not to lose the wider ability to make directions for other events in the Notting Hill Carnival. However, the wider use needs to be on an ad hoc basis only whereas it appears that the provision in relation to the Palace of Westminster should be a standing power, available whenever the House is sitting. In respect of all uses, there is a need for a specific statutory power of arrest to be created so that the provision is effective.

4. PERMANENT PROTESTS

4.1 None of the above addresses the issue of permanent protests in Parliament Square. In relation to Mr Haw, the MPS is keeping the position, and in particular the application of section 137 of the Highways Act 1980, under review.

4.2 One of the matters that has been looked at is the applicability of the Trafalgar Square and Parliament Square Garden Byelaws and it may be of interest to the Committee that our reading of section 2 of those byelaws is that the area covered by the Byelaws, as defined by reference to the Parliament Square (Improvement) Act 1949, does not include the relevant sections of the east and south pavements. The amendment of the Byelaw (or more probably the Act) would extend the ability of the police, the GLA and the Mayor to protect the central garden in Parliament Square from this type of long-term invasion

Appendix D

Jack Straw (Lord Chancellor, Ministry of Justice) Link to this | Hansard source

I understand and am grateful for the hon. Gentleman's comments, which my right hon. Friend the Home Secretary, whose happy task it is to conduct this review, will certainly bear in mind. Having been Home Secretary when we had the Stop the City protests, which were very violent and disruptive-on one occasion people dug up the whole of Parliament square-I discovered that the legal ownership of that piece of land is a nightmare, as different bits of it belong to different owners with different rights in respect of it. If I might make my own suggestion to my right hon. Friend the Home Secretary, one of the things that we have to ensure is that any new legal framework in respect of demonstrations there takes proper account of those legal ownership issues.

APPENDIX E

Dear Mr Steadman,

Please find enclosed the map of the World Heritage property clearly indicating the boundaries of the Westminster Palace, Westminster Abbey and St Margaret's Church inscribed in the World Heritage List since 1987.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by THE CORNER HOUSE (Ev 10)

The Corner House is a non-governmental organisation focusing on environment, development and human rights. It has a track record of detailed policy research and analysis on overseas corruption, including UK laws on corruption and enforcement.

The Corner House will restrict its comments on the Draft Constitutional Renewal Bill to Part 2 (The Attorney General and Prosecutions) of the bill.

General comments

The Corner House believes that actual and perceived independence of the prosecuting bodies is essential to a functioning constitutional democracy. As the Director of Public Prosecutions' 2004 Statement of Independence puts it: "our independence is of fundamental constitutional importance. It is a force for human rights and justice in society." As former Attorney General, Lord Goldsmith, also put it, "you simply cannot maintain a free and democratic society without the checks and balances that over the centuries we have evolved as part of our constitution. The independence of prosecutors is crucial to this."[1] The Corner House believes that the Draft Constitutional Renewal bill must protect and enshrine that independence.

Need for statutory oath for the Attorney General

The Corner House welcomes the fact that the oath of the Attorney General is to be modernised. However, if, as the government proposes, the Attorney General is to both remain a government minister and keep superintendence function over the prosecuting authorities, it is essential that the Attorney General's oath of office is a statutory one, like that of the Lord Chancellor. This statutory oath should require the Attorney General both to uphold the rule of law and to act independently of government in exercising her or his prosecution functions. Anything less would simply not address the credibility gap that will remain if a member of the executive has responsibility for and superintendence of independent prosecuting bodies.

Clause 2: Ban on individual directions

The Corner House welcomes section 2 of the bill banning directions from the Attorney General on individual cases and believes that this is an important principle enshrining the independence of prosecutors. The Corner House believes that there should be no exemptions from this principle and therefore opposes the powers permitted in section 12 as explained in detail below.

Clause 3: Protocol for running of prosecution services

The Corner House believes that the protocol between the Attorney General and the three Directors of the prosecuting authorities, its implementation and effectiveness should be subject to Parliamentary debate and that it should be regularly monitored by a Parliamentary Select Committee, who should take evidence from both the Attorney and the Directors of the prosecuting services.

