HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Bar Council

Introduction

1. In response to the Joint Committee's Call for Evidence, this is the written evidence submitted on behalf of the General Council of the Bar on the Draft Constitutional Renewal Bill and on the Government White Paper entitled The Governance of Britain - Constitutional Renewal.

2. We confirm that we are also available to give oral evidence on what follows should the Joint Committee believe we could be of further assistance to it.

3. The Bar Council provides this evidence as part of its duty to be involved generally in the constitutional and legal issues of the day, to speak for and be concerned to protect and preserve the rule of law at all times, to endeavour to use its experience and legal expertise to care for the public good, and to offer such counsel as it can and as Parliament, Government, lawyers and the public rightly both expect and require. Our evidence is provided in that spirit and in our role as a key stakeholder in the justice system; and we hope we can bring a particular and specialised contribution to the Joint Committee's present deliberations.

4. The Bar Council represents over 14,000 barristers in England and Wales and whilst this evidence cannot be claimed necessarily to represent the individual views of each and every member of the Bar of England and Wales, it is also not merely the personal views of its two authors but is the evidence of the Bar Council as a representative body. This evidence has been derived from specific and careful reviews carried out by the Bar Council on the relevant constitutional issues which the Joint Committee is considering.

5. In particular, on publication in July last year of the Government's Green Paper, The Governance of Britain, the Bar Council established three working groups in order to provide meaningful and considered consultation responses to the Government's initial proposals. One working group was to address constitutional issues, the second to consider citizenship issues and the third to examine the role of the Attorney General. Distinguished barristers representing a full range of experience and different practices and including Silks and Juniors and academics (as well as a former Solicitor General) agreed to serve on the three working groups. The working groups were then charged with

investigating and researching the key issues. The Bar Council's evidence below therefore builds upon extensive internal consultation and considerations. It is founded on an engagement with, and a serious treatment of, the Government's proposals.

6. Thus, especially where we are necessarily and understandably constrained in coverage in this evidence, we would stress that what we say below (even where it is comparatively short or is confined to simple agreement) is the product of considerable underlying work and concentrated thought. Moreover, although properly limited in the length of what we are able to say, we have tried to cover and to give at least our conclusions on all the main parts of the White Paper.

7. In the natural way of things, we are perhaps more expansive where we have additional comments or points of principle or difference of view to explain than where we agree with the White Paper; but that should not be taken as suggesting our disagreements are any stronger than our agreements or that in either case we could not elaborate greatly. Where we have not been able to say as much as we could, we remain very happy to provide further evidence if that would be of assistance.

8. We do not, however, give evidence below on the following matters (although they are canvassed to some extent in the White Paper): Flag Flying, Reform of the Intelligence and Security Committee, Wider Review of the Royal Prerogative, Passports, the National Audit Office or Public and Church of England Appointments. We do not address these, in part because we note that the Joint Committee's Call for Evidence does not specifically seek evidence on those subjects, in part because the Government's own consideration of them remains in several cases at an early stage and in part because a number of them are in any event not areas on which the Bar Council would seek to offer a particular view. Having said that, we do also note that the Government envisages (in paragraph 246 of the White Paper) that the Joint Committee should be able in due course to contribute to the consultation process on the Wider Review of the Prerogative.

9. The Wider Review of the Prerogative (including also the review on Passports) is important in relation to considerations of the constitutional settlement and the rule of law and so, although not addressed here, is a matter in which the Bar Council does have both expertise and evidence which it could and would wish to offer to the Joint Committee at the relevant time.

10. We deal below with the issues in the order in which they are considered in the White Paper and in the Draft Bill (which, with the exception of the Civil Service issue, is the same as the order in the Call for Evidence).

Managing protest around Parliament

11. In relation to this heading and the first part of the White Paper, the Bar Council would emphasise that the right to peaceful protest is a fundamental one and an essential principle. The Bar

Council agrees with the Government's policy to repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005.

Attorney General

12. In answer to question 14 of the Call for Evidence, the Bar Council believes that, subject to a few qualifications, the Government's approach to the role of the Attorney General is broadly right. We expand on this and comment further below.

Chief legal adviser

13. The Bar Council agrees with the view in paragraph 51 of the White Paper that the Attorney General should remain the Government's chief legal adviser, a Minister and a member of one of the Houses of Parliament. We believe that the maintenance of a Law Officer at the heart of government is essential in an increasingly legalistic and regulated world. We also hold that the role of legal adviser to the Government should not be separated from that of a Minister.

14. There are, however, limitations to the independence and to the legal expertise that any Attorney can bring to his/her advisory role. The Bar Council would therefore endorse paragraph 52 of the White Paper. In this regard, specialist, external, independent legal advice will often be required. We believe that it is, in part, the availability of recourse to external legal advice that enables the Attorney's advisory role to be fulfilled and that preserves the constitutionality of the role. Whilst, as the White Paper explains, there are key advantages to having the Attorney as a Minister rather than as a purely independent legal advisor, that is assisted immeasurably by the availability of supplementary independent legal input in appropriate cases and should necessarily continue to be so. The Bar Council will continue to work with the Attorney General and the CPS to ensure that the Treasury Counsel system remains one of the highest quality, is meritocratic and that recruitment to the rank is based on merit and is fair and diverse.

Oath

15. The Bar Council supports a new oath for the Attorney General (paragraph 55 of the White Paper) and the case for a new oath was eloquently made by Professor Jeffrey Jowell QC in his recent JUSTICE/Tom Sargant lecture. We agree the new oath should make clear that, when exercising public interest functions, the Attorney General's duty is to uphold the rule of law. We do not regard a new oath as merely cosmetic and believe it can have a powerful and formative effect in shaping the role of the Attorney, in articulating his/her duty and in upholding public confidence. In order to imbue the oath with a high level of sanctity, to publicise its character and to enshrine its weight and virtue, we would call for the new oath to be encapsulated in and required by primary legislation. Whilst the Government may well be correct that legislation is not technically needed to implement a new oath, legislation would, we think, be the most appropriate means of introducing it and in particular of giving it Parliament's full endorsement and expectation. This would be akin to the statutory oath of the Lord Chancellor and we do not think the Attorney General's oath should be accorded any lesser significance. Since the Government is proposing to legislate in relation to the Attorney General, special additional legislation would not be required and it would be a matter of

regret for that legislation not to include the new oath at its centre as a mark of constitutional renewal and commitment to the values in the new oath.

Accountability

16. The Bar Council further supports a new requirement for an Annual Report which the Attorney must lay before Parliament. For the reasons explained in paragraph 57 of the White Paper, we are not sure that a new and separate Select Committee should be established to scrutinise the Law Officers and we might expect that accountability will be more easily maintained by keeping the Law Officers within the remit of the Justice Committee and reporting to Parliamentary committees more widely whenever may be appropriate. But we also agree that this is a matter for Parliament.

Cabinet

17. We agree with the view (paragraphs 63 and 64 of the White Paper) that the Attorney General should attend Cabinet where legal advice needs to be given. We also share the view (in paragraph 63) that attendance at Cabinet need not be on a regular basis. It seems clear, as a matter of precedent, that from 1928 for nearly three-quarters of a century, the Attorney General was neither a member of nor regularly attended Cabinet. The practice of exclusion from Cabinet was changed when Lord Goldsmith QC began regularly to attend. We believe the rationale for the prior convention was sound and that it would better maintain the necessary objectivity and independence (and perception of independence) of the office. Nevertheless, since we accept that the Attorney will sometimes need to attend, when the Attorney should do so is clearly not something that can be easily externally regulated and it will generally have to be a matter for the Prime Minister (for which the Prime Minister can answer to Parliament) as to when he/she extends the invitation to the Attorney. That said, a restatement of the convention in the principle would be, we think, constitutionally beneficial.

Disclosure of legal advice

18. The Bar Council considers that the legal advice of the Attorney General should be subject to legal advice privilege. Legal advice privilege is a crucial and constitutional right for any individual[1] and the justifications for privilege remain valid for government. As a result, the Attorney's legal advice should not be automatically subject to public disclosure (including for a decision on armed conflict); and we agree with the conclusion of paragraphs 66 to 69 of the White Paper. We would add that the privilege must belong to the government and not to the Attorney such that the government must always be entitled to waive its privilege at any time (just as an individual always can) without the Attorney General being able to prevent disclosure or to claim the privilege as his/her own. Where assurance on legality is likely to be a crucial underpinning to executive action in the international sphere (and here we are thinking particularly of a decision to commit British troops to military action), we think it unlikely that the question of legality would not be raised publicly and in Parliament such that government would have to address the question of legality publicly and would be unlikely to proceed without appropriate advice.

19. We would also add that a dishonest or disingenuous or inconsistent reference to or reliance on legal advice by government could well mean either that the privilege did not apply in the first place (since the relationship between legal adviser and government and the advice given must be bona fide for the privilege to apply) or lead to the waiver of the privilege (and legal mechanisms in these matters could repay further investigation).

Supervision of prosecuting authorities

20. As regards functions in relation to prosecuting authorities, the Bar Council fully agrees with paragraph 75 of the White Paper. In our view, the Attorney General as a Minister should continue to have overall responsibility for the CPS and other prosecuting authorities, for the Treasury Solicitor's Department and the Government Legal Service. We believe this is appropriate and necessary and that no other Minister would be appropriate for this role.

Individual prosecutions

21. The Bar Council agrees that the Attorney General should not have the power to direct a prosecuting authority to prosecute a particular case (paragraph 79 of the White Paper). The position on directions not to prosecute is, however, perhaps more complicated. We consider this first in relation to the national security exception proposed by the Government and then more widely.

22. As regards the suggested national security exception, we accept the Government's proposals in paragraphs 85 to 89 of the White Paper which seem to us well-balanced. We agree there should be provision for the (rare) need to stop a prosecution in the interests of national security; and the requirement for a report to Parliament on any occasion when the power is exercised seems to us an appropriate means of accountability and restraint.

23. What about the power to direct the non-prosecution of cases which do not concern national security? The White Paper proposes that this power be abolished, both in terms of the power to give a direction to a prosecuting authority and of the power to enter a nolle prosequi. So far as the exercise of such powers by the Attorney is concerned, the principle on which the Government bases this recommendation is understood by the Bar Council; but on balance we do not consider that alternative arrangements would work any better than those made for the Attorney General. We believe that the powers themselves (to stop prosecutions) are ones with constitutional value and that there should be an appropriate person with power to direct that a prosecution not be brought or be stopped. We have experience that suggests cases are sometimes pursued improperly or by over-zealous prosecutors which are not in the public interest or are disproportionate and we would note that there are some private prosecutions which should not have been brought. Judges may not always be able to halt such cases and, even if they could, some such cases ought anyway to have been stopped before they have advanced as far as a judge.

24. Such prosecutions should, we think, be able to be halted. The question is who should have that power. It cannot be a judge exercising a separate, non-trial supervisory function because such a supervisory jurisdiction is not known to English law and would confuse executive and judicial roles; it cannot be a political Minister who is not bound by the same public interest non-political requirements as the Attorney; and it cannot be the prosecuting authorities themselves (as the White Paper in effect recognises in paragraph 94) since that would be a nonsense where they had already decided to prosecute. That would appear to leave only two options: either a new position or the Attorney General.

25. As we have observed above, as a matter of strict principle, it can be argued that it should not be the Attorney. However, we are not aware of an occasion where there has been any criticism in recent times of the Attorney General's rarely exercised decision to enter a nolle prosequi and we do not generally consider there to be a problem. We therefore favour keeping the power with the Attorney General. We have considered whether there will be any real advantages in the creation of a new post. If a new post is to be created then the person appointed to that role could perform a number of defined roles, and might be a valuable addition, could be accountable to Parliament (perhaps through a Joint Committee) and would in principle be well-placed to direct the termination of prosecutions in the public interest. Yet, we consider that the Committee ought to bear in mind the fact that creation of such a post may muddy the waters rather than clarify them, and we doubt whether the supposed advantage justifies the cost of creation of such an office.

26. If such a public appointment were not to be pursued, it is a nice question where the balance lies between the principle that the Attorney should not make the decision and the residual value of the ability to stop prosecutions in appropriate cases; but on balance we favour retaining the power and in the Attorney General. Nevertheless, it may be that a requirement on the Attorney to report to Parliament on any occasion where the power was exercised would, in the same way as for national security cases, meet the objection to the Attorney's exercising the power. It may also be that there is a difference between a private direction not to pursue a particular prosecution and a nolle prosequi. To the extent that a nolle prosequi can be entered only after a prosecution has been commenced in open court, the entering of the nolle prosequi is done in public and so can be subject to scrutiny and the Attorney can be readily accountable to Parliament for it. We would advise (as the Government suggests is necessary in paragraph 94) that the ability to stop a prosecution and the continuing relevance of the nolle prosequi would benefit from further detailed consideration by the Government. We believe this should be clarified and be subject to consultation before and in time for the proposed legislation so as to be part of it.

Relations with prosecuting authorities

27. The Bar Council fully supports the protocol approach detailed in paragraph 81 of the White Paper, the measures in relation to the appointments of the Directors of the prosecuting authorities as set out in paragraph 82 of the White Paper and the approach in relation to other prosecuting authorities in paragraph 84 of the White Paper.

Consents to prosecute

28. In relation to consents to prosecutions, it seems to us that paragraph 91 of the White Paper correctly identifies the three categories into which existing consents should be placed. Given the Government's explanation that further work is needed to determine which offences should be placed in which category, we defer consideration of that question for the present time and say no more now than that the principle identified in paragraph 91 is the right one.

Other matters

29. We agree that no change is needed to the power to refer questions of unduly lenient sentences to the Court of Appeal (paragraph 95); and we also accept both that the Attorney will inevitably have a voice in formulation and implementation of criminal justice policy and the Government's conclusion in paragraph 97 of the White Paper.

30. Finally, we would note that the White Paper does not consider in any detail the role and powers of the Attorney in relation to civil justice matters and the duty to act in the public interest (such as, non-exhaustively, in matters affecting charities, in actions against vexatious litigants, in contempt of court matters, in intervening in civil proceedings where appropriate and in acting to protect Parliament's privileges). In our experience, the public interest functions of the office are operating satisfactorily and there is no real need for change. If the suggestion of a new law officer within Parliament were to be pursued, these functions could be transferred to that person. If that suggestion were not to be pursued, we would suggest that the relevant powers and duties should remain with the Attorney and could usefully be codified in legislation or be expressly preserved by a suitable saving provision (since we assume the Government has no intention to remove them). Given the cost implications of the creation of the new role, and the possibly limited benefits of it, on balance we come down on the side of keeping the powers with the Attorney but with statutory definition.

Judicial Appointments

31. Turning to judicial appointments, we believe and would emphasise as strongly as possible that the key and overriding consideration must be maintaining the highest quality judiciary possible. That is a basic and absolutely essential underpinning of our democracy, without which the whole edifice will crumble, both our fundamental liberties and our prosperity as a nation. A high quality judiciary requires first and foremost judges qualified intellectually, legally and in experience to decide (and give directions in) the cases before them correctly and rigorously according to the law and the facts. With that minimum requirement, judges must in addition have the ability, skills, temperament, empathy, understanding and disposition to be good judges. In short, merit must be the sole factor in the selection of judges as is required under the Constitutional Reform Act 2005 (and as it is emphasised to be for the Civil Service in paragraph 176 of the White Paper). Against that principle, we turn below to the specific proposals outlined in the White Paper.

32. We accept the Government's proposal in paragraph 114 in due course to remove the Lord Chancellor from the selection process for judicial appointments below the High Court, subject to the safeguards set out there. However, the JAC is still relatively new and we consider that some more time is required for the system properly to bed down.

33. We agree with the recommendation (paragraph 115) to remove the Prime Minister entirely from judicial appointments since the Prime Minister's involvement adds no benefit (other than its formality) and its existence could be seen to have potential for (even if not actual) political interference which is constitutionally unhelpful.

34. We can see advantages to the proposal in paragraph 116 for the inclusion in legislation of key principles for judicial appointment but only if they enshrine the principle of merit above all else as the essential bedrock of the judiciary and a free and fair society.

35. The Bar Council supports the earlier and quicker carrying out of medical checks in the judicial appointments process (proposed in paragraph 117). The streamlining of this aspect of the process would, we believe, be very welcome including to potential applicants.

36. We agree with paragraphs 118 to 120. We support removing the obligation on the Lord Chief Justice to consult the Lord Chancellor in relation to the listed relatively minor adjustments for existing judicial office holders; and the Bar Council likewise supports the ability of the JAC to take preliminary steps, but in consultation with the judiciary, in a selection process before a formal Vacancy Notice is received.

37. As regards the "new considerations" set out from paragraph 122 of the White Paper, the Bar Council notes the existing powers of the Lord Chancellor as set out in paragraph 123.

38. The Bar Council regards these powers as sufficient and is opposed to a new power of the Lord Chancellor to set targets and to direct the JAC in certain matters over and above the powers already present in the Constitutional Reform Act 2005. A power to direct that the process is run efficiently and on a regular basis is one thing (and not one with which we would argue). However, the proposed power would go further and could mark an unwarranted intrusion into the independence of judicial appointments and could undermine the very reasons for the establishment of the JAC in the first place. There is, moreover, a real danger in a power to direct appointments from certain groups since this would attack both the independence and the quality of the judiciary and the ability to attract the best candidates.

39. The proposal in its widest form is not justifiable and could lead to the weakening of the quality of the judiciary. As soon as the appointment system is known or perceived not to be based on merit, the judiciary will be significantly weaker in its quality and in the respect it commands. Thus, the Government's fears, expressed in paragraph 127 of the White Paper, are well-founded and require

greater weight than currently accorded by the Government. We do not accept that the undesirability and danger inherent in the Government's proposal can be sufficiently ameliorated by consultation with the Lord Chief Justice or by being general rather than specific to any individual appointment. Beyond setting the principles for appointment in legislation, the Lord Chancellor must not in principle exert direct influence in the way that is mooted and the potential aggregation of power back to the Lord Chancellor cannot be dressed as a means of upholding the independence of the judiciary when it would undermine it.

40. Given the Government's necessary caution, which we welcome and commend, on this issue in paragraph 129 of the White Paper, we would urge the Joint Committee to state a principled objection to the consultation question raised by the Government.

41. In the absence of specific proposals, we do not comment on the delegation of the Lord Chancellor's functions to junior ministers or senior officials (paragraph 131) save to note that, in principle and because of the importance of the judiciary, we are generally opposed to delegation of the Lord Chancellor's functions in this particular regard.

42. As to a potential role for Parliament in terms of confirmation hearings for judicial appointments, that would plainly be destructive and inappropriate. We share the views of the consultation responses in this regard. We do, at the same time, see considerable value in the proposal (paragraph 133) for an annual joint meeting of the Justice Affairs Committee and the House of Lords Constitution Committee for consideration of the judicial appointments process; and we would support this innovation if Parliament thought it desirable to introduce it.

43. We would have endorsed the proposal (paragraph 134) for a JAC panel representing potential applicants had there been a need. However, we do not think there is a need as there are now well established groups which deal with these issues. The JAC has established a Diversity Forum, a Liaison Group and a Research Group. It is best to allow these to work rather than to change them now. We do not believe the JAC itself needs alteration in its size or composition (paragraphs 135 and 136). If (contrary to our view) a JAC panel were created, it would, as we understand it, be subsidiary to the Commissioners and so its creation would not alter the need for suitable representation on the JAC itself. In any event, the Government's recognition that the JAC Board provides a wide and diverse range of high-level skills and experience is important. Similarly, the JAC is a young body and it is too early for major alterations of it. We do not believe a case has been made out for change to the JAC's size at the present time. The combination of Commissioners appointed from the professions (not as delegates) with the Groups which we describe above is likely to work well.

44. The Bar Council supports as sensible the proposals in paragraphs 137 and 138 of the White Paper on statutory salary protection for certain tribunal judges and on deployment of serving judicial holders for some judicial posts by the Senior President of Tribunals without the JAC.

