HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Graham Allen MP

Summary

When Gordon Brown made his first statement to the Commons as Prime Minister on 3 July 2007 he chose to make it about constitutional reform. Already during his leadership campaign the only legislation he had specifically committed to was on this subject. Of all the areas he could have chosen - poverty, education, welfare - it was this one that he picked. Understandably he caused much excitement amongst those of us who have campaigned for a generation to bring about a major democratic overhaul in the UK. But since then, momentum has been lost. Perhaps he meant to dissipate his initial promises, or perhaps they have been ground down within Whitehall because of the threat they pose to executive power. Whatever the reason there is now a danger that we will one day look back at this period - and the Constitutional Renewal package in particular - as a missed opportunity for reform. For this reason I urge the committee to take what is an appropriate standpoint for pre-legislative scrutiny and consider these documents not only on a basis of what is in them, but what is missing, and make recommendations accordingly.

The Draft Bill and White Paper address constitutional issues in urgent need of attention. While the proposals contained within it are important within the wider constitutional context, they do not fundamentally alter the UK settlement. The set of proposals under consideration by the committee amount largely to a redistribution of power within the geographical-political Westminster/Whitehall elite. A fully codified UK constitution would need to address issues including the weakness of local government; clarifying the position of the UK within the European Union; participation by citizens in policy-formation at all levels; the rights of the individual, including economic and social rights; and the Royal Prerogatives that remain personal to the monarch, including the right to select the Prime Minister. The contents of Constitutional Renewal appear disparate because they are not yet part of a clearly defined process for establishing a new constitutional settlement. For this reason the Bill when it is brought forward should include provision for the establishment of a Constitutional Commission, composed of parliamentarians but required to conduct its proceedings outside the Palace of Westminster. The present contents of the draft bill, while comprising valuable measures, require some modification and correction if they are to properly address the imbalance of power between executive and legislature.

How do the proposals set out in the Draft Bill and White Paper fit into the wider constitutional context?

1. The Draft Bill and White Paper address constitutional issues in urgent need of attention, in particular parliamentary involvement in war-making and treaty-ratification; the status of the Civil

Service; and the independence of the judicial system. Some of the changes embodied in the government proposals were first called for more than a century ago; and have remained on the agenda thereafter. Events around UK participation in the invasion of Iraq heightened interest in the relationship between the legislature and executive and the relative weakness of the former in influencing the actions of the latter. In 2002 I began tabling motions - with cross-party support - on the Remaining Orders every day, calling amongst other things for parliamentary approval for armed conflict.

2. In the sense that they reflect concerns both of longstanding and current salience the plans set out in the Draft Bill and White Paper are important within the 'wider constitutional context'. But they do not fundamentally alter the UK settlement. At best they are a first step towards such a transformation, and a faltering one at that. In its Governance of Britain green paper (Cm 7170) published in July 2007 the government held out the possibilities of a Bill of Rights and a written constitution (see pages 60-3). Neither the current White Paper nor Draft Bill come remotely close to achieving these goals; and they fail even to provide to provide a possible route towards them.

3. The set of proposals under consideration by the committee amount largely to a modest internal redistribution of power within the geographical-political Westminster/Whitehall elite; in particular away from the executive and towards the judiciary and the legislature. They do not perform this function entirely satisfactory. Other proposals I have tabled on the Remaining Orders that might assist here include the election of members of select committee members by a secret ballot MPs, to replace the Whip-dominated process; and the establishment of a Business Committee of eight elected by the House, to ensure that Parliament controlled its own timetable. Moreover, the contents of Constitutional Renewal do not formally recast the relationship between these different components of the state in the formal fashion that would be required were a written constitution to be established.

4. A codified UK settlement would need to address other issues which are nowhere to be found in these documents. They include:

• The weakness of local government and the lack of democratic accountability within England at regional level

• The atrophy of political parties themselves at local and national level

• The ambiguous nature of UK participation within the European Union. I have proposed on the Remaining Orders that the government seek the agreement of the House to a British draft Constitution for the EU, to put forward for consideration by member states (but not to mandate our government)

• The ability of citizens to participate in policy formation at all levels, taking into account in particular the need to involve marginalised social groups

• The rights of the individual, including economic and social rights; and

• The Royal Prerogatives that remain personal to the monarch, including the right to choose a Prime Minister and to grant a dissolution. In circumstances of a hung Parliament, with competing credible candidates for the premiership, it is unacceptable that the decision should be made through any means other than a vote in the Commons. On the Remaining Orders, I advocate that within two days of a new Parliament meeting, or within 25 days of the death or resignation of a serving Prime Minister, the Commons should name one of its members and ask the monarch to invite her or him to form a government. Similar arrangements are effective in countries such as Germany; and closer to home, Scotland. Also I have a motion calling for General Elections to take place only every five years, on 1 June - no Prime Minister should have the unfair advantage of being able to determine the date of a Poll by requesting a Dissolution from the monarch

5. The government remains committed to bringing forward consultations and proposals related to some of these issues. But their absence from the package currently under examination means that the title 'Constitutional Renewal' exaggerates the sum of the parts within it. There is a serious risk of completely dissipating any momentum which has been generated by the Prime Minister unless significant additions are made to the Draft Bill, which I propose below.

The Government have stated that a key goal is to "rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account" (White Paper, paragraph 2). The Draft Bill covers a number of disparate subjects. Is it appropriate for one single Bill to contain such a range of provisions?

6. While the contents of the Constitutional Renewal White Paper and Draft Bill are in a sense disparate, they deal largely with issues on which urgent action has been recommended. In 2004 the Commons Public Administration Select Committee recommended that the Royal Prerogative as a whole be placed on a statutory basis, but called for immediate moves over war-making, treaties and passports.[1] There are various reasons why reform of the office of Attorney General is required immediately, though some of the details are sub judice. Were it clear that the collection of reforms contained in Constitutional Renewal were an early, determined step towards a fuller settlement, they would not appear such a hotch-potch. A broader context and sense of direction is required.

A Constitutional Commission

7. For this reason the government should negotiate with other parties in Parliament to agree to add clauses to the Draft Bill as it stands to give effect to the following measure (since clauses dealing with the National Audit Office will be added into the Bill proper, there is clearly not an absolute barrier to this practice). Democratic renewal is not the province of one party and certainly not the property of government. For it to be sustainable requires openness and consent. New clauses should establish a Constitutional Commission, comprising members of both houses with no majority for any one party on it. Initially it would produce a work programme by the end of the 2008 parliamentary session, subject to approval by a free vote in the Commons. This document would be required to set out how the Commission intended to collect evidence (no public meetings would be permitted within the Palace of Westminster); what precisely its plans were to ensure that the views of a balanced cross-section of society were represented; what mechanisms it advocated to adopt or veto its proposals; and what action it intended to take in the event they were not accepted. The final purpose of the Commission would be to draft, perhaps in clearly set out stages, a codified UK constitution and Bill of Rights. The former would regulate the functions and protect the status of all institutions from national to local level and succinctly state the position of the UK within the European Union. The latter would give effect in domestic law to UK human rights commitments under international law, including those providing for economic and social provision. An emphasis on plain English (and Welsh) would be a statutory requirement. The Commission would be required to recruit a drafter or team of writers through open competition. It would have to stipulate the role of the courts with respect to upholding the constitution and bill of rights; and what the requirements were for amendments to them.