The Corner House believes that with respect to circumstances in which the Attorney General is to be consulted or provided information (section 3, clause 2 c) of the draft bill), both in relation to prosecutions by any of the bodies supervised and in relation to investigations by the Serious Fraud Office, these should be exceptionally limited. In relation to overseas corruption cases, the fact that the Attorney General has been constantly informed of the progress of investigations has severely undermined the perception of the independence of prosecutors, and created the impression that this is a route for political interference in such investigations.

The Corner House also believes that the protocol should address the circumstances under which the Attorney General should consult independent counsel in undertaking her or his supervisory role. In one recent overseas corruption case the Attorney General's office employed separate counsel to that employed already by the Serious Fraud Office. The Attorney is entitled to take independent legal advice on whether to provide consent for prosecution of certain offences and it is appropriate that she or he should do so. In practice, however, it appears that the Attorney has been taking parallel legal advice on the nature of the evidence and the merits of cases under investigation by the Serious Fraud Office before consent stage. This practice undermines the prosecutors at the Serious Fraud Office and the independence of the Bar and is unnecessarily costly on the public purse. The protocol should establish clearly when it is appropriate for the Attorney's office to seek such separate advice and ensure that when it does so with full visibility to the prosecuting office. Given that the draft bill proposes to remove many of the Attorney's consent functions or transfer them to the various Directors, such independent advice should be needed only in wholly exceptional cases, and there should be transparency about how and when the Attorney decides to take such advice.

Clauses 4-6: Provisions for tenure of office of Directors

It is inappropriate for the Directors of the various prosecuting authorities to be appointed by the Attorney General as long as the Attorney General remains a member of the executive. The appointment process should be independent to remove any perception of appointees being chosen by the executive. This would significantly assist the independence of the prosecuting bodies.

The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, (section 5), stipulates that:

"States should take measures to ensure that:

a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures ...

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review"

The Corner House is not convinced that the current provisions for tenure of office of the Directors contained in the draft bill fully meet these criteria and believes that such measures should be specifically provided for by statute to enhance the independence of prosecutors. The selection criteria and process should be fully transparent. There should be a mechanism for parliamentary scrutiny of the appointment process. Any decision to remove a Director from office should be subject to an independent and impartial review, and not undertaken by the Attorney General alone.

Clauses 7-10: Attenuation of Attorney's prosecution consent functions

The Corner House welcomes the removal of Attorney's consent for prosecution and transfer of consent to the various Directors of the prosecuting authorities. The Corner House notes, however, that the government has not clarified precisely the offences for which Attorney General's consent will be kept (Official Secrets Act offences and war crimes are the only ones mentioned in the White Paper). The Corner House believes that there should be a proper public and parliamentary debate about which offences would continue to require the Attorney's consent for and that guidelines should be drawn up for the circumstances in which the Attorney should give consent.

Clause 11: Abolition of nolle prosequi

The Corner House welcomes the abolition of nolle prosequi.

Clause 12-15: Safeguarding national security

The Corner House has very grave concerns about Clauses 12-15 of the draft bill, and believes that these clauses may be unconstitutional and breach international standards on public prosecution as well as rights to access to justice under the European Convention on Human Rights.

The Corner House believes that the way in which legitimate national security concerns are involved in halting a prosecution or investigation may need clarification, and that the Draft Constitutional Renewal Bill may be the place for this clarification. Any such clarification by statute however needs to be based on domestic and international law principles and needs to contain strong checks and balances to avoid the arbitrary abuse of national security arguments by the executive or by any decision-maker.

Creation of a new statutory power of direction

By means of Clauses 12-15 of the draft bill, the government proposes to create a new statutory power for the Attorney General to halt an investigation by the Serious Fraud Office (SFO) or a prosecution by any prosecutor. The government has stated that it has created this new power on the basis that a small majority of people responding to its consultation on the Attorney General favoured some role for the Attorney in relation to cases which involve a national security or public interest element.[2] The government also noted that the new power was in keeping with the Law Commission's 1998 report on Consents to Prosecution which recommended (again on the basis of a very small majority of respondents to its consultation) keeping consent for a very limited number of offences which involved a national security or international element (such as War Crimes, Taking of Hostages, Biological Weapons, Prevention of Terrorism and the Official Secrets Act).