45. We are not entirely clear what the Government has in mind in relation to the reappointment of JAC Commissioners (paragraph 139) and so do not comment on this for now.

46. We would accept the Government's recommendation in paragraph 140 of the White Paper on providing confidential information from the appointments process to the police for the purposes of investigating crime.

Treaties

47. The Bar Council broadly supports the Government's approach to Parliamentary involvement in treaty ratification. Putting the Ponsonby Rule on a statutory footing would be a positive and beneficial reform; and the giving of legal effect to a negative vote would be a principled step in accord with Parliament's democratic role and authority. Thus, subject to a couple of points below, the Bar Council agrees with the Government's proposals.

48. As a first comment, we would note that international treaties do not always require ratification as a separate step and the Government's proposals do not extend to such treaties where no ratification is required. Such treaties are entered under prerogative and have force without ratification. It is an interesting question, not covered by the White Paper, whether the prerogative to enter into treaties should be further controlled (and the Government's authority limited) so that treaties could not be agreed by Government without being or unless subject to further subsequent ratification (with an exception for the sorts of treaties excepted for good reason in paragraphs 161 and 162 of the White Paper). We do not offer a view on this question here beyond observing that it may be worthy of wider consideration and further investigation.

49. Apart from that observation, we also wonder whether 21 days is sufficient time for busy Parliamentarians to consider, review, investigate, research and debate a treaty in order to mount a reasoned and considered opposition to any proposed ratification (where that might be justified). We think that, even if 21 days were to be adopted as the standard period, it should be capable of extension if Parliament requests additional time. The need for this was recognised to some extent in paragraph 152 of the White Paper but does not appear to have found expression in the Draft Bill. We would have thought that it should.

50. In relation to exceptional cases where the Secretary of State decides it is necessary to pursue ratification without Parliamentary approval, a number of potential safeguards are mentioned in paragraphs 159 and 160 of the White Paper but not all of these safeguards are included in the Draft Bill. Clause 22(3) of the Draft Bill provides for steps that the Secretary of State must take to inform Parliament after the treaty has been ratified (as to which it might be thought that they should include an oral statement to the House); but clause 22 does not appear to provide expressly for mechanisms to consult Parliament by an alternative more raid means. Whilst the White Paper (paragraph 160)

suggests that the Secretary of State would not be precluded from consulting Parliament by alternative means if they are practically available, this appears not to be a positive requirement.

51. The Draft Bill would more adequately control the power if it made it a mandatory requirement on the Secretary of State (as a condition of ratifying a treaty without following the Parliamentary procedure) (a) to consider informing and consulting Parliament on a different, shorter timetable from the standard 21 days, (b) to make an oral announcement to Parliament or to lay a written statement in advance and at the earliest opportunity explaining the exceptional circumstances and the steps to be taken to consult Parliament on a faster basis, (c) to consult Opposition leaders and others as may be appropriate during a recess and/or (d) to certify in sworn writing the reasons why it is an exceptional case that requires ratification without the usual Parliamentary approval. In other words, the Bill could usefully provide for the sort of measures discussed in paragraphs 159 and 160 of the White Paper and make them mandatory. At present, the intentions of paragraph 160 appear not to be fully reflected in the Draft Bill, which could be strengthened in this regard to accord with the underlying purpose and principle of the statutory approach to treaty ratification.

52. Finally on treaties, we agree with paragraphs 164 and 165 of the White Paper that the means of Parliamentary scrutiny are important to consider if the proposed new legislation is to be meaningful in practice. We believe an institutional innovation within Parliament will be important and necessary if ratification regulation is to work properly. Whilst we agree that this is a procedural matter for Parliament, it is important that each treaty put before Parliament is given scrutiny and that institutional mechanisms are in place to ensure this is done.

Civil Service

53. The Bar Council supports putting the Civil Service on a statutory footing and enunciating in legislation its core values and duties. There can be no argument against appointment on merit on the basis of fair and open competition (paragraphs 176 and 178 of the White Paper). Likewise, on paragraph 184, there can be no argument against the key principles of impartiality, integrity, honesty and objectivity (although we are not sure why those principles are paired rather than separately stated in clause 32(4) of the Draft Bill and we might have thought that those values could have been stated as the core values of the Civil Service as the starting point of the relevant Part of the Bill rather than only as part of the proposed new Civil Service Code). We also fully support the introduction of the proposed new Codes.

54. We would address briefly only one further aspect of the Government's proposals on the Civil Service, which is the approach to Special Advisers. Where almost every aspect of public life is (rightly) governed by merit and open and fair competition, the discrepancy in the position of Special Advisers is stark. The Government's position has an air of special pleading in that in other areas of public life funded by the taxpayer it would not be suggested that the normal standards should not be applied to them; and it is highly questionable whether in principle the executive should be subject to a special carve-out from the correct approach which governs every other element of state administration.

55. The notion that non-objective, non-impartial, non-merit-appointed, unelected persons should sit at the heart of government because of personal friendship and allegiance sits uneasily with the principles underlying the White Paper and the Draft Bill. Indeed, the White Paper brings the point into clear relief and is to be welcomed for that reason. Whilst the Bar Council recognises the reality of Special Advisers, the White Paper raises serious questions as to the compatibility of Special Advisers with the governing principles. To the extent that Special Advisers are an inevitable corollary of the party system, then their special status which derogates from the principles of merit and independence may suggest that they should be funded by their party rather than the taxpayer. We raise this only because of the discrepancy that appears on the face of the White Paper and, having raised it, we would wish to leave it as a matter for the Joint Committee to consider. Finally, however, we should state that we agree with paragraph 193 of the White Paper since principle clearly dictates that Special Advisers cannot have executive powers.

War Powers

56. The Bar Council naturally recognises that a decision to go to war is amongst the most important decisions that a state can ever make. We therefore agree with the principle that in a democracy it should be subject to due and proper consideration by Parliament where possible and we would note that the White Paper's treatment of this complex subject is balanced and considered. Beyond that, the Bar Council's principal interest in relation to war powers is in considerations of legality of approach.

57. In this regard, given the often asymmetric nature of modern warfare and given that we would have thought that operational reasons would require secrecy more often than not, we believe that important questions may arise as to (a) appropriate protections for and legal responsibilities of the military should the Prime Minister seek to order military action without Parliamentary approval; (b) the role and involvement of the military in any decision by the Prime Minister not to obtain prior Parliamentary approval; (c) the position where the Prime Minister and the military disagree as to the need for Parliamentary approval; (d) the necessary information to be given to Parliament and any necessary certifications to be given by the Prime Minister where advance approval has not been sought (where greater assurance may be needed for Parliament than where advance approval has been sought); (e) the legal position of the Prime Minister where he or she has wrongly failed to seek Parliamentary approval in abuse of the conditions that allow military action without such approval; and/or (f) the legal position of the Prime Minister and military commanders where any such decision without Parliamentary approval commits troops in breach of international law.

58. These are complex and sensitive matters which cannot be adequately covered in the present evidence and which to some extent go beyond the considerations in the White Paper. We therefore do not try to do them justice in this paper. However, where the Government is proposing a new approval mechanism, the widest possible consequences of that mechanism (especially in fact where it is not used) may require further consideration and clarification. It may be that a certification system (requiring certificates from the Prime Minister and/or the military) would give credence to the new approach where Parliamentary approval is not sought in advance and it may be in any event

that wider codification than is presently proposed would be of assistance for the system of Parliamentary approval to work most effectively and with the utmost clarity. We would of course be happy to expand on this if that would be helpful.

The Law Commission

59. As a final comment and although not mentioned in the White Paper itself, the Lord Chancellor's oral statement to the House of Commons publishing the White Paper included a commitment to introduce a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's intentions regarding outstanding Law Commission recommendations. We would commend this initiative. The Law Commission's work is intended to be non-political and to improve the working of the law from a technical perspective and in accordance with principle. Its work has unfortunately often been overlooked by successive Governments such that it has not come sufficiently before Parliament. We would hope the Joint Committee may wish to add this discrete but important matter into its consideration.

Oral evidence

60. If it would be of assistance to the Joint Committee, we would reiterate that we would be very happy to give oral evidence to explain and amplify the Bar Council's position.

16th June 2008

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[1] R v Derby Magistrates' Court, Ex parte B [1996] AC 487.

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JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by M J Bowman, Director of the University of Nottingham Treaty Centre

RATIFICATION OF TREATIES

A. Issues of Principle

The following observations are for the most part presented on the basis that the proposed reforms are both desirable and likely to go ahead. The former proposition is not one, however, that can simply be taken for granted: the proof of the pudding will be in the eating, and much will depend upon the extent to which Parliament ensures that it has equipped itself with the necessary mechanisms and expertise to enable it to fulfil its functions effectively.

Question 31 - Balance of Powers

On the assumption that the present composition of the two Houses is to be retained, a reasonable balance would seem to have been struck regarding their respective powers. The next two questions, regarding the relationship between the Legislature and the Executive, are inextricably inter-related: the proposed power of the Commons to delay treaties indefinitely should certainly be conditional on the right of the Government to re-introduce particular instruments.

Question 32 - Scrutiny Prior to Signature

It would seem essential here to maintain a clear distinction between two very different scenarios involving signature: (a) where signature is essentially a preliminary to ratification; and (b) where signature actually represents the means by which consent to be bound by the treaty is expressed.

As regards (a), a case could possibly be made for greater Parliamentary involvement in the processes of treaty elaboration prior to the ultimate expression of consent to be bound, and in particular for some form of scrutiny of treaties immediately prior to signature: this might, indeed, both help to minimise the risk of the Legislature and the Executive subsequently finding themselves at odds over the desirability of ratification and serve as a means by which Parliament could enhance its expertise in relation to the treaty-making process generally. Furthermore, it is not to be overlooked that, even as a mere preliminary to ratification, signature entails the potentially significant legal obligation to refrain from action that might defeat the object and purpose of the treaty pending a definitive determination whether or not to ratify. It is less clear, however, that such matters need to be addressed as part of the instant process - it might be preferable for the mechanics

of such a system to be explored on an informal basis, perhaps by means of a trial or pilot study, with a view to possible enshrinement in legislation at a later stage.

(b) The second scenario raises altogether different considerations, however. It is certainly possible in principle, and not uncommon in practice, for consent to be bound by treaties to be expressed by signature alone, at least if the treaty in question does not exclude that option. There is, moreover, nothing to prevent this from occurring in circumstances which raise potentially significant implications for, say, civil liberties.[1] Although the legal consequences (in terms of the undertaking of commitments which are formally binding upon the UK under international law) are the same as where consent is expressed by ratification or accession, the process whereby treaties are accepted by signature alone will not be governed by the proposed arrangements at all - not even the attenuated set of safeguards in section 22(3) - since signature does not appear to fall within the definition of "ratification" in section 24. It may be that a plausible case can be made for allowing this process to remain unregulated, though I am unsure what it might be.[2] Rather, even without any presupposition of the likelihood of skulduggery, this looks like a significant loophole. It is not clear, however, whether the problem is best remedied by amending section 24 to incorporate the expression of consent by signature - I am inclined to think not, as I suspect it might create considerable practical difficulties. An alternative solution might be to seek to establish criteria to govern the exercise of the power to express consent by signature alone: at the very least, perhaps a provision could be adopted extending the safeguards of section 22(3) to cases where consent is expressed in this way.

Question 33 - Extension of the Statutory Period

It is difficult to rule out the possibility that some instance of unusual complexity might arise that would require a longer period for consideration than the standard 21 days. It could even be argued that that period is in any event unduly short. The optimal solution might entail the possibility of formal suspension of the statutory period (up to a certain time limit) to enable appropriate procedures to be completed, but I have no firm views or specific suggestions on this.

Question 34 - Ratification without Parliamentary Approval

Most of the relevant points regarding this issue are addressed in Part B of this paper. For now, it suffices to note that there is considerable attraction in the suggestion that the Secretary of State should pursue appropriate consultations in these circumstances, and that it might well facilitate the consultation process if some new Parliamentary mechanism were to be established to serve as the appropriate vehicle. The proposal envisaging a duty to report back also has much to commend it.

Question 35 - Definitions

The definitions now seem acceptable: the concerns raised in my previous paper regarding the definition of ratification have been fully addressed (though the point raised above in relation to signature under question 32 should not be overlooked).

Question 36 - Parliamentary Mechanisms

In Cm 7342-1, para.164, the Government suggests that it "would welcome any institutional change which would enhance the capacity of Parliament to contribute to the scrutiny of treaties within the statutory framework proposed", but regards it as being "for the Houses themselves to decide upon such arrangements". My only thought is that it is vital to ensure that two distinct forms of expertise are incorporated within any emerging institutional framework. The first relates to the substantive issues which form the subject-matter of the treaty under consideration (legal co-operation, human rights, the environment, finance, trade etc., or any combination of the foregoing). Cm 7329 provides some useful information on the role of the Joint Committee on Human Rights with regard to treaties falling within its remit, and careful consideration should be given to the extent to which the existing committee structure provides adequate foundations for the effective discharge of this function more generally.

Taken alone, this is unlikely to prove sufficient, however, as it will also be necessary to ensure the availability of specific expertise regarding the effective utilisation of the treaty as a technical mechanism for the recognition, protection and enhancement of relevant interests under international law. This expertise will be required to cover both the law of treaties and the practice of treaty-making. My experience of the academic world is that much contemporary commentary on international legal instruments is undertaken by those who are predominantly experts in the relevant provisions of their respective national legal systems (regarding human rights, the environment etc.), with the result that bizarre misconceptions tend to abound when they turn to discuss the specifically international, treaty-oriented aspects of their subject. Even genuine international lawyers tend nowadays to be specialists, with limited awareness of the development of practice regarding utilisation of the treaty-mechanism across the broad spectrum of international law. It is, with respect, difficult to believe that those who are not guaranteed to be legal experts at all will be any less prone to fall victim to such misapprehensions; yet failings of this kind could critically debilitate the potential of Parliament to enhance, rather than impede, the prospects of successful participation by the UK in the ever-expanding, rapidly developing and increasingly structurally-sophisticated network of international treaty arrangements. Accordingly, the institutional development of the requisite expertise should be seen as a priority, if not a pre-requisite to the success of the entire operation.

B. Questions of Drafting

Some tentative suggestions are offered regarding the drafting of Part 4 of the proposed bill.

Section 21

Some minor stylistic problems could profitably be addressed, viz:

Sub-section 1

"unless conditions 1 to 3 or conditions 1 to 4 (as the case may be) are met"

The drafting is less than ideal as the dichotomy posed is a false one: since, according to section 21(4)(b), condition 4 is itself expressed as a contingent element of condition 3, the two sets are not true alternatives.

The phrase "unless the following conditions are met" is shorter, simpler, and avoids this problem.

Sub-section 5(b)

"if the House of Commons resolved as mentioned in subsection (4)(b)"

This formulation seems flaccid, inelegant and open to possible misinterpretation. If it is thought desirable to invoke the specific provision which is the source of the power in question, would it not be preferable to provide

"if the resolution referred to in subsection(4)(b) was that of the House of Commons" ?

Alternatively, if such invocation is not necessary, might it not be clearer simply to state

"if [it was the case that] the House of Commons resolved that the treaty should not be ratified" ?

Section 22

There would seem to be some significant substantive problems here.

Sub-section 1

"exceptionally"

It seems surprising, as Question 34 implies, that no criteria of any description are specified to govern the exercise of this discretion. Is there not a risk that some hypothetical future Secretary of State might routinely submit to Parliament all treaties that seem likely to prove unproblematic, but choose to treat as exceptions certain cases where it was suspected that approval might not be forthcoming? It is to be remembered that, by virtue of the current sub-section 3, (s)he will be entitled to delay even laying a copy of the treaty before Parliament until after ratification. Obviously it is not difficult to envisage that situations might arise in relation to treaty ratification where time is of the essence, so that advance Parliamentary scrutiny might become impracticable, but surely it

would be possible to cater for these by means of some rather more restricted form of wording, e.g., "for reasons of exceptional urgency". It cannot, of course, be ruled out that there are additional situations apart from pressure of time that legitimately require to be addressed, but it would be useful if some indication could be given of what they might be, so that alternative forms of wording might be considered that would enable them to be adequately catered for, while still falling short of the sweeping terms currently proposed.

Sub-section 2

"But...."

It seems inappropriate to begin a sentence in this way.

"...after either House has resolved, in accordance with section 21(4)..."

It may be that I have missed something here, but the wording of this reference to section 21(4) seems baffling in its context. That provision establishes the power of either House to reject ratification of a treaty within a period of 21 sitting days after that treaty has been laid before Parliament, whereas the present provision surely embraces situations where the treaty may never have been laid at all (since that could be the very condition that the Secretary of State has chosen, on this occasion, to dispense with.) This formulation therefore appears inadvertently to negate the power of Parliament to "overrule" the Secretary of State in such circumstances, as the specified condition will be impossible of performance. (I.e., Parliament must act within 21 days of a non-existent date. This problem will not arise, of course, where it is a different condition - e.g. publication - that the Secretary of State has decided to disregard.)

Surely it will be necessary to make appropriate provision for the situation where the treaty has never been laid - viz.,

"A treaty may not, however, be ratified by virtue of subsection 1 if either House resolves, at any time prior to ratification, but in no event later than the expiry of the period referred to in section 21(4) [or alternatively ... the expiry of a period of 21 sitting days, beginning with the first sitting day after the day on which a copy of the treaty has been laid before Parliament], that it should not be [so] ratified."

On the other hand, it might prove highly embarrassing if such Parliamentary intervention were to occur at the very last moment, and especially once the ratification process had irrevocably been set in train, albeit technically not completed. If this is a significant concern, some form of words would need to be found to indicate that the cut-off time was the initiation of the process, rather than its completion, or to identify some other, more appropriate, date for this purpose.

Sub-section 3

"If a treaty is ratified by virtue of subsection 1, the Secretary of State must, ...before ... the treaty is ratified"

Again, the wording here seems inelegant in terms of the temporal relationship between the clauses highlighted, even though the complete sentence caters also for other situations in respect of which there is no such problem. A more appropriate form of words is, however, not at all obvious. Perhaps

"In any case of [or involving] ratification of a treaty by virtue of subsection 1, ..."

Paragraph (b)

The phrase "is of that opinion" appears a regrettably long way from the original reference to the opinion in question, which appears in the first line of sub-section 1. This might be regarded as unlikely to raise serious problems of interpretation, though any perceived difficulty could be mitigated by reversing the order in which sub-sections 2 and 3 appear, which would in any event seem to give a more logical and coherent flow to the entire section.

June 2008

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[1] In the case of the 1985 Council of Europe Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, for example, the UK was one of several countries that expressed its consent to be bound by signature alone. The convention was adopted in great haste in the aftermath of the Heysel Stadium disaster (unusually for Council of Europe treaties, there was no accompanying Explanatory Report) and it was evidently regarded as urgent to bring it into force as soon as possible. This is precisely the sort of context in which a treaty might generate unforeseen and unintended implications for civil liberties (which is not to suggest that it has necessarily done so here), and where some additional element of scrutiny might therefore be regarded as especially important.

[2] The Government itself has doubted the practicability of routine Parliamentary involvement prior to signature, but does not specifically address the (? relatively small) sub-set of cases where consent to be bound is to be expressed by that means.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Campaign to Make Wars History

War Powers

"War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression therefore, is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

Nuremburg War Crimes Tribunal 1946

Summary

This report focuses on Britain's antiquated, unlawful, undemocratic war powers arrangements. It identifies the treaties, conventions and laws prohibiting war and the reasons why Britain repeatedly reneges on international agreements outlawing war and requiring disputes to be settled peacefully. It asks why we are taking part in the massacre of innocent Afghan and Iraqi citizens, the worst atrocity in British history, and why our political, civil and military leaders are continuing to commit, and our law enforcement authorities are failing to prevent, the worst crimes known to mankind.

The report ascertains five main causes of these horrific failures, concentrating in particular on the inept decision making systems in use in Parliament and Government. We then answer the joint committee's questions and finish with seven recommendations to modernise Britain's dysfunctional war powers arrangements.