8. Through establishing such a body the government would signal that its Renewal bill was part of a determined process towards a new democratic settlement; and increase the likelihood of an effective and inclusive cross-party process.

Do the proposals set out in the Draft Bill and White Paper move towards achieving the Government's aim of giving Parliament more ability to hold the Government to account?

Declarations of War

9. Having recorded some general reservations about the overall constitutional process currently taking place, I will now engage with some specifics about the White Paper and Draft Bill. The following problems required correction if the proposals are to be effective in 'giving Parliament more ability to hold the Government to account'.

10. Provision for parliamentary involvement in war-making should be set out in statute, rather than - as is currently intended - a Commons resolution, in order to ensure it is binding and justiceable. (as I have recommended daily on the Commons Order Paper since 2002). Observation of other

countries, including the US and Holland, show that more formalised arrangements than a convention are workable in practice. It is proposed by the government that the Prime Minister should be able to bypass the requirement for prior parliamentary approval in an emergency or on grounds of security ('Draft detailed war powers resolution: 3. Exceptions to requirement for approval: emergencies and security issues'). While I accept that there is need for flexibility, there must be provision for rapid subsequent endorsement (or disavowal) by the Commons, which is currently lacking in the White Paper. It is also regrettable that activity by the Special Forces is specifically excluded from the provisions of the draft resolution ('4. Exceptions to requirement for approval: special forces'). Furthermore the Prime Minister should not have full control over the timing of any vote and the information that is made available to Parliament. There is a need for the mandate for any action to be subject to regular renewal. This provision is essential from the point of view of avoiding 'mission-creep' and ensuring that democratic oversight of war-making was an ongoing process, not simply a one-off occasion. It would have to be accompanied by reconfigurations in the parliamentary committee system. In particular there is a need for a properly resourced committee capable of exercising 'joined-up' scrutiny of military activity to inform the plenary in its deliberations.

Recall of the House

If a military emergency occurred at a time when the House was not convened, such a committee would have the power to order a Recall, or exercise the powers of the plenary if reconvening was not practically possible. In addition, Parliament should be given a genuine power to Recall itself (as I have called for on the Remaining Orders since 2002). It should not be dependent, as is currently intended, on the discretion of the Speaker. Moreover the planned requirement for a majority of MPs asking to reconvene is too great.

Treaty making

11. While the proposal for treaties will be established in statute, at present the circumstances in which ministers may bypass the procedure are too vaguely drawn. It is simply stated in clause 22 of the Draft Bill that they can do so 'exceptionally' if in their 'opinion' they should. While it is to be welcomed that the Commons will be given the power to veto ratification (clause 21), at present, under the 'Ponsonby Rule', there is no effective mechanism for triggering debates and votes on treaties. Appropriate procedures, possibly with a newly-established sifting committee at its centre, must be put into place. Finally, the definition of treaty employed in the legislation (clause 24), is too narrow and could mean that important understandings, declarations and non-binding arrangements escape oversight.

Civil Service

12. The plans to place the Civil Service on a statutory basis are in principle to be welcomed. However in practice they do not mean that parliamentary accountability will be enhanced. While there are limits to the engagement of the legislature in the work of Whitehall - the constitutional principle is that ministers, not officials, are held accountable - it would be desirable to require affirmative parliamentary approval for codes for civil servants and special advisers issued under the Act when it comes into force. I note further that frequent reorganisations of Whitehall take place with Transfer of Functions Orders under the Ministers of the Crown Act 1975 and in practice escape any form of effective parliamentary oversight.[2]

Legal System

13. Government proposals for reform of the legal system make some reference to the role of Parliament, but do not provide the full overhaul of the relationship between the legislature and judiciary that is required. It is intended that the system of pre-appointment hearings currently being developed will take in the Chair of the Judicial Appointments Commission (JAC). While this development is welcome, the process should be extended to take in senior judges with a leadership role including the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court. Parliamentary committees have a long record of proceeding through consensus and fears of 'politicisation' of the process are exaggerated. In order to facilitate closer working between Parliament and the judiciary, and avoid damaging public disputes, there should be specially reserved places for MPs on bodies such as the JAC and the Sentencing Guidelines Council. Finally I welcome the government's stated openness to the idea of forming a parliamentary committee specifically to monitor the Attorney General and the Attorney General's Office. Any such body must have access to adequate legal advice to enable it to provide authoritative views to assist Parliament in its deliberations. This latter requirement is particularly important because the government does not intend amending the presumption that the Attorney General's Advice should remain confidential, even if over matters as grave as war and peace. Ideally, certain classes of advice would usually be disclosed, enabling Parliament to compare the internal views of the Attorney General with those of the experts it had at its disposal. Parliament itself should be able to access its own legal advice, something that proved impossible to do in the run up to the Iraq War.

Protests around Parliament

14. On this subject, it should be noted that there never existed a right to demonstrate in Westminster, it was a right to lobby, which should of course be preserved. Parliament Square should not be 'squatted' by any one individual, as it has been for some years. The best means of ending this problem would be to establish a 'Speakers' Corner' type arrangement for Parliament Square, meaning that anyone could come a direct their thoughts at Parliament, subject to proper regulation, including limitations on banners and a ban on electronic and other amplification equipment.

May 2008

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[1] Taming the Prerogative, HC 422, 2003-04.

[2] See: House of Commons Public Administration Select Committee, Machinery of Government Changes, HC 672, 2006-7.

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SUBMISSION FROM THE EXECUTIVE COMMITTEE OF THE BETTER GOVERNMENT INITIATIVE

The main focus of The Better Government Initiative's work is on the operational effectiveness of government. We therefore strongly support the Government's proposals to give additional powers to the legislature and to legislate on the status and role of the Civil Service.

However, we consider that, notwithstanding the inclusion of some matters of broad constitutional principle such as the use of the Royal Prerogative, the Bill does not go far enough in strengthening the relationship between Parliament, the executive and the people to warrant the title "constitutional renewal". As our first reactions to the Green Paper (submitted on 16 July) indicated, we believe more should be done by the executive and Parliament working together to improve the processes required to ensure that government decisions are soundly based, operationally effective and acceptable to the electorate. If this is not done an opportunity will be missed to produce a fuller, more effective and more convincing package.

Preparation of policies and legislation

An important part of our unwritten constitution is that governments, while necessarily having differences of approach reflecting the political platforms on which they are elected, will act efficiently and disinterestedly in developing and implementing policies and will be ready to justify their decisions to Parliament and the public.

We were therefore concerned that the White paper and the Bill do not adequately address key issues which are essential for effective and transparent government. These are:

· the setting and achievement of high standards for the preparation of legislation and major policy proposals;

· the routine use of consultation documents - expressed in terms that enable both Parliament and the public to follow the argument - that make it clear on what evidence policies have been based and why particular options have been chosen;

· a reduction in the volume of legislation;

· strengthening the capacity of Parliament to hold the government to account (one of the government's own express aims).

The four are of course closely linked. Rigorous standards of policy preparation backed by consultation processes that engage all those with an interest in the proposals including, crucially, those who will be responsible for implementing them, would reduce the number of flawed Acts requiring adjustment and amendment in subsequent legislation. Strengthened Parliamentary scrutiny would be a powerful disincentive to rushed or inadequate preparation.