The Corner House considers that there are some significant differences between the new power to halt an investigation by the SFO and any prosecution on national security grounds and the existing arrangements. The new power is a statutory power. Under existing arrangements, the Attorney General would theoretically be able to halt an investigation by the SFO in his superintendence role but she or he does not have the statutory power to do so. He or she would also be able to refuse permission for a prosecution to continue for offences where consent was required, using the public interest or national security as a reason to do so. This is limited however to those offences where consent is required.

Furthermore, the consent regime and the Attorney's supervisory role, by convention and in practice, involves discussion and consensus reaching between Attorney and prosecutor. As Lord Goldsmith told the Constitutional Affairs Committee in 2006, "I take the view, which I believe was the conclusion which Sir Ian Glidewell reached when he looked at the CPS, that if ultimately, after discussion, there is a difference of view between an Attorney General and a Director then the Attorney General's view should prevail. I have never had to test it. I think it would be quite a big thing if it had to be tested. I do not direct" (emphasis added).[3] The power to override a Director of the prosecuting agency has never apparently been used. Various commentators have pointed out the ambiguity over the Attorney General's right to override a Director of the prosecuting agencies. [4]

By contrast, the draft bill proposes a new statutory right for the Attorney to direct. It allows the Attorney to take the decision to halt an investigation and prosecution without any input from or discussion with the prosecutor. Indeed (Clause 13 (4) of the draft bill) propose that if a prosecutor fails to comply with the Attorney's direction, a court can make an order to bring the proceedings to an end. The new power would also allow the Attorney to require information from a Director that is relevant to determining whether to give such a direction (Clause 15); failure to provide such information would become a criminal offence (Clause 15 (4)). This would set up a new and potentially confrontational dynamic between the Attorney and the Directors where such decisions are concerned.

The new power also, by giving power to the Attorney General to make a decision to halt a prosecution or SFO investigation on national security grounds, makes the executive the sole arbiter of national security considerations. This raises significant domestic constitutional issues. It is not a right, the Corner House believes, that can be granted without a proper assessment of its constitutional impact. No such power should be given, the Corner House believes, without clear mechanisms for accountability, including judicial oversight. Nor should it be given without a requirement on the Attorney or whoever takes the decision (which we will argue should be an independent prosecutor) to conduct a thorough and documented balancing exercise between national security issues and the rule of law. Without strong checks and balances, the new power will seriously erode public confidence in important national security decisions rather than enhance it and undermining the constitution.

Lack of checks and balances

The draft bill proposes to create a new power for the Attorney General to halt SFO investigations and any prosecution with no meaningful oversight by either Parliament or the Courts.

Clause 13 of the draft bill contains a provision for establishing a conclusive certificate where any question arises in relation to whether the new power of direction is or was necessary. As section 5 (a) puts it: "a certificate signed by a Minister of the Crown certifying that the direction is or was

necessary for that purpose is conclusive evidence of that fact". The effect of this provision is to prevent any judicial enquiry into whether the decision was rational, based on real evidence, was applied according to domestic and international law principles, and whether irrelevant or improper considerations were taken into consideration. As this submission will argue below on domestic law issues, it is doubtful whether a power that precludes judicial scrutiny and denies access to due process of law for individuals can be constitutional or compatible with the Human Rights Act.

Clause 14 of the bill requires the Attorney to prepare and lay before Parliament a report on the giving or withdrawal of a direction. While at first sight, this provision allows for Parliamentary scrutiny, section 3 of the Clause makes clear that the Attorney need not include any information in that report which is legally privileged, would prejudice national security or "seriously prejudice international relations", or would prejudice an investigation or proceedings before any court. In practice this is likely to mean that the Attorney will provide extremely limited information about his or her decision.