What is wrong with Britain's war powers arrangements?

1. Britain's current arrangements for waging war and using armed force cause us to violate war law. Having given binding undertakings to the world that we would never wage a war of aggression[1], never threaten or attack another country[2], never kill or harm human beings[3], never destroy a national, ethnic, racial or religious group[4], settle international disputes peacefully, respect human rights, uphold and enforce the rule of law and act towards one another in a spirit of brotherhood and co-operation[5], our Governments repeatedly violate these laws and commit war crimes.

2. The conflicts in Iraq and Afghanistan in which at least 1,000,000 people including 400,000 children have been killed are illegal, morally wrong and constitute genocide, crimes against humanity and crimes against peace under the Rome Statute of the International Criminal Court and the Nuremburg Principles. These massacres now rank as the worst atrocities ever committed by a British Government. That both Houses of Parliament allow the killing to continue and support the criminal actions of Government is horrific and has done immense damage to Britain's international reputation. Britain cannot be trusted to uphold the laws of war.

What causes these failures?

3. Our political, civil and military leaders repeatedly break war law, our law enforcement authorities fail to enforce war law and our citizens fail to uphold war law because of:

a. Leaders' lack of knowledge of the laws of war. No American or British political, civil or military leader knows the laws that govern warfare and the relationships between states, or understands the difference between a war of defence and a war of aggression. As no British MP, Peer, civil servant, monarch, military commander, judge, police officer, editor or taxpayer ever receives a correct briefing on war law, they are unable to uphold or enforce the law when it is about to be or has been breached.

b. False legal advice. For fifty years law officers in both Britain and America have provided false and misleading legal advice on the legality of warfare and armed conflict to politicians, Governments, the armed forces and the public. The legal advice provided by the Attorney General to the Government and Parliament was false, deceptive and less than 5% correct. That it is possible for Britain's law officers to deceive the nation over the legality of war is a disgrace and is the worst legal failure in British history.

c. Failures of war law enforcement. Deep-seated corruption in the Foreign and Commonwealth Office, the MOD, the Law Officers' Department and law enforcement authorities enables political, civil and military leaders to violate war law and commit war crimes. It should not be possible for Police, CPS, Judges or Law Officers to refuse to investigate war law violations and war crimes committed by Ministers of State, or to refuse to arrest and prosecute Britain's main war criminals.

d. Illegitimate investments in armed force. Successive British Governments have deceived citizens into investing vast sums in training and arming military forces for 'defence', whilst using them to wage wars of 'aggression'. Britain currently spends £40bn pa on preparing to kill and killing foreign nationals and £2bn pa on aid and development. These proportions must be reversed if we are to uphold our international commitments.

e. Outdated, faulty, undemocratic decision making systems. With a Monarch commanding our armed forces, the royal prerogative, an unelected House of Lords, faulty decision making systems, false legal advice, antiquated budgeting and non-existent citizen powers, Britain has no chance of operating in a modern democratic manner suitable to the 21st century.

The laws of war

4. Wars are started by leaders never by the people. The decision to wage war or use armed force is the most important that a leader can take. Modern warfare and weapons automatically cost the lives of thousands of innocent people. The horrific consequences of war caused the world's major nations to sign and ratify the International Treaty for the Renunciation of War [the Kellogg-Briand Pact] in 1928.

ARTICLE I The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.
ARTICLE II The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
Why is Britain unable to keep its promises? The Kellogg-Briand Pact is binding international law and it has never been repealed. UK citizens have a right to expect it to be honoured by the inheritors of the solemn promises - the government. If citizens are required to obey the law then so must the government.

5. The Kellogg-Briand Pact together with the London Charter provided the legal basis for the trial of Germany's leaders at Nuremburg after WWII.

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law.... We denounce them as law breakers."

Henry Stimson, USA Secretary of State 1932

"After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such war is illegal in international law; and that those who plan and wage such a war with its inevitable and terrible consequences are committing a crime in so doing... War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression therefore, is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole...

Nuremburg War Crimes Tribunal 1946

6. The main laws governing war, armed conflict and relationships between states are:

· The Treaty for the Renunciation of War [the Kellogg-Briand Pact]

· The United Nations Charter

· The Judgement of the Nuremburg War Crimes Tribunal

· The Genocide Convention

· The Geneva Conventions

· The Universal Declaration of Human Rights

· The Nuremburg Principles

· The Rome Statute of the International Criminal Court

· The International Criminal Court Act 2001[6]

7. Why do British Governments and Parliaments regularly renege on war law taking us into illegal wars of aggression and committing the world's worst crimes? Why have we fought five illegal wars[7] since 1998, killing and injuring 2,000,000 people including 750,000 children, when we had given a firm and binding promise never to do so?

What causes Britain's poor quality decisions?

8. The problem lies with the outdated inappropriate decision making systems used in Parliament and Government. In comparing modern decision making systems used in industry and commerce with those used in Whitehall and the Palace of Westminster it becomes clear that almost every essential component of a high quality decision is absent from political decisions.

9. The House of Commons debate on the Iraq war exemplifies the poor quality of parliamentary decision making. The resolution was deceptive, complex, contained false statements, lacked reference to the laws of war; lacked guidance on the illegal nature of the use of armed force; lacked guidance on the criminal implications for MPs; lacked reference to peaceful alternatives; lacked consideration of the needs and interests of the Iraqi people; lacked a risks / rewards analysis; lacked consideration of outcomes; lacked discussion of moral and ethical standards and basic human values and took no account of Britain's largest ever protest march.

Is the Government's proposal for a detailed House of Commons resolution appropriate?

10. No. As this is the most important decision that Parliament can take it must be approached carefully and by due process of law. Not only is a resolution totally inappropriate but under Britain's current outdated, undemocratic, incompetent, unfair system it would inevitably result in a poor quality outcome.

Is the Government right to adopt a resolution route rather than a legislative route for War Powers?

11. No. The power to wage war or to use armed force must be governed by Statute. When lives are at stake every citizen whose life is at risk should be involved in the decision. Warfare inevitably causes loss of life and no-one has the right to take another's life. That any Member of Parliament should think that they have the right to overrule the Universal Declaration of Human Rights, the Human Rights Act, the Kellogg-Briand Pact, the UN Charter and common law and take a decision to wage war, disposing of human lives as if they were so many insects, is a disgrace and a travesty of justice. That Parliament is complicit in the massacre of at least 1,000,000 people, including 400,000 children, and continues to condone and support the genocide of hundreds of Afghan and Iraqi citizens is an act of pure evil which ranks alongside the actions of Germany's leaders during WWII.

Does the draft Resolution in the White Paper give Parliament sufficient control over conflict decisions?

12. No.

Should the PM determine the most appropriate timing for seeking parliamentary approval?

13. No. A war of aggression is always illegal. The only occasions when Parliament can approve the use of armed force is when (i) Britain or British territory is attacked or (ii) Britain is asked to assist another nation that is under attack. The timing will be governed by the circumstances, not by the Prime Minister.

Should the PM decide what information should be supplied to Parliament?

14. No, never. It is because the Prime Minister controls and manipulates the information supplied to Parliament that we are now effectively a dictatorship.

In the event that the mechanism contains exceptions to the requirement for parliamentary approval, should the PM alone determine if the relevant emergency or security conditions are met?

15. No. The Prime Minister cannot be trusted.

Should there be a requirement to seek retrospective approval where exceptional circumstances have been deemed to apply?

16. No. If the Prime Minister takes a decision that causes the death of another human being then he and his accomplices must answer to charges of murder, genocide or a crime against humanity in court. Under no circumstances should he or she be able to seek retrospective approval from Parliament. If the PM can claim on the hoof that "exceptional circumstances" apply; it would be a recipe to make unlawful decisions and retrospectively invent plausible justifications.

Should the Prime Minister determine whether the security condition continues to mean that it would not be appropriate to lay a report before Parliament?

17. No. Such a power would be open to abuse. There must be democratic checks and balances at every stage.

Should there be a regular re-approval process?

18. No. Approval and re-approval would be illegal.

Is the role of the House of Lords under the proposals right?

19. No. The House of Lords' role as the judiciary in our tripartite system [Commons = legislature, Monarch + Government = executive] should mean that it retains the power to halt the illegal actions of the House of Commons, the Government and the Monarch. It is because it has repeatedly failed to enforce war law that the nation is in this predicament. The House of Lords should be 100% elected [as required by European law] with the power to overrule the House of Commons, the Government and the Monarch if they breach the law.

Is it appropriate that approval is not required for a conflict decision involving or assisting the armed forces?

20 No.

Have the terms 'conflict decision' and 'UK forces' been adequately defined in the draft resolution?

21. No. No resolution should contain anything that conflicts with international or domestic law. Those who draft any such resolution make themselves ancillaries to war crimes if the resolution contains clauses suggesting other than purely defensive use of the armed forces.

Recommendations

22. To carry out an effective review of 'War Powers' the Committee must brief itself on international and domestic war law. Britain's future war powers legislation must reflect these binding agreements. In briefing itself the committee should obtain independent legal advice and avoid advice from the Attorney General, the FCO, the MOD, the Law Officers' Department, Law Lords and government law officers all of whom have taken part in the worst legal deception in history.

23. The committee must establish the truth of the allegation that the Attorney General and Prime Minister deceived Parliament, HM Armed Forces and the nation over the legality of the wars with Iraq and Afghanistan. This can be done by identifying the laws governing warfare and armed conflict and establishing actions that are prohibited or required. A summary of war law is attached [Appendix 1]

24. Once the truth has been established the committee must initiate immediate action in Parliament to halt the killing, rescind the active service orders and recall the armed forces. No further lives must be lost in war.

25. Once the fighting has stopped, the committee should initiate independent criminal inquiries into the wars with Iraq and Afghanistan ensuring that the political, civil and military leaders responsible for planning, initiating or waging the wars and causing the deaths of Iraqi and Afghan citizens are arrested, indicted and tried; that those responsible for misleading Parliament and HM Armed Forces over the legality of war are arrested, indicted and tried; as are those responsible for preparing misleading intelligence reports and those responsible for aiding and abetting the crimes.

26. When criminal proceedings are underway and the architects of the wars and crimes have been indicted, the committee should initiate a wide ranging independent inquiry into Britain's inability to uphold or enforce war law. Why is it that the systems and structures of government in Britain fail to reflect international law? Why do we maintain traditions, conventions, laws and ways of operating that are often several hundred years out of date and inappropriate in a modern democratic society?

27. Utilise £5m from the Conflict Prevention Fund to set up an independent Peace and Conflict Prevention Commission reporting to Parliament and briefed to identify, eliminate and replace the systemic, structural and cultural factors that cause British Governments and political, civil and military leaders to violate the laws of war, renege on international treaties and commit the most serious crimes known to mankind.

28 Finally the committee should recommend new legislation to Parliament governing the conduct of war and the use of armed force. A new War Powers Act should:

i. ensure that a comprehensive high quality decision-making process is followed whenever warfare or the use of armed force is postulated;

ii. reflect the laws of war and the international conventions, treaties and agreements governing the relationships between states;

iii. penalise the use armed force or the violation of war law by British citizens anywhere in the world;

iv. require the UK Government to educate every citizen in the laws of war and their duties and responsibilities in relation to the use of armed force;

v. require military intelligence to monitor the risks of international warfare and report to Parliament and the UN whenever the risks of armed conflict rise to an unacceptable level;

vi. require military expenditure to be reduced to the current level of the aid and development budget;

vii. require military forces to be focussed solely on defence capabilities, eliminating all weapons, policies and practices that cause death or injury, replacing them with 'weapons', policies and practices that temporarily disable or disempower attackers.

The Campaign to Make Wars History is the world's first civil obedience campaign. We are an international alliance of peace activists working together to take lawful non-violent direct action to bring an end to war. By persuading politicians to obey the laws of war, police to enforce war law and the public to uphold war law we will end the killing and return our world to the path of peace, justice and the rule of law.

June 2008

Appendix 1

War Law and War Crimes

The armed invasion and occupation of Iraq is illegal in international and domestic law, violates treaties and renders those involved criminally liable for war crimes.

When the Prime Minister and the Attorney General claimed in 2003 that the war with Iraq was legal and authorised by the Security Council they lied. The use by Britain's armed forces of cruise missiles, rockets, cluster bombs and depleted uranium artillery shells to attack villages, towns and cities in Iraq killing Iraqi citizens violated the International Treaty for the Renunciation of War, the UN Charter and the Rome Statute and constitutes a crime against peace under Article VI of the Nuremburg Principles as well as genocide and a crime against humanity under the International Criminal Court Act 2001.

All war is illegal.

War was outlawed in 1928 by the International Treaty for the Renunciation of War [the Kellogg-Briand Pact]. Sixty three nations including Britain, America, France, Germany and Japan ratified the Pact condemning recourse to war and agreeing to settle disputes peacefully. This treaty is still in force.

ARTICLE I The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
The Kellogg-Briand Pact formed the legal basis for the Nuremburg War Crimes Trials. The attack on Iraq renders Britain's political, civil and military leaders liable for the same crime of waging aggressive war for which Germany's leaders were convicted and hanged in 1946. The judgement concluded:

"After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such war is illegal in international law; and that those who plan and wage such a war with its inevitable and terrible consequences are committing a crime in so doing."

"The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression therefore, is not

only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

The Nuremberg Principles

These seven international war laws derived from the Nuremburg and Tokyo War Crimes Tribunals were adopted as universal statute war law by the United Nations General Assembly in 1950.

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility.

III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility.

IV. The fact that a person acted pursuant to order of his Government or a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

VI. The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Armed attacks on another State are illegal

When Britain signed and ratified the UN Charter we made a binding agreement with every Member State never to threaten or attack them and to settle all disputes peacefully.

2.3 All members shall settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered.

2.4 All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Pre-emptive attacks are illegal. The only legitimate use of armed force is self defence. If an attack occurs a nation may legitimately use proportionate force to defend itself, but it may do so only until the UN Security Council implements measures to resolve the conflict.

The UN Security Council cannot authorise the use of armed force.

The claim that the invasion and occupation of Iraq was authorised by Security Council resolutions 678, 687 and 1441 was a lie. The Security Council is a peacekeeping body and may not use armed force.

41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon its members to apply such measures...

Wilful killing is a crime

At least 80,000 Iraqis including 30,000 children have been violently killed since the war with Iraq began. Wilful killing is a crime and is never condoned or 'right' in law. The Human Rights Act 1998 specifies:

"Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided in law."

Deliberately killing a person because of their nationality is a crime under the Rome Statute of the International Criminal Court. It is never legal for a serviceman to wilfully kill an enemy. Just as it is a crime to explode a bomb in a pub or to fly a plane into the World Trade Centre so it is a crime to deliberately cause the death of another human being. When the first Iraqi citizen died as a result of the actions of Coalition forces those responsible for giving, transmitting, executing or condoning the orders to wage war committed a crime and became criminally liable for every violent death.

Killing Iraqi citizens constitutes genocide.

It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime, or to engage in conduct ancillary to such an act. This applies to acts committed in England or Wales or outside the United Kingdom by a UK national, resident or person subject to UK service jurisdiction[8].

For the purpose of this Statute "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (a) killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

When Coalition armed forces attacked Iraq causing the deaths of thousands of Iraqis every resident of Britain involved in aiding, abetting or executing the decision to wage war became criminally liable for the crimes of 'genocide' or 'conduct ancillary to genocide' and subject to the sanctions of domestic and international law. If a person did anything to aid, abet or assist the commission of the crime, even such things as paying tax, speaking in favour of executing Saddam Hussein or congratulating returning troops for a job well done they committed a crime of conduct ancillary to genocide. You may argue that you did not intend to destroy a national group, but as the legal meaning of intent is defined in the legislation you will find it hard to argue that you were not aware that anyone would be killed.

A person has intent in relation to 'conduct' where he means to engage in the conduct, and in relation to a consequence, where he means to cause the consequence or is aware that it will occur in the ordinary course of events.

Every resident of Britain who condoned, supported or took part in the invasion or occupation of Iraq is bound by the Rome Statute and criminally liable for genocide and conduct ancillary to genocide.

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Everyone has a duty to disobey illegal orders

24. If a person who is bound to obey a duly constituted superior receives from the superior an order to do some act or make some omission which is manifestly illegal, he is under a legal duty to refuse to carry out the order and if he does carry it out he will be criminally responsible for what he does in doing so."

This article from Chapter VI of the Manual of Military Law applies to every British citizen and taxpayer as well as to servicemen and women. It was derived from the Nuremburg War Crimes Trials when Germany's leaders claimed that they were not responsible for the crimes of the German Government as they were following Hitler's superior orders. The judgement rejected their claim.

"It was submitted [by the defendants] that international law is concerned with the action of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised... The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorising action moves outside its competence under international law...

Leaders are responsible for the war crimes of their subordinates.

The International Criminal Court Act makes it clear that no matter who launches the rockets, fires the cruise missiles, drops cluster bombs or deploys depleted uranium shells, responsibility for the resulting deaths, injuries and destruction lies with those who ordered the attack to take place.

65. A military commander, or a person effectively acting as a military commander, is responsible for offences committed by forces under his effective command and control or his effective authority and control... A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.

78. This Act binds the Crown and applies to persons in the public service of the Crown.

Although it is impossible to arrest and try everyone in Britain responsible for war crimes many of Britain's political, civil and military leaders may eventually be arrested, tried and punished as war criminals.

We all have a duty to prevent war

All British residents must abide by their obligations and duties in law and confine their activities to the legitimate path outlined by the UN Charter and the laws of war. To do this residents must

disassociate themselves from any action that can be construed as aiding, abetting or assisting the British Government's use of armed force. Members of the Armed Forces and Civil Service must refuse superior orders contributing to the wars with Iraq and Afghanistan. MPs and Peers must force the Government to end the use of armed force or resign from their seats in Parliament. Taxpayers [Individuals and employers] must withhold taxes from the Inland Revenue until the crimes have ceased and others should report war crimes to the police. The wars with Iraq and Afghanistan in which thousands of innocent men, women and children have been killed are the worst atrocities ever committed by a British Government and they must be stopped. They continue today because too many of us condone or support the Government's illegal actions and fail to take active practical steps to end the killing.

May 2008

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[1] The General Treaty for the Renunciation of War 1928 [Kellogg-Briand Pact]

[2] The United Nations Charter 1945

[3] The Universal Declaration of Human Rights 1948

[4] The Genocide Convention 1948, The International Criminal Court Act 2001

[5] The United Nations Charter 1945

[6] Together with the International Criminal Court [Scotland] Act 2001 these are the domestic criminal laws prohibiting acts of genocide, crimes against humanity and war crimes.

[7] The no-fly zone bombing of Iraq, Kosovo, Sierra Leone, Afghanistan, Iraq.

[8] This is a summary; for the full definition of the offences refer to the International Criminal Court Act 2001 [Sections 50 - 80]

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

EVIDENCE OF THE CIVIL SERVICE COMMISSIONERS

1. On 25 March 2008 the Government launched the White Paper "The Governance of Britain - Constitutional Renewal", accompanied by the draft Constitutional Renewal Bill and the Analysis of Consultations (on previous consultation exercises about the proposals for constitutional change which form the White Paper). The Government invited Parliament and others to consider and comment on the draft Bill, as well as the other proposals in the White Paper. This is the response of the Civil Service Commissioners to the proposals on the Civil Service.

Support for the draft Bill

2. The Commissioners have supported recent calls for a Civil Service Act, for example when giving evidence to the Committee on Standards in Public Life in May 2002 and to the Public Administration Select Committee in July 2003, and in February 2005 in response to the Government's consultation exercise on its draft Bill of November 2004. We believed, and continue to believe, that the constitutional position of the Civil Service and the core values which underpin its work are too important to be left to a Civil Service Order in Council and a Civil Service Code, both of which could be easily changed by a future Government without prior Parliamentary debate and scrutiny. Although the Civil Service exists to serve the Government of the day, it also exists to service successive administrations with equal commitment. To do this effectively, the Civil Service needs to be underpinned by a set of enduring values - honesty, impartiality, integrity, objectivity and selection on merit - and there should be no capability to change those values without the consent of Parliament. We therefore welcome the Government's renewed commitment, as set out in the White Paper, to those values and to setting them in statute. We hope that the draft Bill can be introduced as part of the legislative programme as soon as practicable.