The BGI's report "Governing Well" includes a wide range of recommendations that are relevant to these issues. Those proposals that are perhaps most relevant in the context of the Constitutional Renewal Bill are:

· that the Government should publicly commit itself to improving standards of preparation through specific procedures for the conduct of Cabinet business, including appropriate processes of consultation;

· that the powers of Parliament to scrutinise Government policies should be enhanced, in particular by strengthening Select Committees' effectiveness and prestige by freeing the selection of Chairs and members from control by the Whips; by raising their pay to levels closer to those of Government appointments; by strengthening their powers to call for papers and information, to promote debates on substantive motions and to propose their own bills; and by ensuring that they have the necessary staff resources to discharge their scrutiny role thoroughly and effectively.

We have recommended that these proposals should be implemented without waiting for the enactment of the Constitutional Renewal Bill, through means that do not require legislation (for example, improved standards of preparation could be secured through a Parliamentary Resolution backed by Prime Ministerial guidance to Ministers). The Committee may however wish to consider, if they agree that action on these lines is desirable, whether it should be underpinned by specific provisions within the Constitutional Renewal Bill requiring the Government to take the necessary steps.

We are concerned that even where the White Paper proposes additional tasks for Committees, such as approval of certain key public servants, the resource implications have not been fully considered. The Liaison Committee has noted that, although they consider at present resources are "roughly appropriate", they need to be kept under review.

On the specific issue of post-legislative scrutiny, we warmly welcome the Government's decision to proceed, but we have reservations about certain operational aspects of the proposals on which we have written to the Leader of the House of Commons and to the Chairs of relevant Select Committees. Our main point is that unless Governments provide an identifiable definition of the purpose and intended effects of legislation when it is considered by Parliament it will be much more difficult to get the full benefits of post-legislative scrutiny. The text of our exchange of correspondence with the Leader of the House of Commons is on our website.

The Civil Service

The BGI regards the maintenance of an effective Civil Service with the core values of integrity, honesty, objectivity and impartiality (including political impartiality) as a crucial instrument of good government, supporting Ministers of different political persuasions in policy making and the delivery of services. The effectiveness of the Civil Service will be best secured, and its core values maintained, if its members are appointed and promoted on merit.

We welcome the decision to enshrine these principles and the role of the Civil Service Commission in statute provided that the Bill does in practice safeguard and potentially strengthen the role and effectiveness of the Civil Service and the contribution of the Commission. To achieve this we believe that some amendments are needed. We propose the inclusion of:

· a duty of Ministers to uphold the political impartiality of the civil service rather than relying (we presume) on paragraph 56 of the Ministerial Code;

· a duty of Ministers, also in the Ministerial Code, "to give fair consideration and due weight to informed and impartial advice from civil servants" as well as from other sources and to ensure that opportunity is offered to provide that advice;

· a duty of civil servants not only to serve the Government of the day, but also to behave in such a way as to be able to secure the confidence of a future administration of a different political persuasion;

· a provision that promotion within the Home Civil Service and the Diplomatic Service is to be based on merit and subject to regulation by the Civil Service Commission;

· a specific provision, on the lines of the earlier draft Bill, describing the functions that Special Advisers cannot perform and preventing them from commissioning work from civil servants (the present draft authorising them to "assist" Ministers could be taken to cover every action performed by Civil Servants);

· a limit on the use of Special Advisers either by numbers or by a financial constraint as Lord Butler, a member of the BGI has proposed. We also support his proposal that Special Advisers should have a separate status from Civil Servants given the extent of the differences in the values they are expected to observe and their rules of appointment;

· provision for the Civil Service Code, and that for Special Advisers, to be subject to approval or amendment by Parliament (preferably by Affirmative Resolution);

· power for the Civil Service Commission to undertake inquiries relating to the operation of the Civil Service and Special Advisers' Codes even if not arising as a result of complaints, in particular to establish if the Civil Service provisions of the Bill were being achieved in practice.

We also wish to comment on some of the questions set by the Committee.

· We believe that the Civil Service should be answerable to the Government and not to Parliament. However the effect of the Bill, particularly with the amendments we propose, would be likely to increase transparency (for example in considering amendments to the Civil Service Code) and openness to public scrutiny.

· We consider that more justification is needed than has so far been provided for the exceptions in Clause 34(3)to the requirement for selection on merit on the basis of fair and open competition. Further justification is also required for the exclusion of the bodies listed in Clause 25(2) from the application of the Bill.

We think it important that, in ensuring that appointments are made on merit on the basis of fair and open competition, the Civil Service Commission recognises the need for the appointment and promotion system to take account of departments' requirement for planning for succession in the longer term.

Finally, Sir Thomas Legg, who also contributes to the BGI's work, has pointed out that Clause 25 gives no precise definition of "the civil service of the State", nor is there anything further about it in the Explanatory Notes. The Committee may wish to establish whether this is because the meaning of the expression is thought to be sufficiently clear in law or because there are underlying difficulties about defining what the Civil Service is for the purposes of the Bill.

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SUBMISSION FROM COMMITTEE ON STANDARDS IN PUBLIC LIFE MEMORANDUM ON CIVIL SERVICE PROVISIONS

Background

1. The Committee on Standards in Public Life welcomes the provisions on the Civil Service set out in the draft Constitutional Renewal Bill. Since its establishment in 1994, the Committee has taken a close interest in both the substance and the legal basis of the role, governance and values of the civil service and the contribution these make to ensuring high standards in public life. This interest has been the subject of specific comment and recommendations in the First (1995), Sixth (2000) and Ninth (2003) Reports[1].

2. In both its Sixth and Ninth Reports the Committee recommended that consultation should begin on a Civil Service Act, and it responded to the consultation on the draft Bill of 2004. At that stage the Committee stated that it "Looked forward to speedy progress towards an Act of Parliament", and noted that this was not the first time there had been consultation on such legislation. The Committee therefore welcomes the renewed commitment to legislation in the Governance of Britain consultation document, and is particularly encouraged to see the current commitment to the Constitutional Renewal Bill in the Draft Legislative Programme 2008/09. We believe that early introduction of legislation based on the draft is overdue and should be the key aim at this stage.

General

3. The Committee's view is that the draft Bill is pitched at broadly the right level - a relatively short piece of legislation which establishes the fundamental principles that underpin the Civil Service in a statute that can only be changed after parliamentary debate and approval.

4. Annex A lists the recommendations in the Committee's Ninth Report - its fullest statement about a Civil Service Act - and an indication of whether the recommendation is covered by the provisions of the draft Bill. The Committee does not necessarily remain committed to all its earlier recommendations, recognising that in certain aspects, the situation has changed materially since

2003. For example, in respect of the Civil Service Commissioners' power to initiate an investigation into a complaint about breach of the Code, the Committee is aware that the Commissioners themselves are no longer proposing the need for this power, that they feel adequate arrangements may in any case exist through consultation with the Head of the Civil Service over emerging concerns, and that a provision for additional Commission functions exists at clause 40 of the Bill if needed. In general however, the Committee believes that most of its recommendations from 2003 remain appropriate.

5. The bulk of the Committee's observations below concern those recommendations not covered in the draft Bill.

Committee Comments on Part 5 of the Draft Bill

Application

6. It is not clear why GCHQ, included in the 2004 draft, is now excluded.

Codes of Conduct

7. We can see no reason for the provisions needed to accommodate separate codes for civil servants who serve the Scottish Executive or Welsh Assembly (eg clause 30(2); 32(3)(b and c)). All three codes are identical - as they need to be, given the reserved status of the Civil Service - except for the statement of accountability in the first paragraph. The previous version of the code applied to all the administrations, and we would advocate a single introductory paragraph which makes clear any differences in accountability, not least because of the need for the arrangements in the devolved administrations to be fully understood in Whitehall. Given the importance of the code for setting standards throughout the UK civil service generally, and the need to avoid the impression of divergence on standards where none exists, we see a clear case for having a single document and simplifying the Bill accordingly.