As constitutional expert Professor Bradley told the House of Lords Select Committee on the Constitution, however: "it should not be possible for the Attorney to avoid accounting for decisions taken in the public interest without indicating the facts that had been taken into account".[5] Parliamentary accountability can be meaningful only when the Attorney General is required to put forward a full account of a decision and the facts and reasoning behind the decision. The draft law does not require the Attorney to provide any factual evidence for his or her decision, or to lay out the basis on which his or her decision was made. Nor does the draft law provide for any scrutiny mechanisms within Parliament for the intelligence assessments on which a national security decision is made. Given several recent controversies over executive manipulation of intelligence for political purposes, this is a grave oversight that will do nothing to enhance the accountability of the executive's decision-making with regard to national security or increase public confidence in such decision-making.

These clauses taken together essentially mean that there will be no meaningful checks and balances on the executive, and the executive will be the sole judge of when and how to apply national security grounds in relation to halting an SFO investigation or prosecution. The lack of meaningful parliamentary accountability and exclusion of judicial scrutiny has the real potential to allow for abuse of national security arguments. Without having to account for the reasons for its decision the executive could use national security arguments as a shield for other reasons to which it actually gives as much if not more weight, such as damage to international relations and to commercial contracts which it may be prohibited from taking into account by international law obligations, or for reasons which are synonymous with its interests as the ruling party rather than with the national interest.

Breach of international guidelines on public prosecution

The Corner House believes that the new statutory power as currently formulated would breach international guidelines on public prosecution.

The Council of Europe's Recommendation (2000) 19 of the Committee of Ministers to member states

on the role of public prosecution in the criminal justice system, section 5 f is clear that:

"instructions not to prosecute in a specific case should, in principle, be prohibited. Should

that not be the case, such instructions must remain exceptional and subjected not only to

requirements indicated in paragraphs d and e above but also to an appropriate specific

control with a view in particular to guaranteeing transparency" (emphasis added)

The requirements in paragraphs d and e are that any such instruction, which must be in writing and published in an adequate way, must carry

"d. adequate guarantees that transparency and equity are respected in accordance with

national law, the government being under a duty, for example:

- to seek prior written advice from either the competent public prosecutor or the body

that is carrying out the public prosecution;

- duly to explain its written instructions, especially when they deviate from the public

prosecutor's advice and to transmit them through the hierarchical channels...;

e. public prosecutors remain free to submit to the court any legal arguments of their choice,

even where they are under a duty to reflect in writing the instructions received"

The Council of Europe's Recommendation makes no exception for national security cases.

The International Association of Prosecutors statement of standards of professional conduct for all prosecutors and of their essential duties and rights states (section 2) that where non-prosecutorial

authorities have the right to give general or specific instructions to prosecutors, "such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence." Again, no exception for national security cases is envisaged.

If there is to be a statutory power to halt a prosecution or an SFO investigation on grounds of national security, these international guidelines outline strong checks and balances that need to be in place. These should include that:

Ÿ A decision to halt a prosecution must be in writing and made public;

Ÿ If it is made by a non-prosecutorial authority, the authority must first seek written advice from the public prosecutor;

Ÿ The decision must be explained and it must be shown how it is consistent with the law;

Ÿ The decision must not preclude a public prosecutor submitting any legal arguments of their choice to a court;

Ÿ There should be established guidelines for how such a decision is taken;

Ÿ There must be an appropriate control to guarantee transparency in relation to the decision.

The new statutory power proposed for the Attorney General does not contain these safeguards.

Domestic law issues

As Professor Bradley told the House of Lords Select Committee on the Constitution: "decisions not to prosecute ... appear to bar access to due process of law" and need to take into account European Convention rights incorporated into UK law under the Human Rights Act.[6] The same must hold true for decisions to halt prosecutions and criminal investigations. Certainly, the 'conclusive certificate' provision of the bill (Clause 13 (5)) which effectively prevents any judicial review of the decision would appear to be in breach of Article 6 of the European Convention on Human Rights. Article 6 states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The rights of both the person whose trial has been halted who may want a fair hearing to clear his/her name, and the person who believes that the decision to halt the prosecution is irrational and contrary to the public interest and wishes to bring a judicial review are infringed by the conclusive certificate.