3. In responding to the earlier proposals for a Civil Service Bill, the Commissioners took the view, as did Northcote and Trevelyan in 1854, that a short Bill should be sufficient to secure the core values. We believe Part 5 of the draft Bill meets this requirement. The Bill would:

· enshrine the core values of the Civil Service and selection on merit on the basis of fair and open competition

· require the Minister for the Civil Service to publish a Civil Service Code

· set up the Civil Service Commission:

a) to regulate recruitment to the Civil Service; including, through the publication of the "Recruitment Principles", the Commission's determination of what selection on merit on the basis of fair and open competition means and when exceptions to the principle may be allowed; and

b) to hear appeals under the Civil Service Code

· create the Commission as a corporate body so as to reinforce its independence from the government of the day

· provide for the Minister for the Civil Service and the Commission to agree to the Commission's taking on new roles

· formalise the current arrangement for Special Advisers.

4. We recognise that a balance has to be struck between setting the key principles and values on the face of the Bill and introducing too much detail (which might need to be changed as circumstances change) and that getting the balance right will be key to the success of the Act when it is implemented. We believe the draft Bill broadly strikes the right balance between principle and detail. For example, it enshrines the key principle that there should be a Civil Service Code based on the four core values, but does not put the Code itself on the face of the Bill. This provides flexibility to change the layout and detail of the Code in the light of experience, as the Government did in 2006 following a review of the 1996 Code by a joint working group of Permanent Secretaries and Commissioners. This revision has met with overwhelming approval, but if the Code had been on the face of an Act it might have been difficult to find Parliamentary time to make such changes.

Scope of the Bill

5. There are, though, a number of gaps in the coverage of the bill. These are:

· Promotion on merit. It is a generally accepted principle that civil servants are not only appointed on merit but also are promoted on merit. Indeed, the Civil Service Management Code says "department and agencies must ensure that all promotions and lateral transfers follow from considered decisions as to the fitness of individuals, on merit, to undertake the duties concerned". However, there is no external regulation of how the principle is applied in practice. We think an opportunity would be missed if the principle of promotion on merit and its regulation were not included in the Bill. We are not so concerned about the need to regulate individual lateral transfers, which are often used to broaden a civil servant's experience at the same level. The focus for regulation must be on entry to the Civil Service and promotion within it, particularly to senior posts where appointees have substantial influence.

· The removal of GCHQ. This will mean that the principle of selection on merit and the core values of the Civil Service need not necessarily apply to the department and that civil servants working at GCHQ will no longer be able to raise concerns with the Commission. The Government's draft Bill of 2004 included GCHQ because the Government saw no "operational impediment to [its] inclusion". We do not know what has changed in the four years since then. The Commissioners have chaired a number of senior recruitment competitions at GCHQ and we monitor their compliance with the Commissioners' Recruitment Code for more junior appointments. Although the Commissioners have not heard any appeals from staff at GCHQ since the Civil Service Code was introduced, the facility exists for staff to raise matters with us. As this overall approach has worked well, we are not persuaded by the reasons for changing it. We recognise the wish to bring the security and intelligence services closer together. In our response to the 2004 draft we offered no views on whether or not the Security Service and the Secret Intelligence Service should be included within the scope of the Bill. We did, though, suggest that the Government should consider making both organisations subject to independent regulation. This remains our view.

· Appointments to the senior levels of the Diplomatic Service. These appointments are excluded from the requirement to select on merit on the basis of fair and open competition, and we note that on occasion former politicians have taken up such appointments. It is not clear to us why these appointments to the Civil Service are treated in a different way.

The role of the Commission

6. The powers of the Commission in the draft Bill are based on, and are similar to, those which the Commissioners currently hold under the Civil Service Order in Council 1995 (as amended). In respect of recruitment, these are the powers to interpret through a recruitment code what selection on merit on the basis of fair and open competition means, to permit exceptions to this principle within the framework set by the Order in Council, to audit departments and agencies' recruitment policies and practices to ensure compliance with the recruitment code. The Commissioners also have the authority to approve certain appointments before they are made, which they do for the most part by chairing the recruitment competition for them. In terms of the Civil Service Code, the Commissioners have the power to hear and determine appeals under the Code. The Commissioners are also required to issue an annual report accounting for their work in the previous year.

7. The draft Bill will give the Commission similar powers. The variations, which the Commissioners support, are:

· The Recruitment Principles - the Recruitment Principles will replace the Recruitment Code. The intention of both documents is the same, to publish a set of principles to be applied for the purposes of meeting the requirement of selection on merit on the basis of fair and open competition. However, the Commissioners are taking the opportunity of drawing up a set of Recruitment

Principles to revise the Recruitment Code in order to adopt a more concise approach. This is work in progress.

· The use of exceptions - under the Order in Council the Commissioners have the authority to permit the use of exceptions provided they fall within the framework set in the Order. Under the draft Bill the Commission will have more flexibility to determine the use of exceptions provided they meet the needs of the Civil Service. The Commissioners are taking the opportunity to review their approach to exceptions and their new thinking will be set out in the Recruitment Principles. The Commissioners would also like the Bill to confirm that they have the power to allow exceptions if they are necessary to enable the Civil Service to meet its obligations as a major employer in the United Kingdom.

It may be worth addressing the question: why should there be any exceptions to the principle of selection on merit on the basis of fair and open competition? The vast majority of appointments to the Civil Service are made on merit following fair and open competition. The Commissioners allow exceptions to meet genuine short-term business needs eg a short-term project of several months where the time and costs involved in an open competition can not be justified as they could if the appointment was permanent. We also allow individuals to join the Civil Service on secondment for up to two years on the understanding that they will return to their employer afterwards. And, recognising the Civil Service's responsibilities as a leading employer in the United Kingdom, we allow measures to help the unemployed or those with disabilities. As part of our compliance monitoring of departments and agencies, we ask them about the use of exceptions and who approves them, and in this way audit their use.

· Additional powers - the Government has asked the Commissioners on occasion to take on additional tasks. The draft Bill provides for the Minister of the Civil Service and the Commission to agree that the Commission shall take on additional functions. This will provide flexibility to meet changing circumstances without the need to amend the Bill itself. The Commissioners would expect the Minister to agree that the Commission should continue to undertake the additional tasks which currently fall to the Commissioners. These are:

o advising departments on the promotion of the Civil Service Code and monitoring appeals within departments

o approving all appointments at Permanent Secretary or Director General level (the so called "Top 200" appointments) whether they are made following open competition, internal competition or a managed move.

8. It is also worth noting that the Commissioners believe the opportunity should be taken in the draft Bill to give the Commission specific power to hear complaints that there has been a breach of the principle of selection on merit on the basis of fair and open competition or of the Recruitment Principles. The Commissioners currently hear complaints that there has been a breach of the Recruitment Code even though this is not specifically mentioned in the Civil Service Order in Council.

9. We also think it would be helpful if the Bill were to place the Commission's specific duties in relation to appointments within the broader context of upholding or maintaining the principle of selection on merit. The current Order in Council does this. It would enable the Commission to continue to be able to comment on matters related to but not necessarily directly covered by their statutory duties.

10. The draft Bill does however appear to introduce the potential for confusion in Clause 27. Notwithstanding the provisions on appointments elsewhere in the Bill aimed at ensuring an impartial Civil Service able to serve successive administrations, this clause appears to give the Prime Minister (and the Foreign Secretary in relation to the diplomatic service) the right to appoint and dismiss civil servants. We assume this is not the intention of the clause but would welcome clarification about its purpose and likely effect.

The right to initiate and carry out investigations under the Civil Service Code.

11. There is one issue on which the Commissioners have yet to reach a firm view: the right of the Commissioners to initiate and carry out investigations under the Civil Service Code without first receiving an appeal from a civil servant. We argued for this in response to the 2004 Bill. We did so because we felt too few civil servants were aware of the Code and the implications for their work. We were also concerned that civil servants might be constrained from pursuing issues for fear of the impact on their careers. We therefore had limited confidence in a mechanism which relied on individual civil servants taking the initiative.

12. We have reflected on this for the following reasons:

- following the re-launch of the Code in 2006, civil servants are undoubtedly now more aware of the core values of the Civil Service and the Code's provisions for raising issues under it

- we have worked with departments and agencies on the promotion of the Code, though there is clearly more to be done

- we will be working with departments and agencies to ensure that the processes they have in place for handling appeals are user-friendly.

13. Taking these factors into account, we expect the number of appeals to go up, and we have seen early signs that this is happening. We take the view that it must be better if civil servants feel able to raise issues in departments and with us, which should help to prevent things going wrong in the first place, than for us to look at problems afterwards.

14. We also remain concerned - as we were in 2004 - that if the Commissioners had the formal power to initiate inquiries under the Code, we would be swamped by disgruntled customers of the departments and agencies, members of the public or the media asking for investigations, many of which would turn out not to be Code matters. There would be a risk that the Commission would be diverted from its core tasks. We also note and have sympathy with the view expressed by the Rt Hon Ed Miliband MP, when giving evidence to the Public Administration Select Committee (PASC) on 29 April 2008, that this "cottage industry" might lead to the politicisation of the Commissioners' role. The resource implications would also be significant.

15. We do, though, recognise there will be occasions in which it would be right for the Commission to carry out an investigation, if there were prima facie evidence of a significant breach of the Code. We, therefore, think that the approach suggested by the PASC in their report on the draft Bill that, in addition to the duty to consider complaints from civil servants, the Commission should have the discretion to investigate matters in other circumstances, might offer the right balance. We envisage that the Commission would want to exercise that discretion only in cases where the burden of suspicion was substantial.

Special Advisers

16. The draft Bill reflects the current approach towards Special Advisers. It:

· excepts Special Advisers from the principle of selection on merit on the grounds that they are personal appointees of Ministers and in view of the personal and temporary nature of their work

· excepts them from the provisions of impartiality and objectivity, thus recognising their allegiance to the Governing party and that they are not expected to retain the confidence of future governments of a different political complexion

· confirms that no Special Adviser will have executive powers over civil servants.

17. The Commission supports this approach. We agree in particular that Special Advisers should not be selected on merit on the basis of fair and open competition given the nature of their personal relationship with the appointing Minister and the fact that their appointment lasts only as long as the appointment of the Minister.

18. We have argued since 1997, when the provision was introduced, that no Special Adviser should have executive powers. We therefore welcome the confirmation provided by the draft Bill that the Prime Minister's decision in 2007 to remove such powers will be enshrined in statute. We further argued in relation to the 2004 draft Bill that Special Advisers should not be able to commission work from civil servants. We continue to take that view. Allowing Special Advisers to commission work from civil servants confuses the line of accountability: Special Advisers are there to add political comment, not to run the department. Any commissioning of work should be done by the Minister's private office. We therefore support the proposal by PASC that that the role of Special Advisers could be clarified still further in the legislation by making it clear that they should not be able to authorise expenditure, nor exercise either management functions or statutory powers.

19. In line with the Government's thinking over the last few years, the Bill does not propose a cap on the number of Special Advisers. The Commissioners have supported this approach and continue to do so, believing it to be more important that the boundary between the work of civil servants and that of Special Advisers is clear. To this end, we have supported the changes the Government has made to the model contract for Special Advisers and their Code. It is why we believe the removal of executive powers to be so important. We also recognise the temptations provided by a cap: it would have to be higher than the current number of Special Advisers to allow for some flexibility; and there would be pressure to appoint Special Advisers up to the number allowed by the cap. We do, though, acknowledge a lacuna: a future government would be free to appoint as many Special Advisers as it wished, subject only to Parliamentary and public concerns. We also recognise that in terms of the influence a Special Adviser can exert, a more apposite comparison in purely numerical terms is not necessarily between 70 or so Special Advisers and the 4,000 or so members of the Senior Civil Service but between the 70 or so Special Advisers and the Top 200 or, possibly, Top 600 civil servants. We do not propose an answer, though we note the suggestion from others that, at the start of an Administration, Parliament should agree the number of Special Advisers that can be appointed.

Setting up the Commission

20. The draft Bill proposes setting up the Commission as a corporate body so as to demonstrate its independence from the government of the day. We understand the Commission will take the form

of an executive Non Departmental Public Body sponsored by the Cabinet Office. We recognise that there is no such thing as complete independence and generally support the Government's proposals. However the issue of independence is crucial to how the Commission will in future be perceived, and are attracted to the approach which PASC has mentioned in their report of a specific legislative provision to safeguard the Commission from Government interference in the exercise of its functions. We are content with the proposals for the appointment of the First and other Commissioners on single terms of up to five years, though we would like the schedule to state explicitly that Commissioners are selected on merit on the basis of fair and open competition, which would further underpin their independence, and to recognise that the First Commissioner currently has a much greater role in the appointment of the other Commissioners than is allowed for in the draft Bill.

21. We would also like the draft Bill to make provision for the payment of pensions and compensation for loss of office to all Commissioners and not just the First Commissioner. Although we have no intention of asking the Minister for the Civil Service to extend these provisions to the current Commissioners who are part-time, paid on a fee basis and have a portfolio of other interests, it is possible that the nature of the Commissioners may change over time, and we should allow for such flexibility now. If, for example, we were to move to having fewer Commissioners who worked on a more full-time basis than now, it would seem equitable to change their terms and conditions of service to reflect this.

22. A key aspect of the Commission's independence will be the provision of sufficient funding to enable it to meet its responsibilities effectively. The draft Bill provides for the Minister of the Civil Service to pay to the Commission the sums he determines as appropriate to enable it to carry out its functions. Undoubtedly, the First Commissioner will comment publicly if she thinks the Commission has not been given sufficient funding. However, it would help to emphasise the Commission's independence if the First Commissioner was required by the draft Bill to report annually on the adequacy of the funding.

23. The Commissioners are currently discussing these matters with the Cabinet Office.

Conclusion

24. The Commissioners welcome the publication of the draft Bill and the scrutiny provided by both PASC and the Joint Committee. We support the provisions in the draft Bill which affect the Civil Service and look forward to its early introduction into Parliament. We do, however, believe there are ways in which the draft can be improved and the opportunity should be taken to do this. We stand ready to discuss our views further with the Government and with Parliament.

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Global Witness Submission to the Joint Committee on the Draft Constitutional Renewal Bill

Global Witness would like to take this opportunity to express our serious concerns with respect to the *Draft Constitutional Renewal Bill* ("Bill") Part 2 "Ground Rules for Attorney's Superintendence of Directors."

Global Witness is a London-based non-governmental organisation which exposes the corrupt exploitation of natural resources and international trade systems. We obtain evidence which we use to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was co-nominated for the 2003 Nobel Peace Prize for its work on "conflict diamonds".

Global Witness strongly takes the position that a system of accountability, government checks and balances, and independence of the judiciary, is essential to end the impunity of those who engage in corrupt and other illegal activities. And it is because of this position that we feel obligated to respond to the Joint Committee's call for evidence on the Bill.

Global Witness' concerns regarding Part 2 of the Bill:

Global Witness expressly endorses The Corner House's submission to the Joint Committee.[1] In addition we submit the following:

Section 2 Ban on directions in individual cases

Global Witness believes that there should be no exception to this principle.

Section 3 Protocol for running of prosecution services

Global Witness believes that the protocol should be subject to parliamentary debate and regular monitoring by the Parliamentary Select Committee. We also take the view that the circumstances in which the Attorney General is to be consulted or provided with information should be limited.

In addition, Global Witness believes that a timeframe should be established for the review and revision process of the protocol and that Parliament should be able to amend the protocol after debate.

[1] *Submission to the Joint Committee on the Draft Constitutional Renewal Bill* submitted by The Corner House is attached as Annex "A"

Section 4 to 6 New provisions about tenure of office of Directors

Global Witness thinks that it is inappropriate for the Directors to be appointed by the Attorney General as long as s/he remains a member of the Executive. We agree that the selection criteria for Directors should be fully transparent and that the decision to remove the Directors should be subject to an independent and impartial review.

Sections 12 – 15 Safeguarding of national security

Global Witness would like to express our serious concerns regarding the Attorney General's power to intervene and issue directions to stop *any* prosecution and Serious Fraud Office ("SFO") investigation on the grounds of national security. This power is too discretionary and without sufficient parliamentary and judicial oversight, and is presented as a statutory right without checks and balances.

The following sections are of specific concern:

- 12(1) - There are no limits with respect to the types of prosecutions that can be stopped since this power of direction can apply to *any* prosecution and SFO investigation.
- 12 - There is no regular review of the Attorney General's directions to stop any prosecutions and SFO investigation.
- 12(2) - The terms upon which the Attorney General can withdraw a direction are not stated and therefore cannot be scrutinised.
- 13(3) - There is no provision for the Directors or any prosecutor to oppose a direction once issued by the Attorney General; furthermore that individual can be subjected to criminal prosecution if s/he refuses to provide requested information.
- 13(4) - The role of the court is unclear with respect to situations where a prosecutor fails to comply with a direction issued by the Attorney General.
- 13(5) – The terms regarding the certificate are weak and insufficient, particularly as there is no built-in peer review mechanism of the basis on which the chosen Minister of the Crown issues it. This is especially disconcerting given that the certificate serves as conclusive evidence as to whether or not the direction was necessary for the purpose of safeguarding national security in the first place. For these reasons, Global Witness believes that the use of certificates should be withdrawn or revised.
- 14 - There is no specified timeframe or limit for the Attorney General to provide a report to Parliament. There are also no requirements to include in the report the nature of the information that caused the direction to be brought in the first place; in fact, the relevant information can be omitted. Without this information the report would in essence be a statement of fact advising Parliament that the Attorney General had issued a direction.
- 15 - The power of the Attorney General to request information is absolute and any person refusing to do so "without reasonable excuse" would be subject to criminal prosecution.

Section 16 Annual reports on exercise of Attorney General's function

Global Witness is concerned that there would be no effective parliamentary oversight of the exercise of the Attorney General's functions due to the opacity of the annual reporting requirements.

Section 17 Interpretation

Global Witness is concerned that the wording "relations" in (a) and "interests" in (c) are too vague and open to misapplication and, therefore, should be removed.

Global Witness' concerns relating to repercussions of the Bill

Global Witness believes that the introduction of this Bill would have a seriously negative effect on the UK's ability to investigate and prosecute a large variety of crimes. The power of the Attorney General to

halt any prosecution and SFO investigation without clearly defined limits, oversight and accountability is a dangerous precedent that we believe the UK Government would object to in other jurisdictions.

We think that the sections of the Bill, highlighted above, could have a disastrous effect on the good reputation the UK Government has internationally. This reputation is as a result of its active and positive contribution to the fight against international crimes, especially in the area of corruption, for example:

- The efforts to both launch and operationalise the now international effort to create transparency for revenue streams from the extractive sector: The Extractive Industries Transparency Initiative ("EITI"). Though the EITI Secretariat has now moved from its London DFID base to Oslo, the UK has continued to play a very constructive role in this process.
- The establishment of: i) the City of London Police's Overseas Anti-Corruption Unit to investigate allegations of bribery offences committed by UK companies in foreign jurisdictions; and ii) the Metropolitan Police's unit that investigates and uncovers the proceeds of corruption in London in cooperation with anti-corruption commissions in the country of origin.

Unfortunately, Global Witness has experienced first-hand how the UK's reputation has been tarnished by the Government's intervention to stop the SFO's investigations into the Saudi Arabia component of its wider BAE corruption investigation. It is hard to overstate the extent of the damage this has caused. Global Witness plays a significant role in a number of multi-stakeholder initiatives, such as the EITI and Kimberley Process, and also attends numerous high-level anti-corruption meetings. We have lost count of the number of occasions when within debate, we have been presented with the hypocrisy and contradiction of the UK's actions and rhetoric.