8. We note the concerns expressed by the Public Administration Select Committee about the reduction, compared to 2004, in the scope of civil service duties on the face of the Bill. While this may to an extent reflect changes in the Civil Service Code itself (the 2006 version contains the four "core values" of integrity, honesty, impartiality and objectivity, but not other requirements relating to eg acting within the law or without maladminstration), we agree that the Bill as currently drafted is at the bare minimum in terms of its coverage of even the core values. We agree with the Select Committee that, at least in the case of "impartiality", the use of a single word is inadequate and

ambiguous as between several different concepts in the Code[2]. We also note the Select Committee's suggestion that adequate expression in the Bill of the core values is sufficiently important to justify conversion of the Codes into affirmative Orders if it were not forthcoming (see also paragraph 10 below).

9. The Bill includes no provision requiring Ministers to uphold the impartiality of the Civil Service (as recommended in the Ninth Report) nor not to impede Civil Servants in their compliance with the Code (as included in the 2004 draft). The relevant recommendation in the Ninth Report derived from the Committee's concern that there should be an obligation on Ministers not to ask the Civil Service to undertake political tasks. We recognise that attempts to draft this into legislation have not been straight-forward, and we note that the Public Administration Select Committee Report on the current Bill agrees with the Government that the issue is best addressed at the political rather than the legal level. One of the problems, in practice, has been Government concerns that such a provision might impinge on the Ministerial Code, creating legal requirements around a hitherto administrative document. The Committee nevertheless believes that a legislative statement to uphold impartiality would go to the heart of securing the constitutional boundaries between Ministers, the Civil Service and special advisers, and suggests that this is an issue the Joint Committee might want to consider further. .

10. An alternative approach could be to adopt the Committee's Ninth Report recommendation, that the codes for both civil servants and special advisers should be promulgated by means of affirmative order. We recognise that this approach would reduce the flexibility with which the Codes could be changed. But we believe that the general argument in favour of certainty and Parliamentary accountability has been accepted in principle anyway by the Government in its acceptance of the need to move the management of the Civil Service from a prerogative to a statutory basis.

Appointments , Status & Powers of the Civil Service Commission

11. Apart from the lack of a Commission power to initiate investigations into breaches of the code (see paragraph 4 above), clauses 34 - 37 and the relevant schedule are generally in line with the Committee's recommendations. We support the Select Committee's proposed compromise designed to enable the Commission to initiate investigations of suspected breaches of the Code through a discretionary power, although it is possible that even this could require significant additional resource to filter and assess complaints, of the kind that concerned the First Civil Service Commissioner.

12. We note the provision for the Commission to approve exceptions to the fair and open competition requirements where these are "justified by the needs of the civil service". While we understand that similar wording already exists in the recruitment code (and that the Ninth Report acknowledged exceptions to selection on merit in its recommendations), use of this power would

clearly require rigorous justification and monitoring. We would also raise the question of whether it is in fact the "needs of the civil service" which are relevant in justifying exceptions, or whether the test should be justification "in the public interest".

Special Advisers

13. The Committee is disappointed with the treatment of special advisers in the Bill. In particular:

Ø The provisions fall short of the Ninth Report's clear recommendation - and even, to some extent, of the 2004 draft - in containing nothing about limitations on the role of special advisers. We assume the intention is to rely on the provisions of the relevant code, but this calls into question the status of that code and the fact that neither it nor any changes to it will have direct Parliamentary oversight. We do not therefore see the approach in the current draft as justifying the assertion in the Governance of Britain consultation paper, that the revocation of Article 3(3) of the Order "will be made permanent in the forthcoming legislation."

Ø The draft Bill does not set a limit on the number of special advisers, nor does it provide for any limit to be set or amended by Parliament (indeed, it effectively removes current Scottish and Welsh limits set out in the relevant Orders in Council). The Government argues that the issues raised by the development of special advisers are not susceptible to resolution by the setting of upper limits on their numbers. While the Committee accepts that control over functions and responsibilities is a more directly fundamental issue than the setting of specific numbers, at present the draft Bill attempts neither. If the Bill is to be virtually silent on the crucial issue of permitted and prescribed functions, then it can be argued that the need for crude numerical limits to be written into either the primary or secondary legislation becomes that much greater.

Committee on Standards in Public Life

June 2008

ANNEX A

COMMITTEE ON STANDARDS IN PUBLIC LIFE - NINTH REPORT RECOMMENDATIONS AGAINST PROVISIONS OF PART 5, DRAFT CONSTITUTIONAL RENEWAL BILL

RECOMMENDATION

There should be a short Act to cover the Civil Service and special advisers.

In particular, this should:
√

(a) define the status of the Civil Service
√

(b) include a statutory obligation on ministers to uphold the impartiality of the Civil Service

(c) set out the responsibility of the Civil Service Commissioners for ensuring that the principle of selection on merit is properly applied, together with the ability to make exceptions from that principle
√

(d) set out the Civil Service core values, including the overriding principle of selection on merit
√

(e) grant powers for the Civil Service Commissioners to investigate, on their own initiative, and to report on the operation of the Civil Service recruitment as it concerns the application of the principle of selection on merit
In part

(f) provide for the First Civil Service Commissioner to be appointed after consultation with opposition leaders
√

(g) define the status of special advisers as a category of government servant distinct from the Civil Service
√

(h) state what special advisers cannot do

(i) include power for the Civil Service Code and the Code of Conduct for special advisers to be given effect as statutory instruments requiring the approval of both House of Parliament and amendable by the same procedure

(j) state the total number of special advisers, with an upper limit subject to alteration by resolution approved by both Houses of Parliament

(k) provide for two special adviser posts in the Prime Minister's Office with "executive powers"
n/a

(l) define special advisers with executive powers by derogation from the restrictions on what other special advisers can do
n/a

(m) require an annual statement to Parliament on paid and unpaid special advisers
√

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[1] Respectively Cm2850-I (May 1995), Cm 4557-I (January 2000) and Cm 5775 (April 2003).

[2] In the current Civil Service Code, "Impartiality" refers variously to political impartiality; serving the public impartially; and reflecting a commitment to equality and diversity.

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SUBMISSION BY FDA

1. The FDA welcomes the opportunity to give evidence on the Draft Constitutional Renewal Bill. This evidence restricts itself to the civil service provisions of the Bill.

2. There is a qualitative difference between the civil service of the state and, say, a London Borough Council or an NHS Foundation Trust. However, both a local authority and a hospital Trust have much stronger statutory governance arrangements than does the civil service. Maintaining the integrity of the state and constitution is not simply about standards and governance for elected politicians. It must also be about the governance and standards of the permanent administration. Britain is justly renowned for the political neutrality, impartiality and lack of corruption of its civil service. We believe that the Bill should support and reinforce these strengths.

3. The FDA have argued for many years for a Civil Service Act which would enshrine in statute the core principles and values of the civil service, in particular a commitment to fair and open competition for appointments, and the political impartiality of civil servants, as well as giving statutory status to the Civil Service Commission. This would help to ensure that if a future Government wished to change the values or status of the civil service, it could do so only with the consent of Parliament. We therefore welcome the civil service provisions of the draft Constitutional Renewal Bill (CR Bill).