Furthermore, the decision to halt a prosecution or investigation involves the criminal justice system and the administration of public justice and necessarily involves questions about the rule of law.

There is a real question as to whether it is constitutional for the executive to take such a decision without any reference to or oversight from the courts, who have responsibility for protecting the integrity of the criminal justice system and for upholding the rule of law. As Lord Hope put it in a recent judgment:

"the rule of law enforced by the courts is the ultimate controlling factor on which our Constitution is based."[7] If the rule of law is to be suspended on grounds of national security, the courts must have scrutiny over whether that suspension was lawful.

The UK's domestic law already and clearly allows for a defence of duress and a justification of necessity in cases where due process of law is to be suspended. It is worth noting Halsbury's Laws of England, in the volume that deals with Constitutional Law and Human Rights on this issue, which states (paragraph 6) that:

"common law does recognise that in cases of extreme urgency, when the ordinary machinery

of state cannot function, there is a justification for the doing of acts needed to restore the

regular functioning of the machinery of government."

But Halsbury also states that:

"the argument of state necessity is not sufficient to establish the existence of a power or duty

which would entitle a public body to act in a way that interferes with the rights or liberties of

individuals."

In other words, national security or state necessity is not a sufficient reason to create a new statutory power that interferes with the rights of individuals; national security or state necessity may however be cited in extreme circumstances as a legitimate reason to take appropriate action.

The courts themselves are in the process of establishing what legal principles should be deployed for assessing when a criminal investigation or prosecution may be halted in response to a threat, and what role the courts should have in assessing whether such a decision meets those principles. The Corner House believes that it would be wise for Parliament to delay consideration of the creation of such a new power, and indeed of how national security decisions should be taken, until the full and final view of the courts can be taken into account.

It is highly desirable that any statute clarifying how national security decisions in relation to halting prosecutions and SFO investigations can be taken contains reference to the specific domestic law criteria by which such decisions can be taken. In particular, the statute should specify the conditions under which national security may be invoked under domestic law, that is to say where there is duress, necessity (defined in detail below through customary international law), or extreme urgency, and define these terms in an appropriately restrictive way.

The Corner House believes that any statutory clarification of how national security decisions are taken in relation to halting prosecutions and SFO investigations should also include an appropriately restrictive definition of national security, which confines it to a definite and immediate threat.

International law issues

Decisions to halt a prosecution on national security grounds are likely to raise international law issues especially where that decision involves the breach of an international obligation. The Corner House notes that under general international law, where a state wishes to invoke national security as a reason for breaching an international obligation, the state must show that the act that breaches that obligation was as a result of self-defence, force majeure, distress (that there was no other reasonable way to save lives) or necessity.[8] According to the International Law Commission, "the plea of necessity ... will only rarely be available to excuse non-performance of an obligation and ... it is subject to strict limitations to safeguard against possible abuse".[9] The plea of necessity is subject to certain conditions that include[10]:

Ÿ A State may invoke necessity only to safeguard an essential interest from grave and imminent peril and the course of action taken must be the 'only way' to safeguard the essential interest of the State (article 25. 1(a))

Ÿ The course of action taken to safeguard the essential interest of the State must not impair the essential interest of other States or the international community as a whole (article 25 1 (b)).

Ÿ Necessity may not be pleaded where the State has contributed to the situation of necessity or the international obligation excluded the possibility of invoking necessity (article 25.2).

The International Court of Justice confirmed that these conditions "reflect customary international law."[11] The UK is therefore bound by them.