A further concern is that this Bill, with its use of a vague and open-ended definition of international relations and a lack of clarity on national security, could be used to avoid any scrutiny and debate about a decision made by the Executive. We feel the unintended consequences of the Bill combined with the UK Government's recent actions have further reduced its capacity to comment or prevent other countries from attempting a similar approach to block high-level legal cases.

In order to illustrate our concerns, the following are two of many potential examples related to our work that could be faced if the current version of the Bill passes:

- It is possible that the Attorney General could block an investigation into bribery by UK oil companies for new oil concessions, out of concern about security of oil supply as a matter of national security. Global Witness can already point to some examples where such investigations should have been conducted. If this Bill passes, would it undermine the possibility for any prosecution and SFO investigation?
- What position would the Attorney General take regarding the potential for money laundering investigations into key well-connected brokers, currently residing in the UK? Here we are referring to individuals we have identified in our investigations as playing key roles in the brokering of illegal arms deals and the asset-stripping of foreign countries. Very often such individuals also play a brokering role for access to concessions in corrupt countries for UK (and others) companies – could such matters be defined by the Attorney General as matters of national security because of their commercial "interests" and the importance of the "relations" with the said country?

Global Witness hopes that the members of the Joint Committee on the Draft Constitutional Renewal Bill will carefully consider the national and international implications of the Bill in its current form. We appreciate the opportunity to make this submission.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

MEMORANDUM BY THE HOME OFFICE

This Memorandum sets out the Home Office's position on the main relevant legislation that would apply to policing protest around Parliament should sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCAP) be repealed. This does not comprise an exhaustive list of possible applicable legislation.

POLICING PROTEST FRAMEWORK

a) Public Order Act 1986: Sections 11,12 and 14

1. If the SOCAP provisions were repealed the Public Order Act 1986 would apply to the policing of static demonstrations and marches around Parliament as it does elsewhere in England and Wales. Sections 11 & 12 of the Public Order Act covering processions (marches) already apply around Parliament.

2. Section 11 of the Public Order Act 1986 requires the organisers of public processions to give written notice to the police 6 days in advance, giving the date, time and route of the march and name and address of person organising it, unless not reasonably practicable.

3. Sections 12 & 14 of the Public Order Act give the police the power to impose conditions on public processions and public assemblies, as appear necessary to prevent:

§ serious public disorder,

§ serious damage to property,

§ serious disruption to the life of the community, or

§ the intimidation of others with a view to compelling (see paragraph 31) them not to do an act they have a right to do.

4. In the case of processions, the conditions that can be imposed are not specified but may include conditions as to the route to be followed or prohibiting the procession from entering any specified public place etc.

5. In the case of assemblies, conditions which can be imposed are limited to those governing:

§ the place where the assembly may be held;

§ the maximum duration; and

§ the maximum number of participants.

6. A public assembly is defined in the Public Order Act as an assembly of 2 or more persons in the open air. Currently, under SOCAP a demonstration in the vicinity of Parliament can consist of one person. The powers can be exercised in advance or once the procession or assembly has begun. A person who organises or takes part in a public procession or public assembly who knowingly fails to comply with a condition imposed by a police officer is guilty of an offence.

7. By way of example, if two competing demonstrations occurred around Parliament, the police could impose conditions to prevent serious public disorder on the organisers or those taking part in either demonstration if they had good reason to think that the demonstrations might result in serious public disorder etc and where those directions appeared necessary to prevent it.

8. Equally, if a protest started becoming violent or a crowd of protestors decided to storm Carriage Gates, the police would have powers to impose conditions on the basis of preventing serious public disorder. In addition to powers to impose conditions, the police would be able to arrest a person involved in the commission of a criminal offence if there were reasonable grounds for believing that the person's arrest was necessary for ascertaining the person's name and address (where they cannot otherwise readily be ascertained), or preventing either physical injury, loss or damage to property, public indecency or an unlawful obstruction of the highway.

b) The Metropolitan Police Act 1839: Section 52

9. Additionally, the Commissioner has powers under section 52 of the Metropolitan Police Act 1839 to make regulations from time to time, and as occasion shall require, for preventing obstruction in the streets during public processions etc and to give directions to the constables for keeping order and for preventing any obstruction of the thoroughfares in the immediate

neighbourhood of her Majesty's palaces and the public offices, the High Court of Parliament, etc and in any case when the streets or thoroughfares may be thronged or may be liable to be obstructed.

10. The 1839 Act could be used to give constables directions to prevent disorder around Parliament and to keep access to the Houses of Parliament free from obstruction, for example. But any directions issued would need to be reasonable, proportionate and balanced to meet ECHR requirements.

Section 54 - Prohibition of nuisances by persons in the thoroughfares

11. Every person shall be liable to a penalty not more than [level 2 on the standard scale], who, within the limits of the metropolitan police district, shall in any thoroughfare or public place, commit any of the following offences; (that is to say,)

9. Every person who, after being made acquainted with the regulations or directions which the commissioners of police shall have made .....for preventing obstructions during public processions and on other occasions herein-before specified, shall wilfully disregard or not conform himself thereunto:

14. Every person, . . ., who shall blow any horn or use any other noisy instrument, for the purpose of calling persons together .....

[There are 17 nuisances listed under section 54. The two set out above are the most relevant in relation to protests]

12. It is important to note that the Sessional Order on the Commissioner has no effect beyond the walls of Parliament. While it can provide an indication of the House's expectations of the Commissioner, it confers no powers on the Commissioner. It should not be confused with the provisions of section 52 of the Metropolitan Police Act 1839.

13. The directions of the Commissioner should be understood to relate to those assemblies which are capable of being obstructive etc (i.e. in accordance with section 52 of the Metropolitan Police Act, irrespective of the wording of the sessional order) or else risk being ultra vires. [Papworth v Coventry 1967]

c) Local Authority Byelaws

14. The byelaws which apply to Parliament Square Garden under the Trafalgar Square and Parliament Square Garden Byelaws 2000 would continue to apply as they do for Trafalgar Square.

These byelaws require prior notification and permission by the Mayor for assemblies on the Garden [see paragraph 35 for details].

OTHER POTENTIALLY APPLICABLE LEGISLATION

15. As well as setting out the powers the police have to manage protests, the Public Order Act also includes a range of criminal offences associated with public disorder that would apply on repeal of SOCAP as they currently apply. There is also other legislation that can potentially apply to criminal acts committed in the course of a demonstration.

a) Sections 1 to 5 of the Public Order Act 1986

16. Section 1 - offence of riot where a group of twelve or more people use or threaten unlawful violence for a common purpose and the conduct of them taken together is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. It's rare for a charge of riot to be brought.

17. Section 2 - offence of violent disorder where a group of three or more people use or threaten unlawful violence and; the conduct of them taken together is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

18. Section 3, - offence of affray where a person uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. In order to prove this offence the threat of unlawful violence has to be towards a person present at the scene.

19. Section 4 of the Public Order Act 1986 contains the offence of using threatening, abusive or insulting words or behaviour or displaying threatening abusive or insulting writing or signs. The behaviour must be directed to a person with intent either to cause him to believe immediate unlawful violence will be used; or to provoke such violence; or to cause him to believe such violence will be used.

20. Section 4A of the 1986 Act also criminalises the use or display of such words or behaviour. The person must intend to cause harassment, alarm or distress and must actually do so. It is a defence for the accused to show his conduct was reasonable. Taking photographs or video film of a person in a 'threatening' manner could constitute an offence under this section.

21. Section 5 of the 1986 Act makes it an offence to use or display such words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress. The conduct need not be directed against a particular person but the accused must intend his words or behaviour to be threatening, abusive or insulting or be aware that they may be. It is a defence to show that there was no reason to believe there was anyone within sight or hearing likely to be caused harassment, alarm or distress. It is also a defence if the accused can show his conduct was reasonable. A police officer can be caused harassment, alarm or distress under this section, and the offence does not require the act causing harassment alarm or distress to be directed towards the officer.

b) Protection from Harassment Act 1997

22. Pursuing a course of conduct (including verbal conduct) which amounts to harassment of another, including alarming, distressing or putting in fear of violence will be an offence under section 2 or 4 of the Protection from Harassment Act 1997.

23. It is an offence under section 2 of the Protection from Harassment Act 1997 to pursue a course of conduct which amounts to harassment of another (or of two or more persons, where the intention is to deter them from carrying out lawful activities - this was added by section 125 of the Serious Organised Crime and Police Act 2005) - harassment includes alarming or causing a person distress and conduct includes speech. An intention to cause harassment is not necessary, but it is necessary to show that a reasonable person would think the behaviour amounted to harassment. It is a defence to show that the course of conduct was reasonable in the particular circumstances.

24. It is an offence under Section 4 of the Act to pursue a course of conduct causing another to fear that violence will be used against him. The court may make a restraining order on conviction for either offence and a victim of harassment may take civil proceedings under the Act for an injunction and damages for any resulting anxiety or financial loss. The perceived limitations of the powers are that they require a "course of conduct" which in the case of harassment of a single person means conduct on at least two occasions and in the case of harassment of two or more persons, means conduct on at least one occasion in respect of each person.

25. The course of conduct could include aiding, abetting, counselling and procuring such harassment ('collective harassment') by virtue of s7 of the Act as amended by the s43 of the Criminal Justice and Police Act 2001.

c) Breach of the Peace

26. There is a breach of the peace wherever (even on private premises):

§ harm is actually done, or is likely to be done, to a person, whether by conduct of the person against whom a breach of the peace is alleged or by someone whom it provokes; or

§ harm is actually done, or is likely to be done, to a person's property in his presence; or

§ a person is genuinely in fear of harm to himself or to his property in his presence as a result of an assault, affray, riot or other disturbance.

27. The common law power to arrest to prevent a breach of the peace may also be available, but only where an imminent risk of violence could be established

d) Obstructing police officers

28. Resisting or obstructing a police officer in the execution of his duty is an offence under section 89 of the Police Act 1996.

e) Trade Union and Labour Relations (Consolidation) Act 1992

29. Under section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992, it is an offence to do any of the following wrongfully and without legal authority and with a view to compelling a person to do or abstain from doing anything he has a right to abstain from or do:

§ to use violence, intimidate a person or his family or injure his property;

§ persistently follow him;

§ hide tools or other property;

§ watch or beset his house or other place where he is;

§ follow him in a disorderly manner.

The offence does not have to be connected to a trade dispute.

30. The behaviour must be "wrongful" i.e. it must amount to a civil wrong such as nuisance, intimidation or trespass. .

31. The section has its origins in the Conspiracy and Protection of Property Act 1875 and is most obviously relevant in the context of trade disputes. However, it is not limited in its terms to such a dispute and one of the leading cases concerns a demonstration outside an abortion clinic. That case (DPP v Fidler 1 WLR 91) may also illustrate the difficulties in prosecuting for the offence in the context of pickets and demonstrations as it turned on the difference between "compelling" and "persuading". The defendants argued successfully that their actions were designed to persuade, not to compel women not to have terminations. The offence will also only be available where the protestors' action is tortious. If the demonstration is entirely peaceful and does not involve trespass or intimidation or amount to a public nuisance, no offence under section 241 may be committed.

ISSUES ARISING FROM PERMANENT DEMONSTRATIONS

a) Unlawful Obstruction of the Highway

32. Under section 137 of the Highways Act 1980, if a person without lawful authority or excuse in any way wilfully obstructs the free passage along a highway, he is guilty of an offence and liable to a fine not exceeding level 3. The onus is on the prosecution to prove that the defendant was obstructing the highway without lawful authority or excuse. A constable may arrest a person where necessary to prevent unlawful obstruction of the highway under section 24 of the Police and Criminal Evidence Act.

33. In October 2002, Westminster City Council's claim for an injunction to remove Brian Haw's display of banners which they alleged was an obstruction of the highway was dismissed on the basis that the Claimant's use of the highway was not unreasonable in the circumstances, having regard in particular to his right to freedom of expression under Article 10 of the European Convention on Human Rights 1950 ("ECHR"): Westminster City Council v Haw [2002] EWHC 2073 (QB).

34. Article 10 cannot be used to circumvent highway regulations, but it is a significant consideration when assessing the reasonableness of any obstruction to which protest gives rise. Courts also account for the duration, place, purpose and effect of obstructions.

b) Byelaws - Trafalgar Square and Parliament Square Garden Byelaws 2000

35. These are enforced by the heritage wardens employed by the Greater London Authority. Section 5 lists the acts within the Squares for which written permission is required. These include:

5. Unless acting in accordance with permission given in writing by -

(a) the Mayor, or

(b) any person authorised by the Mayor to give such permission

no person shall within the Squares-

5) use any apparatus for the transmission, reception, reproduction or amplification of sound, speech or images, except apparatus designed and used as an aid to defective hearing, or apparatus used in a vehicle so as not to produce sound audible to a person outside that vehicle, or apparatus where the sound is received through headphones;

7) camp, or erect or cause to be erected any structure, tent or enclosure;

10) organise or take part in any assembly, display, performance representation, parade, procession, review or theatrical event;

36. Breach of these bye-laws is an offence punishable on summary conviction with a fine not above level 1 of the standard scale (s385(3) Greater London Authority Act 1999).

POWERS TO MANAGE SECURITY RISKS/RISKS TO PUBLIC SAFETY

37. The Joint Committee asked witnesses about the implications of the police losing powers to impose conditions on a protest to prevent a security risk and a risk to public safety if sections 132 to 138 of SOCAP were repealed.

38. If SOCAP were repealed, the police would not have a specific power to impose conditions on a public procession or assembly on the grounds of a security or public safety risk under sections 12 & 14 of the Public Order Act 1986.

39. As set out in paragraph 3, sections 12 & 14 of the Public Order Act 1986 give the police the power to impose conditions on public processions and public assemblies, as appear necessary to prevent:

§ serious public disorder,

§ serious damage to property,

§ serious disruption to the life of the community, or

§ the intimidation of others with a view to compelling them not to do an act they have a right to do.

40. The Home Office view is that preventing public safety risks can be managed under the criteria for imposing conditions outlined above, to the extent that they fall within preventing serious public disorder and that the measures available would be effective.

41. In so far as preventing a risk to security is concerned, since sections 132 to 138 of SOCAP came into force, physical security measures around Parliament have been increased. There are operational measures in place for the protection of the Government Security Zone including regular mobile and foot patrols of the area and certain sites.

42. Other measures to manage security risks around Parliament are set out below:

a) Trespass on designated sites

43. Sections 128 to 131 of the Serious Organised Crime and Police Act 2005 created the offence of criminal trespass on a protected site. On 1 June 2007 an order designating a number of sites as protected sites came into force. The order included the Palace of Westminster and Portcullis House.

b) Section 60 of Criminal Justice and Public Order Act 1994

44. Section 60 of the Criminal Justice and Public Order Act 1994, as amended by the Knives Act 1997, gives the police powers to stop and search in anticipation of violence.

45. Section 60 (1) contains a power under which if a police officer of or above the rank of inspector reasonably believes:

§ that incidents involving serious violence may take place in the locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or;

§ that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason,

46. The officer may give an authorisation that stop and search powers without suspicion can be used in a defined area for a specified period not exceeding 24 hours.

c) Section 44 of the Terrorism Act

47. An authorisation under section 44 of the Terrorism Act gives the police the power to stop and search pedestrians, vehicles, drivers and passengers for the purposes of preventing terrorism. Authorisations must be confirmed by the Secretary of State within 48 hours in order for it to remain valid after that period. The powers can be authorised in particular locations and for a particular period of time.

NOISE NUISANCE

48. Section 137 of the Serious Organised Crime and Police Act 2005 bans the use of loudspeakers at any time and for any purpose (subject to a number of exceptions, including where consent of local authority has been granted) within the designated area around Parliament.

48. Repeal of section 137 will remove the general offence for using a loudspeaker in the designated area. Repeal of SOCAP will also remove the police's power to impose requirements as to maximum permissable noise levels where necessary to prevent disruption to the life of the community (section 134 (4) (f)) The use of loudspeakers will continue to be governed under Section 62 (1) of the Control of Pollution Act 1974 and section 8 of the Noise and Statutory Nuisance Act 1993. Section 62(1) of the Control of Pollution Act makes it an offence to operate a loudspeaker in a street between the hours of 9pm and 8 am, for any purpose.

50. However, under section 62(3A) of the 1974 Act, subsection 1 does not apply to the operation of a loudspeaker in accordance with a consent granted by a local authority under Schedule 2 to the Noise and Statutory Nuisance Act 1993. In other words, the 1993 Act allows a person to apply to the local authority to use a loudspeaker between 9pm and 8 am but the consent may itself be subject to conditions.

51. Section 2 of the Noise and Statutory Nuisance Act amended section 79 (1) of the Environmental Protection Act to make noise in street a statutory nuisance. It added paragraph (ga) to the list of statutory nuisances in subsection 1,"noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street". However subsection 1 (ga) does not apply to noise made by traffic, by any naval, military or air force of the Crown or by a visiting force; or by a political demonstration or a demonstration supporting or opposing a cause or campaign.

52. Use of amplification equipment on Parliament Square Garden requires the prior permission of the Mayor of London under the Trafalgar Square and Parliament Square Garden Byelaws.

53. The Joint Committee asked witnesses what powers would be available to the police and others to prevent noise disturbance upon repeal of section 137 of SOCAP. It was suggested that the police already had powers under section 14 of the Public Order Act to impose a condition on the maximum duration of an assembly, on the grounds that use of a loudspeaker was causing serious disruption to the life of the community.

54. The Home Office simply notes that it would be a question of fact as to whether individuals were causing sufficient disruption to the life of the community with loudhailers to justify the police imposing a condition on the basis of disruption to the life of the community and whether, consequently, a condition could be imposed limiting the duration of an assembly. As there would be no specific power to impose conditions limiting the use of a loudspeaker, the only option would be to tolerate the loudspeaker, or to limit the whole assembly. There may be questions about whether limiting the whole assembly is a proportionate response to loudspeaker noise.

55. The police would additionally have to recognise the exemption of noise from political demonstrations as a statutory nuisance under the Noise and Statutory Nuisance Act 1993, as well as any local authority consent that had been granted under the 1993 Act.

POWERS OF ARREST

56. In accordance with section 24 of the Police and Criminal Evidence Act (PACE) a constable may, without warrant, arrest a person involved or suspected of involvement or attempted involvement in the commission of a criminal offence if there are reasonable grounds for believing that the person's arrest is necessary for one of the specified grounds at s24(5) PACE. These grounds include ascertaining the person's name and address (where they cannot otherwise readily be ascertained), and preventing either physical injury, loss or damage to property, public indecency or an unlawful obstruction of the highway. It is the latter ground (at s24(5)(v) PACE) which is of most obvious relevance in the context of large protests.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by ILEX

Role of the Attorney General and Judicial Appointments

The Institute of Legal Executives (ILEX) is the professional and regulatory body for Legal Executives lawyers and currently has a membership of 24,000 students and practitioners.

Legal Executive Lawyers are employed within solicitors' firms to conduct specialist legal work. Amongst other things, Legal Executives lawyers undertake the following work:

· Advice and representation to clients accused of serious or petty crime;

· Advice and representation to families with matrimonial problems;

· Handling various legal aspects of a property transfer;

· Assist in the formation of a company;

· Be involved in actions in the High Court and county courts;

· Draft wills;

· Undertake the administration of oaths.

Under the Tribunal, Court and Enforcement Act 2007, Legal Executive lawyers will be eligible for appointment as Deputy District Judges and in 2010 District Judges.

Executive Summary

Role of the Attorney General

· ILEX is of the view that the Attorney General (AG) needs to at the heart of government so that he or she has a genuine understanding of the wider policy context in which the government is acting. As such, ILEX, therefore, accepts the importance of the AG being a member of, and directly accountable to, Parliament.

· A wholly independent AG might stop conflicts of interest issues from arising, but will create important issues of accountability.

· The status quo has worked reasonably well and with the extra layer of checks and balances envisaged in the Bill, the perceived conflicts might be reduced, although never entirely alleviated.

Powers of the Attorney General

· ILEX agrees with the proposal in the Bill to provide that the AG's function of superintending the prosecuting authorities does not entail an ability to give a direction in relation to individual cases, including the abolition of the power to enter a nolle prosequi.