4. We welcome the report of the House of Commons Public Administration Select Committee (PASC) 'Constitutional Renewal: Draft Bill and White Paper', to which this evidence refers on points of concern.

5. We have five underlying concerns with the Bill as currently drafted.

6. Firstly, we have been advised by the Cabinet Office that once the Bill is enshrined in statute, the use of prerogative powers to make Orders in Council "will fall away", and that any future use of the Royal Prerogative in the civil service is only possible where this is allowed for on the face of the Bill, eg in relation to vetting. The Joint Committee will want to be satisfied of this interpretation. Moreover, if the subsequent management of the civil service is to rely on statutory provisions, then as drafted the Bill appears to leave a number of important issues unaddressed. In particular, one of the advantages of such legislation, in our view, is that it would extend to civil servants the protection of employment legislation enjoyed by other workers. We should like to be convinced that

the Bill successfully achieves this, and would not wish to see what we regard as contractual matters, such as vetting, left under Prerogative powers. An underlying concern of the FDA is that we are keen to draw a distinction within the Bill between current Government intention (which may be benign but is necessarily transitory) and Constitutional protections, which we believe should be permanent.

7. Secondly, we are unclear about the future employment status of civil servants. There remains a question as to who is the employer, and the related risk that Ministers (actually or potentially) could play an active role in the management of the civil service, including the promotion or dismissal of civil servants. At present, civil servants are 'Servants of the Crown'. The Civil Service (Management Functions) Act 1992 established in statute Her Majesty's Home Civil Service and allowed delegations through the Minister for the Civil Service (the Prime Minister) to other Ministers of the Crown. Clauses 27, 28 and 29 seek to maintain the practice and retain the basic structure of the 1992 Act. However, the Bill does not appear to guarantee the employment status of civil servants under law.

8. It appears to be being argued that the contract of employment of a civil servant remains with the Crown (although this is not evident on the face of the Bill) and that management of this is delegated to the Prime Minister, or Ministers. However, if the intention is to place a constitutional protection to maintain civil service independence in statute, it is not clear why a politician should therefore have the statutory right to manage civil servants and have oversight of the contract of employment of a civil servant, rather than this power being vested in a permanent official such as the Cabinet Secretary/Head of the Home Civil Service/Head of the Diplomatic Service. Whilst it has not been the practice of this or previous Governments for Ministers to intervene in issues about the employment of individual civil servants, there appears to be no constraint within the Bill that would prevent them from doing so in future.

9. We therefore endorse the view of PASC (para 22) that this requires further investigation.

10. Further, the draft Bill lacks clarity about what is meant by the terms 'civil service' and 'civil servant', and we would welcome clarification of the term 'Servant of the Crown' and differentiating the position of those appointed to an office under statute who are civil servants for this purpose, and those who are not.

11. Thirdly, we are concerned about the status and role of Special Advisors. The FDA is not opposed to the concept of Special Advisors and in practice Special Advisors perform a valuable role in supporting Ministers and liaising with departmental civil servants.

12. However, the Bill does not appear to offer any protection against a special adviser being given the authority to manage or direct civil servants. Clause 38 (1) (b) simply defines the duties of a Special Advisor as being "to assist" a minister. And Clause 32 (2) refers to the requirements of civil servants "to carry out their duties to the assistance of the administration". It is therefore not at all clear what it is, apart from the method of appointment, that differentiates a Special Advisor from any other civil servant. In contrast, the draft 2004 Bill published by the Government offered in Clause 16 a definition of "restricted duties" which included in 16 (8) (c) "exercising any function relating to the appraisal, reward, promotion or disciplining of civil servants in any part of the Civil Service".

13. We therefore welcome the recommendation in Paragraph 44 of the PASC Report that it needs to be absolutely clear in primary legislation that Special Advisors have restricted powers.

14. Fourthly, we are concerned at the facilities within the Bill for some appointments to be "excepted from appointment of merit on the basis of fair and open competition", both into the Home Civil Service and to the Diplomatic Service. We have not yet been presented with evidence to explain the type and number of appointments that the Civil Service Commissioners might wish to exempt from the principle of fair and open competition into the Home Civil Service, and believe that this is a matter that needs to be investigated further. Whilst we recognise that such a facility may be helpful in very limited circumstances, there should at the very least be transparency about its use in the Home Civil Service, and ideally express constraints on when it might apply.

15. Moreover, we share the view of PASC (Para 35) that "we do not understand why it should ever be appropriate for the government to make senior diplomatic appointments other than on merit following a fair and open competition". The FDA recognises that senior figures from outside the Diplomatic Service may have much to bring to overseas relationships and we have no objection to their appointment, provided that they secure the post by fair and open competition.

16. Fifthly, we share the concern of PASC (para 28) that the Bill must encapsulate the core values adequately, and that the definition in particular of 'impartiality' must be strengthened and political impartiality made a statutory requirement.

Questions raised by the Joint Consultative Committee

4. Do the provisions in the Draft Bill increase the accountability of the civil service and the Civil Service Commissioners to Parliament?

17. The FDA has long argued that the civil service has a wider accountability to Parliament, beyond its obligation to the Government of the day. We accept the statement in the Civil Service Code that the civil service "supports the Government of the day in delivering and implementing its policies and in delivering public services. Civil servants are accountable to Ministers, who are in turn accountable to Parliament". However, in addition to this primary accountability, the civil service should have a status separate from that of the Government of the day; there are not only certain practical functions for which civil servants are directly accountable to Parliament (such as the role of an Accounting Officer) but also a constitutional understanding that there must be a wider accountability for the civil service to protect the interests of future Governments and citizens.

18. We believe therefore that the provisions of the Bill will enhance and confirm this wider accountability and constitutional status. We also believe that the Civil Service Commissioners should themselves be understood as having accountability to Parliament and not solely to the Executive.

19. We therefore welcome the argument of PASC (Para 48) that would require the agreement of the Leader of the Opposition to the appointment of the first Civil Service Commissioner rather than simply being consulted. We further welcome PASC (para 54) in proposing that the Joint Committee consider further how the Civil Service Commission should develop financial and operational independence from the Government. Finally, we suggest that any report of the Commission should be to Parliament rather than to the Prime Minister as proposed in Schedule for Part 2 18.

5. The Draft Bill puts the Civil Service Commission on a statutory footing as a non-departmental public body. Will this increase the independence of the commissioners?

20. We believe that this will help to do so, but see above in answer to Q4.

6. Under the Draft Bill, the Commission retains the right to hear appeals from civil servants and make recommendations, but the Draft Bill does not state who recommendations should be made to. Should this be included in Statute?

21. We believe that any such report should, in the first instance, be to the Cabinet Secretary/Head of the Home Civil Service/Head of Diplomatic Service.

7. Should the Commission be given the powers and resources to initiate investigations without an appeal being made to it?

23. We recognise the ambivalence of the Civil Service Commission themselves on this issue, as explained by PASC (para 55-58). The FDA has long argued that the Commission should be able to consider a specific complaint by a third party, including a trade union representing civil servants. We therefore endorse the recommendations of PASC, that the Commission should be enabled to undertake investigations at their discretion, other than in response to specific complaints from civil servants and without the need for Government consent.

8. Appointments to the Civil Service must be made on merit following open and fair competition, but the Draft Bill sets out a number of exceptions to this, in Clause 34 (3). Are these exceptions appropriate?