Furthermore, international judgments have added other limitations to the circumstances in which States can invoke necessity, such as:

Ÿ a requirement that as soon as the situation of necessity has ended, and stability resumed the State must resume its international law obligations immediately;[12]

Ÿ the State invoking the situation of necessity "is not the sole judge" of whether the conditions which would enable it to do so have been met, rather objective criteria must be satisfied.[13]

Where international treaties do expressly allow for national security to be invoked, there are usually careful restrictions on and principles for how it may be invoked. For instance, in relation to the UN Convention relating to the Status of Refugees, 1951, the UNHCR consider that, where the national security exception in article 33 (2) of that Convention is used to remove refugees from a host country:

Ÿ The threat must be interpreted restrictively and according to the principle of proportionality

Ÿ The danger posed must be very serious;

Ÿ The finding of dangerousness must be based on reasonable grounds and supported by credible and reliable evidence;

Ÿ There must be a rational connection between the removal and the elimination of the danger;

Ÿ The removal must be the last possible resort;

Ÿ The danger to national security must outweigh the risk to the refugee.[14]

In a different context, the OECD has developed similar principles in relation to the circumstances in which member states can invoke national security in order to intervene with Sovereign Wealth Funds.[15] Key principles on which governments should be able to design and implement measures intended to address national security concerns in the context of foreign investment and Sovereign Wealth funds include:

Ÿ Transparency and predictability (including prior notification of interested parties; consultation with interested parties; and full disclosure)

Ÿ Proportionality (ensuring that the measure taken should be avoided where other measures are adequate and would address the concern; that any such measure is based on rigorous risk assessment techniques and designed with appropriate expertise; that any such measure should be restricted to the specific risk identified; and that any such measure should only be taken as a last resort)

Ÿ Accountability (ensuring there are procedures for parliamentary oversight, judicial review and monitoring).

Given that according to the International Court of Justice, States cannot be the sole arbiters of whether the objective conditions are present to invoke necessity, it is undesirable that a member of

the executive should make a decision about halting a prosecution or SFO investigation on grounds of necessity. It is undoubtedly against international law if they do so without any scrutiny from the courts or parliament. If there is to be a statute expressly allowing either the attorney or any decision-maker to use national security grounds as a basis for halting a prosecution or SFO investigation, it must make specific reference to the principles outlined in international law. In particular, such principles that should be specifically included are that:

Ÿ halting the prosecution is a proportionate response to the national security threat;

Ÿ halting the prosecution must be the only way to respond to that threat;

Ÿ the threat must be 'grave and imminent' and there must be credible, reliable and objective evidence that the threat is such;

Ÿ the decision-maker must make public for scrutiny the objective grounds on which he or she has taken the decision;

Ÿ as soon as the threat has eased, full consideration must be given to resuming the prosecution.

The case for an independent prosecutor to make the decision to halt a prosecution on grounds of national security

As long as the decision to halt a prosecution on national security grounds remains exclusively with a member of the executive with no meaningful checks and balances on that decision, there will always be a perception that the decision may have been based on political rather than objective grounds and that any intelligence assessments on which such a decision is based may have been politically manipulated. For the sake of the integrity of both the judicial system and the security and intelligence system in the UK, a decision to halt a prosecution or investigation on grounds of national security should be taken by an independent prosecutor who has responsibility for upholding the rule of law, and is able to assess whether or not the threat to national security is so exceptional as to justify setting aside the duty to prosecute or investigate.

It is worth noting that the former Attorney General, Lord Goldsmith stated: "robust independence in the prosecuting function is the only way to ensure that potentially controversial prosecution decisions command respect."[16] A decision to halt a prosecution on national security grounds is always likely to be controversial and contentious. A decision taken by an independent prosecutor with appropriate input from the government, made according to the principles of transparency, legality and appropriate control, is likely to command more respect than one taken by a member of the executive with no checks and balances.

As law professor Jeffrey Jowell put it in evidence to the House of Lords Select Committee on the Constitution:

"it is not necessary to have a 'political' Attorney in order to identify or assess [matters of national security or public interest]. In countries such as Ireland, an independent DPP has proved perfectly capable of making these decisions. He consults in sensitive cases with the Government (in a similar way to our Attorney's consultation with ministers under the 'Shawcross Convention') but the decision is his alone, untainted by the perception of unacceptably partisan bias".[17]

It is worth noting that at present in the UK decisions to halt prosecutions on grounds of national security primarily in relation to terrorism cases where the identity of an intelligence agent might be made known by a prosecution are routinely taken by the Director of Public Prosecutions after consulting with the Government.