· Provision needs to be made for an exceptional category of cases, namely those which implications for national security. The requirement for the AG to give a report to Parliament will increase transparency in such cases.

Cabinet Meetings

· ILEX is of the view that the AG should only attend the Cabinet to give the Cabinet legal advice as required. Further, all relevant papers as a matter of cause should be sent to the AG. This would also enable the AG to decide whether legal issues arise necessitating her attendance.

Attorney General Legal Advice

· There should be a general presumption against disclosure. However, there should be an exemption to this general rule in grave and serious cases, for example, where armed conflict is involved and men and women might be sent to war.

Role of the Attorney General

1. Is the Government's approach to the reform of the Attorney General's role and powers right?

1.1 The brief of the Attorney General has three traditional roles:

i. overseeing prosecutions

ii. imparting legal advice to the government; and

iii. sitting in government as a minister of the Crown.

1.2 In light of the fact that the former Attorney General (AG) was subjected to continual and sustained accusations of conflicts of interests throughout his tenure in office, ILEX is of the view that it is reasonable that the AG's role is reviewed in order to maintain public confidence. That said, however, it is important for the government to bear in mind that the current role of the AG has worked reasonably well with its implied checks and balances for many years save for the recent accusations of conflict. Importantly these accusations would have been made whoever was in office at the time.

1.3 As the Constitutional Affairs Committee (now the Justice Committee) observed:

'Allegations of political bias, whether justified or not, are almost inevitable given the attorney general's seemingly contradictory positions'[1]

1.4 Given the above, ILEX recognises the difficulty in retaining public confidence whenever there is an appearance of conflict of interest, whether imagined or real. As such, putting the position of the AG under statutory footing by of Parliamentary reporting and the taking of an oath may, indeed, provide another layer of checks and balances than hitherto provided. Abolishing the power to give directions in individual cases will also help build public confidence in the role of the AG.

1.5 The important issue is striking the right balance between someone wholly independent and someone with a good grasp of policy considerations who is at the heart of government, and accountable to Parliament. ILEX is of the view that an AG with a good grasp of governmental policy issues does not necessary mean that an AG would be susceptible to undue political influence. As the paper 'Governance of Britain - Constitutional Renewal' points out there has been no suggestion that any law officer in modern times has in fact taken a decision on the basis of political considerations has been substantiated[2].

1.6 The AG needs to be at the heart of government so that she or he has a genuine understanding of the wider policy context in which the government is acting.

1.7 ILEX, therefore, accepts the importance of the AG being a member of, and directly accountable to, Parliament. The status quo has worked reasonably well and with the extra layer of checks and balances envisaged in the Bill, the perceived conflicts might be reduced, although never entirely alleviated.

2. Compared with the current situation, are the powers of the Attorney General increased or decreased under the proposals in the Draft Bill? In particular, are the Government's proposals for a statutory power to intervene to safeguard national security appropriate? To what extent can this power be subjected to judicial review or held to account within Parliament?

2.1 ILEX recognises the difficulties that the above contradictory roles can create. For example, unless there is a public perception that the AG is a wholly independent figure detached from Executive decision making, the difficulty of the AG stopping a prosecution for national security grounds, without it appearing it is done for political reasons will continue to be problematic. Although, a wholly independent AG might resolve the conflict issue, a wholly independent AG will raise issues of accountability.

2.2 The option, as the 'Governance of Britain - Constitutional Renewal paper', together with the proposed Draft Bill makes clear, is to legislate that the superintending role of the AG does not extend to giving directions in individual cases. ILEX supports this proposal.

2.3 ILEX also notes that the power to stop a prosecution on National Security Grounds will, however, be put on a statutory footing under the proposed Bill. ILEX has no objections to this as

long as there is proportionate transparency having regard to the full circumstances of the case and for the public to know why a particular decision was taken in those exceptional cases (see below).

3. The Draft Bill requires the Attorney General to lay an annual report before Parliament. Will this increase the Attorney General's accountability to Parliament? Are additional measures needed?

3.1 ILEX favours accountability and transparency as being in the public interest in central government decision making. To this end, ILEX sees the requirement to lay an annual report to Parliament as increasing transparency in the role of the AG. However, the government must bear in mind that it is not the legal advisor that is normally accountable for the giving of that advice but the people who act on it.

3.2 As Lord Falconer rightly observed:

"In every other area the person who is accountable is not the person who gives the advice but the person who takes and acts on the advice"[3]

3.3 In view of the above, there must be a clear framework as to the purpose and objectives of the annual report. Draft clause 16 of the Bill does not make it clear, for example, whether the purpose is to increase accountability in the role of the AG.

4. Do the proposals strike the right balance between accountability of the Attorney General to Parliament for prosecutions and the independence of prosecutors?

4.1 ILEX accepts the difficult balancing act that needs to be performed in allowing the relevant prosecuting authorities the power to make decisions in individual cases, but retaining the legitimate ministerial input in the overall objectives and priorities applied by the prosecuting authorities in taking these decisions.

4.2 ILEX can see the advantages of maintaining the status quo vis-a-vis the prosecuting authorities in order to prevent, among other things, the risk of the Directors of the prosecuting authorities being drawn into the political arena.

4.3 In view of the above, ILEX recognises that the AG is in the best position to ensure that prosecution decisions are fully informed by relevant considerations without being subjected to improper pressures political or otherwise.

5. When is it appropriate for the Attorney General to attend cabinet?

5.1 ILEX is of the view that the AG should only attend the Cabinet to give the Cabinet legal advice as required. Further, all relevant papers as a matter of cause should be sent to the AG. This would also enable the AG to decide whether legal issues arise necessitating her attendance.

5.2 ILEX feels that this is important because of the need for the AG giving the advice to make it clear that she or he is not part of that group, that the AG is somebody advising that group. As such, the advice imparted by the AG can be and seen to be objective by the public, which can only enhance the role of the AG and transparency in the role.

6. Is the Government's proposed model of a statutory protocol between the Attorney and the prosecuting authorities a good one? Is the content of the proposed protocol right?

6.1 As the 'Governance of Britain - Constitutional Renewal' paper rightly identifies the role of the AG vis-à-vis the prosecuting authorities is largely based on implied checks and balances. Although, a statutory protocol will expressly make clear the relationship, ILEX is of the view it will not make a huge difference to the role of the AG.

7. Should the oath of office of the Attorney General be a statutory requirement like that of the Lord Chancellor?

7.1 ILEX accepts this as a reasonable proposition and an extra safeguard against accusations of conflicts of interests

8. Should the Attorney General's power to stop a prosecution by way of a nolle prosequi be abolished?

8.1 ILEX views the above has being consistent with the approach being taken in relation to the extent of the powers of the AG as regards individual cases.

9. Are the provisions of the Draft Bill setting out the tenure of office of the Prosecutorial Directors appropriate?

9.1 No comment.

10. Should the Attorney General's legal advice be disclosed?

10.1 ILEX is of the view that there should be a general presumption against disclosure, which is akin to the lawyer and client relationship notwithstanding pressure from certain aspects of media intervention.

10.2 However, the above rule should be open to exceptions in grave and serious cases, for example where international law; commercial; or moral cases are concerned. The idea that the public is not being told the basis on which men and women are being sent to war risking their lives is morally repugnant. It is also now a matter of basic transparency in the public interest. As the evidence to the Joint Committee made clear:

"The three things we all want before we use force is parliamentary support, public support and it is clear that it is accordance with international law".[4]

10.4 It would be difficult to see how advice in respect of the use of armed force can remain confidential bearing in mind our commitment to international obligations and upholding the rule of law. The United Kingdom, together with its international Allies, must lead in this area by example.

Judicial Appointments

In terms of the proposals relating to Judicial Appointments, ILEX makes the following general observations:

The Constitutional Reform Act 2005 (hereinafter the 2005 Act) made significant constitutional changes to the system of judicial appointments. Essentially, it took away the Lord Chancellor's power to appoint judges and placed the power in the Judicial Appointments Commission but with proper accountability. This involved a detailed process with proper consultation, together with the setting up of a unique Select Committee in the House of Lords.

The new system under the 2005 Act has only been in place for 18 months and has not had time to 'bed in' or, indeed, develop. As such, ILEX is of the view that to propose further constitutional changes so soon after the implementation of the 2005 Act appears to be a little premature in the absence of any evidence to suggest the following:

· That there are problems with the new system;

· Change is needed to reduce bureaucracy; or

· There is a need to streamline the appointments system.

ILEX is also mindful of the danger that ministerial accountability may be lost by the reduction of the checks and balances in the current system of judicial appointments. In terms of the proposal for the setting of targets, for example, the government needs to be clear about what targets they have in mind. This is not made clear in the paper 'Governance of Britain- Constitutional Renewal Bill or the Draft Bill.

ILEX understands that the Lord Chancellor can already set non-statutory criteria covering experience and expertise for judicial posts below the High Court. For example, this is often the case for appointments for the post of District Judges. The post of District Judge will normally require an applicant to have sat as a deputy district judge for 2 years or a minimum of sittings.

Given the above, it seems to ILEX that most of the proposals as envisaged in the Bill can be achieved by closer partnership working and, more importantly, without the need for further legislation.

June 2008

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[1] Constitutional Affairs Committee - Constitutional Role of the Attorney General HC 306.

[2] The Governance Of Britain - Constitutional Renewal - Policy Proposals p20

[3] 21st May per Lord Falconer - Joint Committee on the Draft Constitutional Renewal Bill questions 141-216

[4] Ibid question 203.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Judicial Appointments Commission

Introduction

1. This is the response of the Judicial Appointments Commission to the Draft Constitutional Renewal Bill and the accompanying White Paper published by the Government in March 2008 (CM 7342). It responds only to those proposals which deal with the arrangements for making judicial appointments.

2. The views in this paper build on those made in our response on January 2008 to the Government's consultation paper on judicial appointments which was published in October 2007 (CM 7210). However, this evidence covers a number of additional points as the draft Bill and White Paper include proposals on which the Government had not previously consulted.

3. The JAC notes that these additional proposals have not been subject to formal consultation alongside the majority of the Government's proposals. A number of these new proposals have not been included in the draft Bill, but only in the White Paper, perhaps with a view to their being included in any legislation which may subsequently be introduced to Parliament.

4. We note that some of the proposals (such as a power for the Lord Chancellor to set targets for, and to direct the JAC), have far reaching implications, including for the independence of the JAC and hence the appointment of the judiciary. It is argued that these are necessary to fill the "accountability gap" left by the removal of the Lord Chancellor from part of the process. However, the additional powers proposed create run counter to the desire to reduce the role of the Executive, create an operational interface with the Lord Chancellor, and upset the delicate balance which was carefully crafted by the Constitutional Reform Act 2005. Without the benefit of full consultation, and without the benefit of seeing the proposals in the form of draft clauses, it is also difficult to assess fully and accurately the impact of these changes. The JAC hopes that the Joint Committee will give weight to this context and the importance of the proposals during its consideration.

5. The JAC does not consider there is sufficient evidence to support any significant change to the existing arrangements. The JAC has only been in existence since April 2006. We have implemented our own processes - the development of which was the subject of wide consultation - for only 19 months. While the JAC is responsible for the middle part of the selection and appointments process, we do believe there is scope for improvements which would enable the JAC to function more efficiently, including in the management of the end to end appointments process. We have drawn attention to these in our response to the Government's consultation paper of October 2007 (pages 7 and 8) and are working with our partners to achieve these.

Proposals set out in the Draft Bill

· Schedule 3, Part 1 - Selection of Supreme Court Judges.

6. The Constitutional Reform Act 2005 (CRA) currently provides for the Prime Minister to approve appointments to the Supreme Court.

7. The JAC recognises that the CRA gives the Prime Minister very little discretion in relation to his role in the appointments process and on that basis does not disagree with the Government's proposal to remove him from the process completely.

· Schedule 3, Part 2 - Basic provisions about judicial appointments etc.

Paragraphs 7 and 8 - seek to set out in legislation key principles for judicial appointments.

8. The JAC believes that there should be clarity about what is intended here. For example, it is not clear precisely what the Government has in mind in relation to "flexibility, proportionality, and effectiveness". For example, could the principle of flexibility be construed in such a way to require the JAC to accept late applications for selection exercises?

9. The JAC is already subject to the application of these principles by virtue of public law. Without any greater clarity of what the Government intends, the JAC is not persuaded of the need for additional principles in legislation, indeed, we consider that doing this could lead to confusion and increase the potential for challenge, possibly by unmeritorious application for judicial review.

10. The risk of challenge would be reduced if the key principles were not statutorily based, but any principles agreed would nevertheless need to be very clearly articulated if they are to be meaningful. However, in that regard, the Committee may be interested that the JAC publishes its principles in its Annual Report:

· Fairness - We are objective in promoting equality of opportunity and we treat people with respect.

· Professionalism - We are committed to achieving excellence by working in accordance with the highest possible standards.

· Clarity and openness - We communicate in a clear and direct way.

· Learning - We strive for continuous improvement and welcome and encourage feedback.

· Sensitivity - We are considerate and responsive in dealing with people.

11. Overall, the JAC remains to be persuaded that key principles, in whatever form, would improve the operation of the selection arrangements given that those arrangements are already highly prescribed in the CRA.

Paragraphs 9 to 12 - seek a power for the Lord Chancellor to specify particular business needs in Vacancy Requests.

12. The CRA sets out a number of criteria that should be used to determine the eligibility of potential candidates for judicial appointment. The Lord Chancellor has consistently sought to apply additional, non-statutory criteria, to Vacancy Requests which he sends to the JAC. Examples of the restrictions include a requirement that candidates should normally expect to have completed 30 sitting days since appointment in a fee paid judicial role or have two years' judicial experience.

13. The JAC regularly challenges the non-statutory criteria which the Lord Chancellor seeks to apply on the basis that it restricts the eligible pool of potential candidates and has the potential to restrict diversity. The proposals in the draft Bill give the Lord Chancellor very wide powers to apply additional non-statutory criteria. The JAC believes that the use of these powers will damage its ability to discharge its diversity duties and does not feel able to support them (see also paragraphs 77 to 79 below).

14. The one exception to this - which the JAC does support - relates to paragraph 10, which extends the diversity duty at section 64(1) of the CRA which applies to the JAC to both the Lord Chancellor and the Lord Chief Justice.

· Schedule 3, Part 3 - Panel to represent potential candidates for appointment etc.

15. Paragraphs 13 to 16 - propose the formation of a statutory Panel that will be formed of persons representing bodies that have an interest in the functions of the JAC. No member of the Commission or its staff will be permitted to be a member of the Panel.

16. The JAC actively engages with a wide range of individuals and groups that represent the interests of potential candidates. But we do not consider this is as an appropriate matter for primary legislation. Provisions in primary legislation are likely to result in a rigid arrangement which is unlikely to be flexible enough to be meet the needs of potential candidates, the JAC, or its partners. A statutory Panel is also likely to be much more formal and costly to operate.

17. The JAC has already established a number of groups involving key interested parties. For example, we have already established an Advisory Group which includes organisations (such as the Law Society) that represent potential candidates, and we maintain a Diversity Forum, and a Research Group which both include membership from our partners and key interested parties. The feedback we receive from the members of those groups is that they are working effectively.

· Schedule 3, Part 4 - Power to amend Schedule 14 to the Constitutional Reform Act 2005.

18. At Schedule 14 the CRA prescribes a number of posts which may only be filled following a selection by the JAC. The proposal would allow the Lord Chancellor to remove posts from that list following consultation with the Lord Chief Justice.

19. The JAC believes that the whole approach of removing posts from Schedule 14 of the CRA is defective and open to abuse. If posts are removed, some vacancies may be filled by deployment and some by new appointments or promotions, but all three categories will become appointable by the Lord Chancellor.

20. It is the JAC's view that the right approach is that where posts are to be filled by the deployment of an existing judge into another position at the same level such a post should be filled without a competition by the Lord Chief Justice, and that there should be no Henry VIII power for the Lord Chancellor to remove a post from Schedule 14.

· Schedule 3, Part 5 - Removal of some of the Lord Chancellor's functions in relation to selections under Chapter 2 of part 4 of the Constitutional Reform Act 2005 etc.

21. Paragraphs 20 to 31 - The CRA currently provides for the Lord Chancellor to accept, reject, or ask for reconsideration of all JAC recommendations. The Government proposes to reduce the role of the Executive in the appointments process by essentially removing the Lord Chancellor's discretion in respect of any JAC recommendation below that of the High Court.

22. The Lord Chancellor is - and presumably will remain - the Minister responsible for the justice system [Part 1 of the Courts Act 2003]. The JAC believes that for the Lord Chancellor to fully discharge that duty and properly account to Parliament for it, he should be involved in the appointments process for members of the judiciary.

23. There should be proper accountability to Parliament in making judicial appointments. Under the Government's proposals, while the JAC would, in effect, become responsible for appointments to all judicial offices below the High Court, it is difficult to see how it could become properly and directly accountable to Parliament for the exercise of that duty without more extensive changes.

24. The JAC questions the rationale for a dividing line at the High Court in terms of accountability for judicial appointments, especially given that judges at all levels can have a direct and profound impact on the public and business.

25. The JAC considers that the existing CRA arrangements are the result of a careful consideration by Parliament of all of the issues which emerged during the lengthy passage of the Constitutional Reform Act in 2004/5. They balance the responsibilities in the appointments process and appear to enjoy wide support. The JAC does not, therefore, support the current proposals for change.

26. Paragraph 32 - The proposal will allow the Lord Chief Justice to delegate some of his functions to a nominated judicial office holder. The functions include statutory consultation of the Lord Chief Justice by the Lord Chancellor prior to a vacancy request coming to the JAC, and statutory consultation of the Lord Chief Justice by the JAC as part of its selection process.

27. The JAC supports the streamlining of arrangements wherever this is appropriate and considers that if the Lord Chief Justice were able to delegate certain functions to other judicial office holders it should result in less bureaucracy. The JAC therefore supports this proposal.

· Schedule 3, Part 6 - Medical Assessments.

28. Paragraphs 33 to 35 - essentially transfer the responsibility for carrying out medical checks from the JAC to the Lord Chancellor.

29. The JAC does not consider that medical checks should be a consideration in the selection of potential candidates - they are an appointment consideration. We therefore agree with the Government that it is more appropriate for the Lord Chancellor (as the appointing authority) to carry out these checks.

· Schedule 3, Part 7 - Powers of Lord Chancellor in relation to information.

30. This proposal appears to be intended to clarify the existing information provisions at sections 72, 75, 81 and 89 of the CRA. In effect it appears to go much further.

31. The JAC considers that any sensitive information on the selection process, particularly in relation to individual candidates, must be properly protected.

32. The Government's proposals appear to give the Lord Chancellor a wide-ranging power to seek any information. The JAC is not aware of any evidence of difficulty in this area and is not clear why these significant powers are being sought. On that basis the JAC does not feel able to support these proposals.

33. In the event that the Joint Committee decided to support the provision of these powers, the JAC hopes that any new powers would be constrained to the provision of specific information in specific circumstances.

· Schedule 3, Part 8 - Deployment authorisations, nominations etc

34. The Lord Chief Justice is currently required to consult with the Lord Chancellor, and in some cases obtain his concurrence, in relation to a wide range of deployments, authorisations and nominations.

35. The Government's Consultation received widespread support (including from the JAC) for the proposal to remove the requirement for consultation with the Lord Chancellor, leaving the Lord Chief Justice to make decisions on judicial deployments, authorisations, nominations etc. We therefore support the proposal that it should be for the Lord Chief Justice to decide on the deployment etc of judges and that it seems unnecessary for him to seek agreement from the Lord Chancellor.

36. In our response to the Government's consultation paper of October 2007 (CM 7210), we said that in addition to its responsibility for making selections for judicial appointments, our concurrence is also required for appointments as Deputy High Court Judges under section 9(1) and 9(4) of the Supreme Court Act 1981. We also noted that there are other forms of designations and deployments including designations as Presiding Judges.