24. See above, paragraphs 14 and 15. We have expressed deep reservations about the use of exceptions under the recruitment principles. We believe that the most senior positions in the Diplomatic Service should be filled only through fair and open competition. It must be right that other appointments made by Her Majesty, by definition the more important positions, should be made through such a process. We accept, however, that there may need to be an exception in relation to Special Advisers.

9. The Draft Bill does not define the number or role of Special Advisors. Instead Special Advisors must comply with a Code of Conduct published by the Government, and the Government must make an Annual Report containing information about the numbers and cost of Special Advisors. Are these provisions appropriate?

25. The FDA recognises the difficulty in not defining the number of Special Advisers, and endorses the sentiments of Sir Robin Mountfield quoted in PASC (Para 41). However, as explained above, we believe that the key issue in the context of Special Advisors is to address the question of their powers. An attempt to define the numbers of the Special Advisors might in practice simply lead to the establishing of a norm. It would be important therefore to be clear on what the functions of Special Advisors are on the face of the Bill. The current wording which refers to them 'assisting' Ministers is inadequate, or at least incomplete, in part for reasons we have already discussed above.

10. Is the way that the Draft Bill defines "Civil Servants" and "The Civil Service" appropriate? Are the exclusions in Clause 25 (2) appropriate?

26. Our concerns on this matter are explained above in paragraphs 7 to 10. In principle we believe that all employees of the state should have the full protection of statute law and that matters relating

to their employment should be removed from the Royal Prerogative decisions. We recognise that this raises practical issues in some circumstances. In this context of this Bill, therefore, the FDA is content with the exclusions in Clause 25 (2), although the Joint Committee will wish to note that the staff of GCHQ are civil servants. Staff in the Secret Intelligence Service and the Security Service are Crown Servants. We also believe that parallel legislation for the Northern Ireland Civil Service (and Courts Service) should also be enacted.

Other Issues

27. In addition to the issues explored above, we share the view of PASC (paras 62-65) that the Joint Committee may wish to consider further the obligations upon Ministers. In addition to the obligations explored by PASC, we also believe that it would be appropriate for a reference to be made on the face of the Bill to the obligation on Ministers in the Ministerial Code Paragraph 3.1 that "Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions".

28. We also share the concerns of PASC (paras 66-67) about the way in which successive Governments have handled machinery of government changes. Whilst any Government must retain the power to shape departments as they believe is appropriate, too often such changes are undertaken for what appear to be cosmetic reasons or, even where there are clear operational benefits, are undertaken without any proper review or the development of a business case, or even proper planning. We cannot understate the disruption that is caused to the work of departments, and to individual civil servants, when such changes are made, especially where there has not been proper planning. These changes are often also costly and cause significant HR difficulties for departments and individual civil servants themselves. The FDA's recent Annual Conference supported calls for the Bill to include the requirement for a full review of organisational arrangements in the relevant areas in consultation with trade unions, before changes were made.

29. An outstanding issue not incorporated into the draft Bill is that of civil service nationality rules. This is a long standing issue which the Government has repeatedly indicated it intends to address, and the Government has been supportive of the attempts by Andrew Dismore MP to pursue the matter through a Private Members Bill. Unfortunately Mr Dismore has to date been unsuccessful, and we believe that this should be addressed in the draft CR Bill.

30. Finally, in considering the role of the Commission and the oversight of the important principle of appointment on merit, sight must not be lost of the needs of the civil service as an organisation and the importance of a fair and structured approach to managing and developing people.

31. For a variety of reasons the civil service has moved in recent years to a much greater degree of external entry into posts within the Senior Civil Service. This was primarily because it was felt that the civil service had not the right match of skills given new challenges facing government. A position has been reached where two out of every five director generals (Grade 2s) are external appointees. In 2007, 40% of appointees into the Senior Civil Service were external candidates. That said, there is evidence that up to 50% of external hires are not successful. The FDA has welcomed the fact that Sir Gus O'Donnell and colleagues are examining closely the experience of significant external recruitment and its implications for the long term health of the civil service and whether the taxpayer is actually getting value for money. Any organisation the size of the civil service should be able to generate the majority of senior staff it requires, recognising as the FDA has long done, that there will always be a need for some degree of external entry to more senior posts; it is getting the balance right that matters.

32. There is a danger at the moment that the concept of appointment on merit is being defined in a way that undermines the health of the civil service and risks becoming a 'tick box' exercise rather than recognising that the civil service is an organic entity operating in a complex political environment in which broader management needs must be an important consideration. It is already arguable that Ministers and the civil service as an organisation are suffering from the loss of 'collective memory' (which is not simply a matter of 'filing' but a historic understanding of complex issues) and experience that recent practices have fostered.

33. It is important therefore that the Bill does nothing to exacerbate this problem.

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HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the Local Government Association

A New Politics: Localising the Constitution

1. Introduction

1.1 The government and the LGA have committed to a new relationship which moves closer to recognising that central and local government are equal partners in delivering services for people - through the central-local concordat.

2. Summary

2.1 The LGA believes that local government should feature more strongly in the bill as it presents an opportunity to reconnect people and political processes, and to formalise local government's place in the constitution, building upon the central-local concordat.

2.2 The LGA would like to see the points below addressed in the draft Constitutional Renewal Bill:

v A statutory duty to ask government departments and agencies at all levels periodically to review their functions and ensure that power is exercised at the lowest effective and practical level;

v Establish a powerful Parliamentary committee charged with pre-scrutinising legislative proposals with local government implications and promote the deregulation of councils and the reduction of consent regimes;

v Allow councils to introduce Public General Acts to Parliament;

v The Audit Commission, like the NAO, to become directly accountable to parliament; and

v The right of councils to nominate a proportion of members to local public bodies

How would councils like to see the bill improved?

3. Local government must be at the heart of constitutional renewal

3.1 There is a need to reconnect people and political processes. Our constitution - written or unwritten - is our society's definitive statement of the relationship between people and political processes. Our vision is democratic. Political structures exist in order to make real the insight that the nation is a community, owning in common its collective assets and mandating collective effort through the organs of the state to achieve justice and equity.

3.2 It follows from this that the constitution is not simply about roles and responsibilities among the central bodies of the state. Implicitly or explicitly, the constitution gives an account of how individuals, families and communities relate to the totality of collective action. So local government must be at the heart of the constitutional settlement and the draft Constitutional Renewal Bill. If the broad challenge is to restore vitality and trust to our democracy, local government is central to it. The bill is also an opportunity to formalise local government's place in the constitution and embody in the core constitution the devolutionary direction of travel that we have been pleased to see Ministers advocating.

3.3 We are looking for a draft Constitutional Renewal Bill that reflects this and believe there is a strong case for legislation in five areas.

4. Legislative embodiment of the principle of subsidiarity.

4.1 There is a cross party consensus about what can be achieved through centralism and recognition that the solutions to some of society's greatest challenges will only be found locally, such as gang culture, drug abuse, obesity and long-term unemployment.

4.2 Clause 4 of the central-local concordat sets out a number of shared objectives between central and local government and states that "in delivering these objectives, there should be a presumption that powers are best exercised at the lowest effective and practical level." We suggest this could best be achieved by including a subsidiarity clause in the draft Constitutional Renewal Bill that enshrines into law what central and local government have already agreed to in the concordat, and which is embedded on the European Charter of Local self-Government to which the UK subscribed in 1997.