The Corner House believes that there are mechanisms for ensuring that an independent Director can be accountable to Parliament for any such decision. The Director can and indeed must be called before a Parliamentary Select Committee to account for his or her decision and be required to provide full information to Parliament about his or her decision and the grounds on which it was made.

If any role for the Attorney is to be kept, the Corner House believes that it must be dependent upon there being a statutory oath of independence and of upholding the rule of law for the Attorney and that the role must be limited to an advisory role rather than a power of direction. The Attorney must be required to reach a consensus with the independent Director in taking the decision to halt the prosecution, and will seek written representations from the Director and/or the prosecutor involved as to his or her views.

The Corner House also believes that whoever takes the decision, whether the Attorney or a Director must make a full public and written account of the grounds on which the decision was taken, documenting clearly the exercise that was undertaken to assess whether the national security considerations were so exceptional as to justify setting aside domestic legal principles and the government's international law obligations.

Government input and advice on national security issues

Whoever takes the decision, there must be clear guidelines for how the government can make legitimate representations about information and considerations which may affect the decision to be made, and transparency about how these representations are made. A Shawcross exercise, or a

similar consultation exercise that seeks the views of government Ministers on the public interest aspects of an investigation or prosecution if it is an independent prosecutor, should meet the following criteria:

Ÿ The representations of each government department should be put before Parliament and made public. Clearly some information may need to be omitted to protect the lives of intelligence agents, but damage to international relations is not a legitimate reason to withhold information. This is particularly the case where the decision to halt a prosecution is in breach of an international obligation, such as the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, which expressly prohibits damage to international relations being used as a reason to halt a prosecution.

Ÿ Government ministers may not in their representations raise considerations that are forbidden by domestic law or international conventions. This creates confusion as to the real basis for their advice, and whether unlawful reasons may have affected their advice.

Ÿ Government ministers will not express an opinion on whether the Attorney or independent Director should halt or proceed with the prosecution, but only lay out the information and considerations which they believe should be taken into account.

Ÿ The Government must show, in its advice, that it has requested full, rigorous, objectively verifiable intelligence assessments from the security services about the national security threats, and that it has sought to verify these with security experts. The Government should provide the assessments in full to the Attorney General or the Director taking the decision, and should provide, at the very least, the conclusions reached by these assessments, to Parliament.

Mechanisms for judicial scrutiny

The Corner House believes that any decision to halt a prosecution on grounds of national security must be open to proper scrutiny through the courts as to its lawfulness, both under domestic and international law, and that there must therefore be proper judicial scrutiny of any such decision.

The Corner House believes that the removal of the conclusive certificate in Clause 13 is absolutely essential to ensure that decisions to halt a prosecution on national security grounds can be subject to judicial review.

An additional procedural mechanism would be to specify in the legislation that where one of the Directors wishes to invoke national security as a grounds for halting a prosecution (or if the Attorney General's role is kept, if the Attorney wishes to do so), he or she should apply to the courts to get the prosecution halted. Professor Bradley, for instance, suggested a similar mechanism in his evidence to the House of Lords Select Committee on the Constitution, when he proposed that any decision to prevent a prosecution by the Attorney General could be subject to a requirement that the decision "be approved by (for instance) the Queen's Bench Divisional Court" on the grounds that it

may be considered that it is not sufficient "to rely on conventional safeguards against abuse of this power". [18] Careful consideration would need to be given as to whether such a mechanism would preclude judicial review thus preventing access to justice required by Article 6 of the ECHR.

Conclusion

The Corner House believes that the new statutory power for the Attorney General at Clauses 12-15 of the draft bill is a break from the previous consent role envisaged for the Attorney and has considerable constitutional implications. The new power has not been drafted with any meaningful checks and balances that are essential for a functioning democracy.