37. We argued that these decisions are of real significance to the administration of justice and that they should be made in an open way according to declared procedures to ensure the appointment of the best possible candidate from the full range of those eligible to apply. We suggested that the judiciary should be invited to propose, for each type of significant designation or nomination, a set of procedures which would satisfy the criteria of openness and accountability and that the JAC should then be invited to approve these procedures. This would then leave the judiciary to make individual decisions against that criteria with the JAC having no concurring in individual decisions. We therefore welcome the provision giving effect to this proposal for Deputy High Court Judges.

Proposals set out in the White Paper

· Paragraphs 120 to 121 - The JAC should be allowed to take preliminary steps in a selection process before a formal Vacancy Request is received.

38. The CRA is prescriptive in terms of the operation of the JAC. It allows the JAC to begin a selection exercise on receipt of a formal Vacancy Request from the Lord Chancellor. The Government has indicated that it wants to allow the JAC to take the preliminary steps in a selection exercise prior to the formal issue of Vacancy Request.

39. Our response of January 2008 to the Government's consultation paper on judicial appointments (CM 7210) highlighted the need for the JAC to engage as soon as it can with the Court Service and the Tribunals Service, to understand their anticipated requirements for appointments over the coming year. And we mentioned that concerns had been expressed that the drafting of the CRA,

under which the receipt of a vacancy notice triggers action by the JAC, might inhibit these necessary early discussions.

40. As we said at the time, these concerns have been allayed to a large extent. In consultation with key interested parties, broad agreement has been reached that all parties should ensure that, at the start of each financial year, the JAC is provided with full and accurate documentation on all the vacancies for which appointments will be sought over the coming year.

41. Despite the unpredictable nature of some vacancies the commitment to work together to ensure that the annual programme is itself settled by September (except for unforeseen vacancies) and the essential documentation for the programme has been received before April each year will provide important efficiency dividends, allowing easier scheduling of exercises and more effective use of the staff and other resources available. In view of these changes, the JAC does not consider any legislative change is necessary.

· Paragraphs 123 to 130 - Providing additional accountability mechanisms.

42. The Government is seeking to provide the Lord Chancellor with wide-ranging powers that would allow him to direct the JAC and to set performance targets in order that he may satisfy himself that the JAC is working efficiently and effectively.

43. These new powers are justified on the basis that, as it is intended to remove the Lord Chancellor's discretion to reject, or ask for reconsideration of any JAC recommendation for appointment below the High Court. The JAC does not support that initial proposition - see comments in relation to Schedule 3, Part 5 of the draft Bill. But in any event, we note that the Government does not intend these new powers to apply only to activities of the JAC that relate to appointments below the High Court - i.e. where the imputed accountability gap would arise.

44. In relation to the power of direction, the JAC notes that the Government did not consult on this potentially significant power along with its other proposals in October 2007. This proposal is discussed in the White Paper, but it does not appear in the draft Bill. Consequently there is a lack of detail about the precise nature of the power and the way it would operate. The JAC believes this power may have implications for its independence from the Executive.

45. In relation to the power to set targets for the JAC, we believe this proposal also has the potential to compromise the JAC's independence and the quality of selections made. For example, externally imposed targets create an operational interface between the Lord Chancellor and the JAC and it is not entirely clear how this would sit with the JAC's duty to select candidates solely on merit

[section 63(2) CRA], and the extent to which it might impact on the JAC's independence from the Executive.

46. The JAC remains to be convinced of the value of targets in relation to judicial appointments. By discussion of potential targets, seeking to meet targets, or explaining why they have not been met, can be a very resource intensive process, and divert an organisation from its true purpose. There appears to be some evidence to this effect where they have been used in other sectors where the quality or nature of the work is fundamental to the success of the organisation as in the case of the JAC's role in selection candidates for judicial appointment.

47. For example, the target suggested in the Government's White Paper [paragraph 126] to increase the proportion of applications for appointment from certain groups is meaningless - it might well be possible for the JAC to meet this target by generating applications from candidates who are unlikely to be successful in the selection process. This would be both unfair to the candidates themselves and potentially off-putting to other candidates from under represented groups in the judiciary in the future. Moreover, achievement of mis-directed targets might result inefficient use of resources, as well as affecting candidates.

48. The JAC believes that a better way of judging its performance, particularly in relation to diversity, is to compare the selections made for each appointments against the eligible pool. We have been working with the legal professional bodies and others to determine the eligible pool for each selection exercise. We have found that the pool varies considerably given the statutory criteria set out in the CRA, or any non-statutory criteria applied by the Lord Chancellor. We have included data on the eligible pool for each competition in our published selection exercise statistics for 2007/8. We believe this will provide a much better basis on which to track our year on year performance.

49. In relation to judicial appointments, there is a further potential objection to targets that may not apply in other sectors. The purpose of the JAC is rooted in its independence. The imposition of targets acts to reduce its independence. An example might be helpful. The budget of the JAC is set by the Ministry of Justice. The imposition of targets in combination with a limited budget has the practical effect of reducing the JAC to a service provider for the Ministry of Justice by restricting its freedom to implement the selection process and outreach activity that it believes is appropriate in relation to judicial appointments.

50. We also oppose targets which set specific budgetary constraints, for example on research or our outreach work, with the 'knock on' implications for diversity as well as independence.

51. In their questions, the Joint Committee asked whether it would be more acceptable if the Lord Chancellor's power to set targets, or to issue directions, were subject to the approval of the Lord Chief Justice. While we agree that the formal consent of the Lord Chief Justice may be helpful in balancing the influence of the Executive, we note that a number of commentators have also expressed concerns about the existing level of judicial involvement in the selection arrangements. The formal involvement of the Lord Chief Justice in this way is therefore likely to exacerbate the situation.

52. The JAC cannot support these proposals.

Paragraph 131 - Delegation of the Lord Chancellor's and Lord Chief Justice's functions.

53. We note that the draft Bill provides for the Lord Chief Justice to delegate his functions. Our comments in relation to paragraph 32 of Part 5 to Schedule 3 reflect this.

54. In relation to the earlier proposal for the Lord Chancellor to delegate certain of his functions, we note that the Government has not brought forward any proposals at this stage, but has sought views.

55. While it is difficult for the JAC to provide a view in the absence of more specific information about the nature of any delegation, we note that by reason of the Lord Chancellor's oath of office and the Constitutional Reform Act 2005, he has a range of unique duties and responsibilities not shared by other Ministers. Included in those are,

"the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters".

The Lord Chancellor must be qualified by experience in law or Parliament, and has a duty to respect the rule of law.

56. These unique duties carry great weight and are significant in the way in which the Lord Chancellor approaches his responsibilities in relation to the appointment of the judiciary. It is clearly important that any future arrangements do not harm these important safeguards.

Paragraphs 132 to 133 - A role for Parliament.

57. The JAC has already indicated its support to the proposal that the appointment of any future Chairman of the JAC should be subject to pre-appointment scrutiny by the relevant select committee.

58. The Government also suggests that there might be merit in an annual meeting of members of both the Commons Justice Committee and the Lords Constitution Committee to hold the system to account.

59. While we welcome any proposal that will lead to more effective accountability, we do not consider it would be appropriate to comment on the workings of Parliament or how individual Committees should discharge their functions.

Paragraph 134 - A JAC panel representing potential applicants.

60. The JAC does not support this proposal. Our comments on paragraphs 13 to 16 of Part 3 of Schedule 3 of the draft Bill reflect this.

Paragraph 135 to 136 - Size and composition of the JAC.

61. The size and composition of the JAC, which is clearly prescribed by the CRA, represents a complex settlement of issues raised during lengthy parliamentary debates just three years ago.

62. Our experience to date illustrates that the existing membership of the Commission, which comprises lay, judicial, professional, lay justice, and tribunal members, has worked very well in practice, and represents an invaluable range and depth of knowledge and experience. These members do not view themselves as representatives of other organisations, but act corporately in promoting the objectives of the JAC.

63. The JAC does not support any proposal for review.

Paragraph 137 - Statutory salary protection for certain tribunal judges.

64. The JAC does not have any views on this proposal.

Paragraph 138 - Power to amend Schedule 14 to the Constitutional Reform Act 2005

65. The JAC has commented above on the provisions at Part 4 of Schedule 3 to the draft Bill.

Paragraph 139 - Reappointment of JAC Commissioners.

66. The Government proposes to simplify the re-appointment of Commissioners who do not hold senior judicial office.

67. The JAC welcomes this proposal. However, we would like to see more detail of the proposed procedures in relation to any decision of the Lord Chancellor not to reappoint a particular Commissioner.

Paragraph 140 - Disclosure of confidential information to the police.

68. The Government proposes to introduce legislation to allow information relating to judicial appointments and discipline to be disclosed to the police for the purposes of investigating crime.

69. The JAC recognises that under the CRA difficulties can arise if information is revealed which might indicate criminal activity.

70. The JAC accepts the Government's argument that the CRA should be brought into line with other similar legislation to enable any such information to be provided to the police solely for the purposes of investigating crime.

Additional proposals from the JAC requiring legislative change

· Repeal of section 65 of the CRA - Lord Chancellor power to issue guidance to the JAC.

71. The power under section 65 of the CRA to provide guidance to the Commission on the conduct of its functions has not been used, nor, so far as the Commission is aware, has its use been considered. The JAC has developed, after wide discussion, its own framework of procedures, which command wide acceptance, and it is hard to envisage circumstances under which use of the power under section 65 is likely to be helpful. The JAC therefore suggests that in the event that legislation is taken forward, the Government should take the opportunity to repeal section 65 of the CRA.

· To guarantee appropriate resourcing of the JAC

72. The ability of the JAC to fulfil its statutory functions to widen the pool of those available to become judges and to select solely on merit is dependent on sufficient funding. The public interest requires that the judicial selection process is conducted to the highest standards. It is important that the independence of the JAC should be safeguarded by an acceptance, possibly even in legislation, by the Government of the obligation to provide the JAC with sufficient resources to enable it to comply with the Vacancy Notices it receives in a fair, timely, and thorough fashion, and in full compliance with its statutory duties.

73. The general duty on the Lord Chancellor in section 1 of the Courts Act 2003 to ensure that there is an efficient and effective system to support Courts business is relevant and helpful here. The Commission is aware of the pressures on public expenditure and conscious of the need to provide value for money. It is undoubtedly the case that the judicial selection process could be conducted more cheaply, if for instance it were to be done with less regard to the need to widen the pool; but the JAC believes that to cut costs in this way would have damaging long-term consequences.

74. We note that at paragraph 4.29 of his Review of Administration of Justice in the Courts of March 2008, the Lord Chief Justice made a similar observation:

"The new Commission started in April 2006 without any shadow operation and subject to a process which, in some respects, was unduly cumbersome. The administrative and staffing implications of the creation of the JAC an in particular the need to identify requirements further in advance than had been the case under the previous system, were underestimated. The Commission's resources are limited and in the light of our experience clearly require review. It has had to face competing demands from both HMCS and the Tribunal Service upon those limited resources."

· Repeal of section 94 of the CRA

75. Under the CRA, the JAC runs two types of exercises: those held under section 87 for specific vacancies, and those held under section 94, under which the Lord Chancellor requests the JAC to draw up a list of people who are potentially selectable for vacancies for a specific type of appointment which may, or may not, arise later.

76. Most of the JAC's larger selection exercises have been of this latter type. This type of exercise has been regarded as convenient in circumstances where the number of vacancies required in a particular selection exercise is difficult to predict. It has, however, very unfortunate consequences for many of the people on the list. Even after they succeed in the selection exercise, they have no guarantee that they will in fact be appointed.

77. This state of uncertainty may last for a year or more until the next exercise, and in the meantime their situation is often described as being in a professional limbo, unable to make firm plans for the future.

78. The JAC argues that it is wrong for candidates to be left in this uncertain position. After discussions with its key interested parties, it has been agreed that the section 94 arrangements should not generally be used. However, in the event that legislation is introduced, the JAC considers that the opportunity should be taken to repeal section 94 of the CRA.

· Responsibility to be given to the JAC for application of any non statutory eligibility criteria (see also paragraphs 12 to 14 above)

79. In its response to the Government's consultation of October 2007, the JAC argued that it should have the final decision on the determination of eligibility criteria for specific judicial posts. It may be helpful to give a specific example of a criterion. The analysis of the JAC is that a key limiting factor on our being able to make a significant contribution towards improving diversity is the usual requirement for the Lord Chancellor to stipulate in Vacancy Requests to the JAC that candidates for salaried judicial posts should normally have had previous fee-paid experience.

80. They say this is a real barrier to large numbers of potential candidates. For example, we have heard from members of the Employed Bar who represent over 3000 employed barristers (over half of whom are female and around a quarter of which are from BME backgrounds) that because of the terms of their employment, it simply is not possible for their members to consider part time judicial posts on a fee paid basis.

81. This not only reduces their prospect of success but also, and importantly, deters many from making an application. The same constraints are reported many solicitors - particularly those working in large, high-pressured and high-profile firms. The JAC has asked the Lord Chancellor to review the criteria that he applies. It continues to believe that he JAC should have the final decision on the determination of eligibility criteria for specific judicial posts.

June 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by JUSTICE

Draft Constitutional Renewal Bill

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

2. JUSTICE makes the following comments.

Part 1: Demonstrations in the Vicinity of Parliament

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

Part 2: The Attorney General and Prosecutions

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

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

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

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

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

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

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

10. Accordingly, JUSTICE welcomes:

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

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

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

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

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

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

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

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

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

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

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

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

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

Part 3: Courts and Tribunals

20. JUSTICE agrees with:

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

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

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

21. JUSTICE disagrees with:

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

22. JUSTICE is currently unpersuaded by:

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

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

Part 4: Ratification of treaties

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

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

War Powers and the prerogative

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

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

Parts 5: Civil Service

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

Part 6: Final Provisions

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

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

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

June 2008

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

[2] P3, Factsheet P14, November 2006

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

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Law Society of England and Wales

Background

1. The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors' profession, and has a public interest role in working for reform of the law. The Law Society's interest in the Constitutional Renewal Bill is focussed on Part 3 Courts and Tribunals which deals with judicial appointments.

2. The Law Society's interest in judicial appointments is guided by two principles: appointments should be made independent of the Government; and action needs to be taken to encourage a more diverse judiciary. The Society considers the Constitutional Reform Act 2005 to be a disappointment. While establishing the Judicial Appointments Commission, the Act has not secured independence from the executive. Although the Act requires the Commission to "have regard to the need to encourage diversity in the range of persons available for selection for appointments" progress has been inadequate.

3. The Society believes that the Constitutional Renewal Bill should be used to achieve independence for the Judicial Appointments Commission in the selection of candidates for judicial appointment and to reinforce the duty of the Commission to strive for a more representative judiciary. In the absence of those two measures, public faith in the judiciary may be undermined.

Clause 20: Salary protection for members of tribunals

4. The Law Society supports clause 20 which provides that the salaries of certain Tribunal office-holders once determined may not be reduced. This will provide the same protection for these officeholders as is already available to office holders in the courts.

Clause 19: Judicial appointments etc and Schedule 3

5. This clause gives effect to Schedule 3: Judicial appointments etc which sets out a series of amendments to existing statutes relating to judicial appointments Our comments on each part of Schedule £ are set out below.

Part 1: Selection of Supreme Court judges

6. These provisions will amend Sections 26, 27, 29, 60 and Schedule 8 of the Constitutional Reform Act 2005 to remove the Prime Minister from the process for the appointment of the President, Deputy President and judges of the Supreme Court. In future when presented with a candidate chosen by a Selection Commission, recommendations to the Queen for appointment will now be made by the Lord Chancellor instead of the Prime Minister. At present the Lord Chancellor notifies a selection to the Prime Minister who submits a recommendation for appointment to the Queen. In addition the Lord Chancellor will be required to consult the devolved administrations and the senior available judge of the Supreme Court before giving guidance on procedure regarding selection for Supreme Court appointments, any such guidance being laid before Parliament.

Law Society View

7. The Law Society remains of the view that Government retains too much influence over the Judicial Appointments Commission. The Commission is under the sponsorship of the Ministry of Justice and a substantial proportion of all Commission staff is on secondment from the Ministry or other branches of the Government. The Law Society believes that in accordance with the principle of the separation of powers, the executive should be removed entirely from the judicial appointments process.

8. Since the creation of the Judicial Appointments Commission, the Lord Chancellor has retained a residual but important role in appointments, either in accepting the Commission's selection, or rejecting a name, or asking for it to be reconsidered. We believe that the role of the Lord Chancellor in judicial appointments is incompatible with the demands of judicial independence - and creates the continued perception of appointments as a source of patronage by ministers.

9. The Law Society considers that, after running the appointment process and assessing the candidates, the Commission should itself make the decision whom to appoint, with no involvement by Ministers at any stage. This would require the Judicial Appointments Commission to recommend names for appointment directly to the Queen and therefore take over the full powers of both the Lord Chancellor and the Prime Minister in this area. All judges would therefore be appointed in an open and transparent way and it would remove any potential for allegations that particular judicial appointments were made according to a Minister's personal preference or party affiliation.

10. The Law Society therefore regrets that these provisons have only gone so far as to excise the Prime Minister from the judicial appointments process: they should also delete the continued involvement and powers of the Lord Chancellor.

Part 2: Basic provisions about judicial appointments etc

11. These provisions will amend sections 63, 63A, 64, 95 and 98 of the Constitutional Reform Act 2005 to make it clear that the Lord Chancellor may set out additional criteria relating to particular business requirements to be used by the Judicial Appointments Commission when making selections for judicial appointments and create new duties to be followed by all those with responsibilities in the appointments processes.

Law Society View

12. The Society would wish to see the remaining powers of the Lord Chancellor in relation to the judicial appointments process removed completely in order to secure the complete separation of the Judicial Appointments Commission from the executive and completely independent decisions on appointments by the Commission. These provisions would give the Lord Chancellor the power to attach criteria for candidates for a particular judicial appointment over and above the usual statutory requirements as to, for example, length of professional experience.

13. The provisions specify the business requirements that would justify intervention by the Lord Chancellor to dictate additional criteria being attached to the recruitment for a judicial post as being qualifications, experience or expertise of the person to be selected, or to the office currently held by that person; requirements as to where the person selected is to carry out his functions; and requirements as to how soon a selection should be made. The Lord Chancellor would be able to withdraw or modify any requests which he has previously specified to the Judicial Appointments Commission as regards any business requirement or to add a new one. Conversely the Lord

Chancellor would be able to allow the selecting body in certain circumstances to dispense with those requirements. The Lord Chancellor would be able to require the Judicial Appointments Commission to notify him, or obtain his consent, before dispensing with a particular requirement.

14. Such powers clearly infringe the independence of the Judicial Appointments Commission and, in the view of the Law Society, are likely to lead to discrimination against those who are already under-represented among the judiciary - solicitors, women, BMEs. As the Explanatory Notes to the draft Bill suggest, one example of a requirement that could be specified under the new provisions could be that candidates for some senior tribunal positions are required to be existing holders of senior judicial office, for example High Court judge, or Circuit judge. The criteria for a judicial appointment should be framed by the Commission in the light of the details of the request for a competition exercise to be undertaken and should not thereafter be changed.

15. The Law Society supports the revision of the duties on those who have responsibilities in relation to judicial appointment procedures and the extension of those duties to other participants in that process. The Society does believe that there need to be new duties to ensure that the selection processes are fair, transparent, efficient, flexible, proportionate and effective and supports the insertion of those principles into the statutory framework for the judicial appointments system.

Part 3: Panel to represent potential candidates for appointment etc

16. These provisions amend sections 64A, 66 and schedule 12 of the Constitutional Reform Act 2005 to require the Judicial Appointments Commission to establish a panel of persons representing bodies which have an interest in how it carries out its functions. The Panel must have regard to the new duties to ensure that the selection process is fair, transparent, efficient, flexible, proportionate, effective and independent. The Panel will be independent of the Commission and will make representations to the Commission on any of its functions. The Commission will have to respond to those representations within a reasonable time. The Panel will be entitled to see and comment upon the Commission's Annual Report before it is submitted to the Lord Chancellor. The Lord Chancellor will be required to consult the Panel as well as the Lord Chief Justice before issuing, amending or withdrawing statutory guidance to the Judicial Appointments Commission.