4.3 The Duty to Involve, set out in the Local Government and Public Involvement in Health Act 2007, may provide a useful model. A subsidiarity clause could ask government at all levels to review their functions and ensure that power is exercised at the lowest effective and practical level. Exempt from this would be matters where we recognise central government, acting through Parliament, has the responsibility and democratic mandate to act in accordance with the national interest, including national economic policy, and national taxation.

4.4 But the presumption would be that decisions should be taken as closely as possible to citizens because this leads to better services for local people and more efficient use of resources. Local decision-making and local innovation are vital to making things better for citizens and restoring trust in public services.

5. Establish a powerful Parliamentary committee charged with pre-scrutinising legislative proposals with local government implications and promote the deregulation of councils and the reduction of consent regimes

5.1 Too often, Parliament legislates on the basis of central government's proposals, to impose new tasks on local councils which have been inadequately thought through for their cost or their ease of implementation. Sometimes the result is unanticipated cost on the council tax payer. Sometimes it is chaotic implementation. In many cases - as with the 2003 Licensing Act - it is both. In either case, local communities are left disillusioned as Ministers' policy commitments fail to materialise in line with the vision they have set out. This contributes to disengagement with the political process and

low citizen satisfaction. Better scrutiny would help to create a more consensual and realistic political climate, as well as improving actual policy delivery in communities.

5.2 So we recommend that Parliament should set up a powerful committee charged with pre-scrutinising legislative proposals with local government implications and oversight of the deregulation of local government and the reduction of consent regimes Such a committee already exists in the House of Lords to scrutinise "whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny."

6. Allow councils to introduce Public General Acts to Parliament

6.1 The government has a monopoly of control over what Parliament can talk about. Private Members' Bills which the government opposes can be killed by depriving them of time; Local Bills can only apply to a limited geographical area and are prohibitively costly for an individual council to promote.

6.2 So we recommend that Parliament reform the process for initiating Bills and the way Seasonal Orders allocate legislative time to allow councils to introduce Public General Acts within their sphere of competence. They would have more chance of passing into law than a Private Members' Bill, and require a less costly and cumbersome process than Local Bills currently do.

6.3 There would be three operational parts to this proposal:

v Create a new Bill procedure that allows local government acting collectively to promote a Bill intended to create Public General Act (i.e. an ordinary Act of Parliament that applies everywhere, rather than a Local Act that only applies to a single council or group of councils); currently councils can only promote a Local Bill, considered in a cumbersome special committee procedure

v Equip councils to promote a Bill collectively through a new joint arrangement

v Change the Sessional Orders that allocate legislative time so that the government takes a smaller share of time, allowing enough time for debate on Bills promoted under the new procedure

6.4 This proposal would allow new legislative ideas to come from communities themselves, not from government with its automatic majority, and on subjects that were not part of the government's programme. Without eroding the authority of the government's mandate in the Commons, it would

restore the perception that Parliament was a place of genuine debate on real issues arising in parts of the country outside the Westminster Village.

7. That the Audit Commission, like the NAO, should become directly accountable to parliament

7.1 The Audit Commission and the NAO are both responsible for ensuring public bodies behave with financial propriety and deliver value for money. It is not obvious why the body charged with assessing value for money and probity should, in the case of central government, be accountable directly to elected representatives, but, in the case of local government, to public officials (which is what Ministers are). Notwithstanding the statutory provision that "The Commission shall not be regarded as acting on behalf of the Crown" (Sch 1, para 2 of the Audit Commission Act 1998), "The Secretary of State may give the Commission directions as to the discharge of its functions and the Commission shall give effect to any such directions" (Sch1, para 3 of the 1998 Act). Over recent years, the Commission's principal role has been to implement an inspection regime that establishes whether councils are implementing the government's service improvement priorities. The National Audit Office, on the other hand, is answerable to Parliament alone and cannot be influenced by Ministers. Its role is to establish whether taxpayers' money is being properly spent for the purposes set out by the elected representatives of the people - not the purposes chosen by Ministers.

7.2 Our proposal makes sense because their functions - making sure money voted by Parliament is properly spent - are the same. It would:

v establish that all taxpayers' money was subject to the same standard of value-for-money and probity;

v reestablish that audit and inspection of local government was about value for money and probity rather than also being about compliance with Ministerial policy;

v demonstrate that taxpayers are equally respected as taxpayers whatever tax they happen to be paying.

7.3 It would require repeal of the1998 Audit Commission Act and amendment of the 1983 National Audit Act (possibly by simply adding councils and the NHS to Section 7

8. That councils be given the power to nominate a proportion of members serving on local public bodies

8.1 In recent years it would appear that service as a local councillor has increasingly been regarded as a disqualification for appointment to local public bodies like LSCs or PCTS rather than the reverse. The knowledge and experience of local elected members, and their connection with the local community and local authority services should make them more, not less well-equipped to serve on such bodies, though local authorities need to nominate members with relevant skills and the time to devote to such duties, and to offer adequate support.

9. About the LGA

9.1 The Local Government Association is a cross party organisation representing over 400 councils in England and Wales. The LGA exists to promote better local government. We work with and for our member authorities to realise a shared vision of local government that enables local people to shape a distinctive and better future for their locality and its communities. We aim to put local councils at the heart of the drive to improve public services and to work with government to ensure that the policy, legislative and financial context in which they operate, supports

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Memorandum by Local Government Information Office

The LGIU is an authoritative and informed source of comment, information and analysis on a range of local government and public policy issues. A local authority membership-controlled organisation, LGIU members include Labour, Conservative and Liberal Democrat councils. The LGIU shares its expertise with government and campaigns to extend local authority best practice, freedoms and responsibilities.

SUMMARY

The Committee will consider the balance of power between parliament and government. Although it will focus on a limited number of topics, it has asked for contributions on how the specific proposals in the Bill fit into the wider constitutional context. LGIU believes that part of this wider context is the relationship between central and local government as a broad balancing factor in the constitutional framework.

The original Green Paper, The Governance of Britain, included a proposal formalising the central-local relationship in a concordat. This has been agreed behind closed doors between the relevant department of government and the Local Government Association. LGIU believes this concordat should be out in the open and be given constitutional recognition through inclusion in this Bill, and that consideration should be given to a more fundamental recognition of the roles and responsibilities of local government.

We believe that it is not only appropriate but desirable to include a range of provisions that are perceived to have 'constitutional' implications within a Bill such as this. Distinguishing general or underlying principles from the mainstream of legislation will be important in achieving the status, and consequently the protection, that such principles need.

LGIU welcomes the opportunity to submit written evidence to the Committee, and would value the opportunity to expand on the issues we have raised in oral evidence.

THE WIDER CONSTITUTIONAL CONTEXT

1. In announcing the draft Bill in the Queen's speech, the proposals were described as being "to renew the constitutional settlement and strengthen the relationship between Government, Parliament and the people". The wider constitutional dimensions are recognised in the introduction to the White Paper, The Governance of Britain - Constitutional Renewal. Here, the Government has presented four key goals for its constitutional initiatives:

a. to invigorate our democracy

b. to clarify the role of Government, both central and local

c. to rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account

d. to work with the British people to achieve a stronger sense of what it means to be British.

2. Local democracy has a crucial role to play in the relationship between the people and the state. The absence of the local dimension from the draft Bill is a critical imbalance as:

· the majority of interactions between individuals, communities and the state are local

· participative processes increasingly encourage people's involvement with local government as a means of influencing the services they receive and their quality of life

· responsive multi-purpose representative local democracy is a precondition of effective local participation.