The Corner House believes that clarification of how decisions on halting prosecutions on national security grounds is needed and that the draft bill may be the place to do this. However, the Corner House believes that any mechanism for invoking national security exemptions in relation to halting prosecutions must be based on clear, objective criteria and a transparent and accountable process which meets international guidelines on public prosecution as well as domestic and international law principles.

The Corner House believes that for the sake of credibility, it is desirable that any decision to halt a prosecution or SFO investigation on national security grounds be taken by an independent Director, following a process of consultation with government that is based on clear guidelines and that is transparent. The decision must be put in writing and made public. It must document the evidential basis and the grounds on which it was taken, and the exercise that was undertaken assessing that national security considerations were exceptional enough to justify setting aside domestic legal principles and the government's international law obligations. The decision must be subject to judicial scrutiny. There must also be a full accounting to Parliament of how the decision was reached.

Finally, the Corner House believes that any statute clarifying how decisions to halt prosecutions on national security are taken must specify the domestic (and international) law principles upon which such a decision may be taken.

The Corner House

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[1] 13th Tom Sargent Memorial Lecture, "Politics, Public Interest and Prosecutions - a view by the Attorney General", An Address by the Right Hon the Lord Goldsmith QC, Her Majesty's Attorney General, London, 20/11/01.

[2] The government's analysis of its consultation on this aspect of the Attorney General's role is however contradictory. The analysis refers to at least 6 respondents who wished for no Attorney General consent whatsoever (regardless of national security concerns). It goes on to say that 14 out of 16 who replied on this specific issue (our of a total of 52 respondents) favoured keeping some role for the Attorney.

[3] House of Commons, Constitutional Affairs Committee, 5th Report of Session 2006-07, "Constitutional Role of the Attorney General", 24th July 2007, oral evidence by Lord Goldsmith.

[4] See Clare Dyer, Guardian Online, "Conflicting roles, Explainer: Attorney General", 26 March 2008, available at: http://www.guardian.co.uk/politics/2008/mar/26/constitution.law

[5] House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, "Reform of the Office of Attorney General", 18th April 2008

[6] House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, "Reform of the Office of Attorney General", 18th April 2008

[7] (R(Jackson) v Attorney General [2006] 1 AC 262 para 107.

[8] Articles 21, 23, 24 and 25 of the International Law Commission's Draft Articles on State Responsibility.

[9] International Law Commission, Draft Articles on State Responsibility, Commentary 2 to Article 25, http:/untreaty.un.org.ilc/texts/instruments/English/commentaries/9_6_2001.pdf

[10] See International Law Commission Commentaries on Draft Articles on State Responsibility and commentaries.

[11] International Court of Justice, Gabcikovo-Magymaros Case

[12] LG&E Energy Corp, L&E Capital Corp., LG&E International Inc v. Argentine Republic, ICSID case NO. ARB/02/1, Decision on Liability, 3 October 2006.

[13] International Court of Justice, Gabcikovo-Nagymaros Case, 25/9/07; see also the ICJ's Oil Platforms Case, where the court held that whether a measure is 'necessary' is "not purely a question for the subjective judgment of the party" (2003 ICJ Reports, p. 183, para 43).

[14] See UNHCR Advisory Opinion on the scope of the national security exception under Article 33(2) of the 1951 Convention, 2/1/06, http://www.unhcr.se/Pdf/Position_countryinfo_papers_06/Advisory_opinion_national_security_USA.pdf

[15] OECD Investment Committee Report, 4/4/08, "Sovereign Wealth Funds and Recipient Country Policies", http://www.oecd.org/dataoecd/34/9/40408735.pdf

[16] 13th Tom Sargent Memorial Lecture, "Politics, Public Interest and Prosecutions - a view by the Attorney General", An Address by the Right Hon the Lord Goldsmith QC, Her Majesty's Attorney General, London, 20/11/01

[17] House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, "Reform of the Office of Attorney General", 18th April 2008, Appendix 3.

[18] House of Lords Select Committee on the Constitution, 7th Report of Session 2007-08, "Reform of the Office of Attorney General", 18th April 2008