Law Society View

17. The Society welcomes the institution of such a Panel and would be pleased to represent the profession on it. The Law Society does not regard the new Panel as a replacement either for the professional Commissioners or the existing liaison arrangements with stakeholders. The Panel should prove to be the medium through which the experiences of the consumers of the judicial appointments process can be fed into the JAC and thereby achieve improvements.

Part 4: Power to amend Schedule 14 to the Constitutional Reform Act 2005

18. These provisions amend sections 85 and 144 of the Constitutional Reform Act 2005 to enable the Lord Chancellor, after consultation with the Lord Chief Justice, to make an order to remove statutory references in order to remove the requirement for candidates to be selected by the Judicial Appointments Commission before they can be appointed. Such orders would require the approval of both Houses of Parliament.

Law Society View

19. The Society opposes these provisions as they retain the scope for interference by the Government in the process for the appointment of members of the judiciary. In particular they would provide the Lord Chancellor with the ability to override statutory requirements as to holding open competition or encouraging diversity to facilitate the appointment of the archetypal white male barrister.

Part 5: Removal of some of the Lord Chancellor's functions in relation to selections

20. These provisions amend sections 85, 87, 88, 89A, 90, 91, 92, 93, 94A, 95, 96 and 96A of the Constitutional Reform Act 2005 to remove the Lord Chancellor's powers to reject, or require reconsideration of, selections made by the Judicial Appointments Commission for all judicial offices below the High Court. Those options are preserved in relation to the High Court, the Lord Chief Justice, the Heads of Divisions, Lords Justices of Appeal and the Senior President of Tribunals.

Law Society View

21. The Society would wish to see the remaining powers of the Lord Chancellor in relation to the judicial appointments process removed completely in order to secure the complete separation of the Judicial Appointments Commission from the executive and completely independent decisions on appointments by the Commission. To the extent that these provisions remove the scope for the Lord Chancellor to second guess the recommendations of the Commission for all appointments below the High Court the Law Society supports the proposals. However the Society sees no justification for distinguishing between judicial offices below and above the High Court. The role of the Lord Chancellor should be removed from approving all appointments to judicial office.

22. The provisions in Part 5 would enable the Lord Chancellor to interfere in an appointments process being undertaken by the Commission for the High Court and above. He would be able to require the Judicial Appointments Commission to reconsider a decision that no candidate of sufficient merit had been identified by a particular selection process. He would be able to refuse an appointment on medical grounds. The Lord Chancellor would not be required to make an appointment recommended by the Commission if the person selected declines it or does not accept within the time specified or is not available for the appointment within a reasonable time. He would be able to modify or withdraw a request for a competition to make an appointment to a vacant senior judicial post if the Lord Chief Justice agrees or if he considers that the process for identifying candidates by the Commission or the selection panel had not conducted an exercise satisfactorily. He would not be required to proceed with an appointment where there has been a change in the business need since the request was sent.

23. In the view of the Law Society all of these functions could be undertaken by the Judicial Appointments Commission acting on its own initiative.

Part 6: Medical assessments

24. These provisions amend sections 96 and 97 of the Constitutional reform Act 2005 in relation to medical assessments of those who have been selected for appointment to salaried posts. At present the Judicial Appointments Commission requests successful applicants to undergo a medical check up with a GP. In future when the Ministry of Justice writes to a successful applicant offering a judicial appointment, the letter will be accompanied by a form detailing the candidate's medical health for completion and return to the Ministry. On receipt of the completed form the Ministry will send it to its medical assessor and it is only if the assessor identifies a possible health condition or

problem that the candidate will be asked to visit their GP for a detailed examination. If a candidate does not comply with the request to provide information or to undergo a medical assessment, or if the medical report is unsatisfactory, the Lord Chancellor will be able, after consultation with the Lord Chief Justice, to notify the Judicial Appointments Commission that he is not proceeding with that appointment.

Law Society View

25. The Law Society supports transferring responsibility for conducting medical check ups of successful candidates from the Judicial Appointments Commission to the Ministry of Justice. It should help to expedite the appointment process which is notoriously protracted, not least by removing the need for every successful candidate to seek an appointment with their GP. The Law Society would like to see further action to expedite the appointment process which in most cases takes over a year from application to taking up an appointment on the bench. However in the main these will be operational matters for the Judicial Appointments Commission rather than issues which can be prescribed by statute.

Part 7: Powers of Lord Chancellor in relation to information

26. These provisions amend sections 72, 75D, 81, 89 and 97A of the Constitutional reform Act 2005 to empower the Lord Chancellor to require the Judicial Appointments Commission to provide information or documents in connection with his functions in relation to judicial appointments.

Law Society View

27. Notwithstanding the Society's opposition to the continuation of the involvement of the Government in the person of the Lord Chancellor in the judicial appointments process, it does accept these provisions. It is necessary for there to be the power to require the Commission to provide information on the performance of its functions. Ideally the Law Society would like that power to rest with Parliament rather than the Lord Chancellor.

Part 8: Deployment, authorisations, nominations etc

28. These provisions remove requirements in the Constitutional Reform Act 2005 and other statutes for the Lord Chief Justice to consult the Lord Chancellor or obtain his concurrence before exercising certain functions such as deploying serving members of the judiciary to particular posts (usually leadership ones) or nominating them or authorising them to carry out certain functions.

Law Society View

29. In the view of the Law Society the deployment of members of the judiciary should be decided independent from Government and would therefore like these provisions to be taken further to excise the continued involvement of the Lord Chancellor.

30. Furthermore the Society does not support powers which enable the usual process for judicial appointment to be circumvented by, for example, enabling a Circuit judge or Recorder to act as a judge of the High Court. Such a course of action only allows the replication of the existing members of the judiciary - predominantly white, male and barristers.

Additional issues

31. At the conclusion of the oral evidence before the Joint Committee on 20 May the Law Society was invited to submit any additional points which it would like to see included in the Bill. The Society would request the Joint Committee to give consideration to the following issues:

Funding

32. The Law Society would like to see a statutory obligation on the government to provide sufficient resources to the Judicial Appointments Commission to ensure that it is able to carry out its functions effectively.

Targets

33. The Government's response to the Judicial Appointments White Paper Government Policy Proposals referred to the possibility of the Government imposing targets on the Commission. The Law Society opposes targets for the Commission. Targets in the public sector have proved to be counter productive. More seriously in the case of the Judicial Appointments Commission they would undermine its independent status.

Guidance

34. The Law Society would like to see revoked the power of the Lord Chancellor to issue guidance to the Judicial Appointments Commission on the way it should conduct its functions under sections 65 & 66 of the 2005 Act.

Eligibility criteria

35. The Judicial Appointments Commission should have the final decision on the eligibility criteria for any appointment not the Lord Chancellor. Having set up an independent body to operate the judicial appointment system, it should be able to do so independently without the risk of intervention from the Government. The Society is particularly concerned that the exercise of this power could impair the diversity objective.

Transparent appointments process

36. The Government's response to the White Paper included the new proposal that the Lord Chancellor should be able to remove a specific judicial office from list of appointments requiring a selection process to be undertaken where it can be filled by the deployment of a serving judicial office holder. This would undermine the diversity objective in enabling a serving member of the judiciary to obtain a more senior appointment without undergoing competitive selection and appointment on merit.

Length of appointments process

37. While the length of the appointments process is an operational rather than statutory issue, the Law Society remains concerned about the performance of the Judicial Appointments Commission. There can be an interval of up to two years between the initial advertisement and the successful candidate taking a place on the bench. It is unreasonable to expect an individual to put their professional career on hold for that length of time and it may be a factor in deterring some lawyers from applying for judicial office. The Law Society is therefore strongly supportive of the efforts of the Commission to expedite the selection process. Better forecasting of impending vacancies and a

rolling programme of recruitment have been implemented by the Commission and should produce an improvement.

38. If that reduction in the length of the appointment process can be achieved, then there are two legislative amendments which the Law Society would request. Firstly section 94 lists. Section 94 of the 2005 Act enables the Lord Chancellor to request the Judicial Appointments Commission to provide a list of suitable candidates for appointment to a particular level of judicial office, for example Recorder. The Commission undertakes the selection process, the successful candidates are notified, but they do not proceed to immediate appointment. Instead their names are placed on a list to await appointment as and when an appropriate vacancy occurs in the area in which they have specified that they would wish to sit. An individual can remain on the list for in excess of 18 months. There would be no need for section 94 lists if the selection process was more responsive to the needs of the Courts Service.

39. Secondly, an efficient selection process completely removes any justification for the continuation of the power of the Lord Chancellor under section 9 of the Supreme Court Act 1981 to authorise a Recorder or Circuit Judge to sit as a High Court Judge without having had to go through the normal recruitment process operated by the Judicial Appointments Commission. Section 9 authorisation does not conform to the requirement for the appointment process to be open and transparent and is likely to favour the traditional model for a judge - a white male barrister.

June 2008

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Baroness Miller of Chilthorne Domer

Introduction

1.1 This evidence is submitted by Baroness Miller of Chilthorne Domer, Liberal Democrat spokesperson for Home Affairs.

1.2 It focuses on Part 1 of the Draft Bill.

1.3 Clause 1(1) would repeal sections 132 to 138 of the Serious Organised Crime and Police Act (SOCPA) 2005.

1.4 The rest of clause 1 would make consequential amendments to SOCPA, the Noise and Statutory Nuisance Act 1993 and the Serious Crime Act 2007.

1.5 I welcome the repeal of SOCPA s. 132-138.

1.6 I also welcome the statement in the White Paper that "the Government will not pursue harmonisation of the sorts of conditions that can be placed on marches and assemblies in the Public Order Act 1986".

Overarching questions

2.1 The central theme of the overarching questions issued by the Joint Committee Call for Evidence is the impact of the Draft Constitutional Renewal Bill (DCRB) on the ability of Parliament to hold Government to account.

2.2 Part 1 of DCRB is more important for the ability of British citizens to hold Parliament and government to account.

Balancing our democratic rights

3.1 The Call for evidence asks:

The Draft Bill provides an opportunity to re-balance the right to protest outside Parliament against the right of Parliament to operate effectively and without hindrance. How should this balance be struck?

3.2 I agree that a balance is sometimes necessary between different rights. I consider, however, that the loss of the right to peaceful demonstration imposed by the curtailment of access to the area around Parliament was not proportionate to the benefit to any other rights.

3.3 As Lord Carlile, the Independent Reviewer of Terrorism Legislation, has said:

Have we been too cautious...? I believe that we have. If we have, we need to go one stage further and say that we are prepared, even the Government are prepared, from time to time to admit that we have legislated a step too far... Now let us step back and restore those standards that we regard as essential in our precious democracy. [Official Record, 26 Jan 2007 : Column 1379]

3.4 The European Convention on Human Rights set out the right to freedom of expression (Article 10) and freedom of assembly and association (Article 11).

3.5 Article 11 is, however, a qualified right. It states that "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

3.6 In order for the conditions of this qualification to be met, the restrictions on peaceful demonstration must therefore be necessary for one of these legitimate aims.

3.7 The government has argued that the legitimate aims behind the SOCPA laws were:

a) protection of Parliament's right to operate unhindered; and

b) national security.

3.8 I would suggest that the SOCPA powers failed this necessity test for three reasons:

1) The powers were not necessary for the smooth operation of Parliament because other, less restrictive but equally adequate powers were already available. Moreover, I suggest, the work of Parliament is in some ways enhanced by the presence of demonstrations, both spontaneous and planned.

2) The powers were not necessary for national security because there is no evidence of the threat posed by demonstrations and no evidence of the effectiveness of the SOCPA powers for dealing with the supposed threat. In fact, the powers were nigh unworkable.

3) The powers disproportionately curtailed the freedom to demonstrate outside Parliament.

3.9 I shall elaborate on each of these points:

4.1 1) The effectiveness of Parliament

I would suggest that Parliament's role of calling government to account and Parliament's legislative role require that Parliamentarians be in touch with the views of the British public.

4.2 Certainly, in the modern age, there are all sorts of routes of access to lobby Parliamentarians: we have e-mails and easy access to mass media and printing. But the right to peacefully demonstrate remains vitally important.

4.3 Many lobbying channels can be dominated by organisations, NGOs, the private sector. Many have great resources and dedicated Parliamentary liaison workers.

4.4 The right to stand up and demonstrate remains a direct and relevant form of political expression for ordinary people. We saw this in 2001 at the demonstrations concerning the Iraq War.

4.5 In particular, the right to stand up and demonstrate is important for reacting very quickly to events as they happen. This is the most transparent way for the mood of the public to be conveyed to Parliamentarians unfiltered by media or corporations or who can afford what.

4.6 For these reasons, I suggest, far from impeding the work of Parliament, the right to freely demonstrate actually enhances the work of Parliament and the vibrancy of our democracy.

4.7 Of course, it is appropriate that this right should be fairly available to all and not monopolised by a few. Nor should demonstrations overstep certain boundaries of noisiness or disruption. However, powers to control serious infringements were already in place before SOCPA.

4.8 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. Sessional orders are able to apply to members of the public, not just Members of Parliament. For example, an order is made giving the police the power to hold up the traffic outside Parliament in order to let MPs get to the House to take part in debates or to vote. Although the Sessional Orders do not confer any special powers of arrest on the police, we believe that they are sufficient to deal with all ordinary circumstances.

4.9 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 come into play. 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.

5.1 2) National security

I recognise that by necessity we live in a time of heightened security. Since the September 11th attack in the U.S. and the July bombings in this country, it is incumbent on us all to maintain a heightened vigilance. We are not, however, convinced of the case for special limits on demonstrations around Parliament as part of the response to the terrorist threat. The police have a variety of powers to guard against the terrorist threat.

5.2 For example, under the Terrorism Act the police have powers to stop and search in the designated area, and between January and July 2006, 714 searches took place within the government security zone around Westminster and Whitehall and a further 4,465 people were spoken to about their activities [Official Record, 26 Jan 2007 : Column 1369]. As already outlined, the police already have powers under the Public Order Act and a variety of civil remedies for ordering demonstrations that get out of hand.

5.3 We have been made aware of no evidence, apart from anecdotal assertions, of a link between the presence of demonstrators in the Designated Area and any increased security threat. Nor is there any evidence that SOCPA 2005 has helped to improve the security situation around Parliament.

5.4 On the contrary, attempts to enforce the almost unworkable SOCPA laws have taken up large amounts of police time and resources. For example, policing of the "Sack Parliament" protest of October 2006 cost £298,000 [Official Record, 30 Nov 2006 : Column WA76]. The Liberal Democrats are of the opinion that a free and active democratic right to demonstrate is part of the solution to potential danger. An open, active civil society promotes social strength from within that cannot be achieved by legislation.

6.1 3) The "chilling effect" on political participation

The restriction of rights to freedom of expression and freedom of assembly led to the erosion of democratic participation among vital third sector organisations, such as charities, and among the general public.

6.2 Moreover, by the conflation of the question of appropriate demonstrations with the issue of security, the SOCPA powers created highly disproportionate penalties that led to criminal charges for very minor infringements. This has compounded the deterrent effect on public democratic involvement.

6.3 According to the Metropolitan Police Commissioner, between the enactment of SOCPA 2005 and March 2007, 91 individuals were arrested for demonstrations outside Parliament [Official Record, 28 Mar 2007 : Column 1649W].

6.4 These include the cases of Milan Rai and Maya Evans who were both convicted for unauthorised "demonstrations" drawing attention to the victims of the Iraq war. Mark Barrett was arrested for holding a tea party outside Parliament which, according to the police, constituted an illegal demonstration.

6.5 The inconsistency with which the law has been applied has been highlighted by the work of comedian Mark Thomas (http://www.markthomasinfo.com/) whose Mass Lone Demonstrations have shown the arbitrary application of the law and the ridiculous situations that have arisen from the unnecessarily strict and shoddy drafting of SOCPA s.132-138. This was confirmed by District Judge Purdy in Westminster Magistrates Court who found difficulties in both the letter of the law and its application [Regina v. Brian Haw, 22/01/07].

6.6 In addition to these obvious effects of the law, there may also have been a deeper effect on the democratic participation of British citizens, who have been caused to doubt their right to demonstrate because of SOCPA and these high profile cases. Although sheer number of demonstrations has remained high, this is partly due to the resolve of those who have been trying to draw attention to the problems caused by SOCPA.

6.7 It is impossible to tell how many ordinary people have decided not to exercise their democratic right to demonstrate because of the "chilling effect" of the SOCPA laws. As I said in the 2nd Reading of the Public Demonstrations (Repeals) Bill, which proposed the repeal of SOCPA 132-138, "People are now afraid that they will get a criminal record for simply holding a placard or even wearing a T-shirt with a slogan on it anywhere near Parliament" [Official Record, 26 Jan 2007 : Column 1368].

6.8 This view was corroborated by the Advisory Group on Campaigning and the Voluntary Sector, chaired by Baroness Kennedy QC, which supported my Bill in its May 2007 report on campaigning and the voluntary sector.

Special considerations

7.1 The call for evidence asks whether there ought to be special provisions for access, loudspeakers, heritage, permanent demonstrations and equal access. I have dealt with several of these questions above.

7.2 As with the work of Parliament, I believe that democratic participation actually enhances the status of Westminster as a World Heritage site. One of the cultural criteria of World Heritage is "to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs". The idea of democracy is closely connected with the idea of an active citizenry, taking part directly in the working of a legislative assembly. As such, the opportunity to express a political opinion outside Parliament makes the site one of living heritage, not just a historical spectacle. Only the most extreme aesthetic offences should be controlled and then using existing laws.

7.3 I do not think that new laws are necessary to control permanent demonstrations, but I do agree that we must allow for other people to have access to the prime "opposite parliament" space too.

7.4 With regard to Brian Haw's encampment, I would agree with Lord West's statement that "responsibility for the management of the grass area of Parliament Square and the enforcement of by-laws falls to the Greater London Authority under the GLA Act 1999" [Official Record, 12 July 2007: Column WA246]. Both the authorities and demonstrators must be reasonable and where one group monopolize access to Parliament existing by-laws should be utilised to provide for fair access.

7.5 In the case of loudspeakers, I believe that there are already sufficient laws in place to prohibit excessive noise. For example, section 2 of the Noise and Statutory Nuisance Act 1993 amends the Environmental Protection Act 1990 as follows:

Noise in street to be a statutory nuisance

2 Noise in street to be a statutory nuisance

(1) Section 79 of the 1990 Act (statutory nuisances) shall be amended as follows.

(2) In subsection (1) (list of statutory nuisances)-

(a) for "Subject to subsections (2) to (6) below" there shall be substituted "Subject to subsections (2) to (6A) below",

(b) after paragraph (g) there shall be inserted-

"(ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;", and

(c) after "section 80 below" there shall be inserted "or sections 80 and 80A below".

(3) After subsection (6) there shall be inserted-

"(6A) Subsection (1)(ga) above does not apply to noise made-

(a) by traffic,

(b) by any naval, military or air force of the Crown or by a visiting force (as defined in subsection (2) above), or

(c) by a political demonstration or a demonstration supporting or opposing a cause or campaign."

7.6 Nuisance use of a loudspeaker in a demonstration outside Parliament would be covered by the definition of nuisance noise from "equipment" caused "by a political demonstration or a demonstration supporting or opposing a cause or campaign".

Closing comments

8.1 The repeal of SOCPA 2005 is a very welcome step and certainly represents a renewal of our constitutional right to peaceful demonstration, which has recently been eroded.

8.2 Demonstrations add to the vibrancy of our democracy, they do not detract from it.

8.3 I submit to the Committee that the repeal should return the situation around Parliament to the status quo ante. We do not need to create any new rules at this time.

Baroness Miller of Chilthorne Domer,

Liberal Democrat Home Affairs Spokesperson

June 2008