3. Local government is a critical element in effective democracy, and LGIU believes that the law should protect both the status of local government, and its responsibilities to support the participation of citizens. There is danger in treating local government and the workings of Parliament and central government as distinct and separate, as this fails to recognise the inter-relationship of central and local spheres of influence and responsibility, and avoids the need to consider the working of democracy as a whole.

4. We would like to see the Committee considering the nature of the relationship of central and local government, recognising the important role of elected local government as a key sphere of responsibility and influence on behalf of the people of their areas, and reaching conclusions about how these issues might be provided for within an over-arching constitutional framework.

CENTRAL-LOCAL CONCORDAT

5. In December 2007 the Local Government Association (LGA) and Secretary of State for Communities and Local Government signed a central - local concordat, as envisaged in The Governance of Britain Green Paper. The concordat gives a degree of recognition to the central-local relationship, setting out broad principles which are indications of intent rather than solid commitments. Indeed, government compliance with the concordat has been questioned on at least

two occasions since it was agreed[1]. It is important to note that the concordat represents an agreement between key players, rather than one based on a general commitment from government (signed for example by the Prime Minister on behalf of all government departments) or on wider consultation with those with a stake in local government.

6. LGIU believes that a central - local concordat requires statutory status, as an expression of the role and responsibilities and inter-relationship of local and central government, and that the opportunity arises quite naturally through this Bill. A set of principles for future concordats could require that agreements be settled from time to time between central government and the LGA, on a basis of consultation with local government stakeholders more widely (local authorities, National Council of Voluntary Organisations, and other national bodies with an interest). The set of principles should be ambitious for the future of local democracy; should have cross government and cross party support; and be based on a consensus of what democracy means to local people and communities.

7. The present position, that the partners to the concordat will be responsible for any revisions, and for monitoring the concordat, and therefore monitoring central - local relations, is inadequate. This crucial area of democratic and constitutional engagement should be open to public scrutiny, and partners to the agreement publicly accountable for implementing and reviewing the concordat's provisions. LGIU has an open mind as to whether the concordat should be monitored by an independent body or by a parliamentary select committee (joint committee) charged with an independent brief, and would welcome the Committee giving consideration to these options.

PRINCIPLES OF LOCAL DEMOCRACY OR SELF-GOVERNMENT

8. LGIU believes that the ability of locally elected representatives to make democratic decisions and to represent and support the participation of people locally should be protected within the constitutional framework. The chequered history of local government over the last fifty years shows widely varying views on the role and responsibilities of local government on the part of central government. The progress made in the last decade should be built upon and protected within a constitutional framework that has cross-party support.

9. The British government has already recognised a set of principles that protect this approach in international law. The European Charter of Local Self-Government[2] defines local democracy as the ability of local authorities to 'regulate and manage a substantial share of public affairs' and having full discretion to take action in their areas of responsibility. The Charter, to which UK negotiators made a significant contribution, provides a litmus test for the level at which decisions should be made - 'for preference public responsibilities should generally be exercised by authorities closest to the citizen'.

10. It is a requirement of the Charter that the principles of local self-government are recognised and protected in domestic law. Central government has argued that the totality of our legislation ensures compliance. This is a gap in UK law and in our compliance with the Charter. It is also the case that the UK is in breach of the Charter in other significant respects, particularly in the sphere of the financing of local government.

11. LGIU sees two possible approaches that would safeguard the democratic principles acknowledged by the Charter: by including the terms of Charter in a vehicle such as the draft Bill, or by the adoption of a set of principles which complied with the Charter. There are illustrations of the adoption of a set of principles, both within the European Union and elsewhere, and LGIU tends to favour this approach, which would create the opportunity to enshrine commonly understood principles of representation and participation in our legislation.

12. This would have the effect of protecting the position of local government in three ways. It would ensure recognition by politicians both locally and nationally; mean that civil servants across government would need to consider the local implications of plans and investment; and create a standard that the courts could refer to in reaching conclusions in appropriate cases.

13. LGIU urges the Committee to consider whether statutory recognition of the terms of Charter would be appropriate, or would it be more in accordance with UK law to recognise a set of principles based on the Charter?

LOCAL ACCOUNTABILITY

14. LGIU has significant concerns as to how the relationship between local authorities and the various quangos and locally appointed boards fits into the constitutional framework. In 2002, LGIU hosted the independent Commission on Local Governance, which heard evidence from a range of sources, and drew attention to the lack of accountability of the increasing number of organisations and agencies responsible for local services. It also expressed concern that local strategic partnerships were developing without sufficient attention being paid to accountability to local people - a situation which persists. The Commission called for a thorough review of the role and responsibilities of quangos, saying that the case for an assessment was overwhelming. Quangos should be added to the responsibilities of local authority Overview and Scrutiny Committees.

15. LGIU believes that immediate consideration could be given to the form in which quangos could be held to account through overview and scrutiny, building on the extension of scrutiny to the bodies represented in Local Area Agreements, recently introduced by Parliament in the Local Government and Public Involvement in Health Act 2007.

16. A review could also consider what functions of quangos should be reallocated to local authorities. We would wish to see the possibility of appropriate transfers of authority considered as part of a major review of the role of quangos and local boards.

June 2008

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[1] 'LGA accuses government of breaking central/local deal' (over an amendment to the Planning Bill) Local Government Chronicle (LGC) 14 February 2008; 'Quango sparks concordat row' (over the draft strategy for the Local Better Regulation Office) LGC 3 April 2008

[2] The UK signed and then ratified the Treaty in 1997-98.

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Memorandum by the Public and Commercial Services Union (PCS) and Prospect

Introduction

1. PCS, a respondent to the Civil Service Bill published in 2004, and Prospect broadly welcome the draft Constitutional Renewal Bill as it offers, for the first time in 150 years and possibly the last time, the opportunity to put civil service employment and the Civil Service Commissioners on a statutory footing.

2. PCS and Prospect - unions representing over 365,000 members, majority of whom work in government departments, agencies and public bodies - further welcome the proposal to enshrine the core values of the civil service namely impartiality, integrity, honesty and objectivity into law, as well as the principle of appointment on merit.

3. However, PCS and Prospect believe that the Draft Bill does not go far enough in terms of putting civil servants on the same footing as other employees because it has not addressed existing key anomalies which serve as a contradiction to the main purpose of the Draft Bill. The anomalies are set out in our responses to the questions posed by the Joint Committee as follows:

Do the provisions in the Draft Bill increase accountability of the civil service and the Civil Service Commission to Parliament?

4. Undoubtedly, the provisions are likely to lead to an increase in accountability to Parliament. However, the exclusion of the Secret Intelligence Service, the Security Service, GCHQ and the Northern Ireland Civil and Court Services , as well as the absence of a definition of what constitutes the civil service, may render the accountability process incomplete.

5. The argument for keeping the Secret Intelligence Service, the Security Service and GCHQ outside the scope of the Draft Bill as set out in paragraph 195 of the White Paper is that the "Government does not believe it would be sensible to operate two different systems, and therefore a saving provision for the retention of the prerogative in this area..." Whilst PCS and Prospect can understand why the Government wishes to retain a single system for national security vetting, it is

very mindful of the way that the prerogative was used to ban trade unions from GCHQ in 1984. We would therefore urge the Joint Committee to reconsider the argument being put forward for exclusion in each case.

The Draft Bill puts the Civil Service Commission on a statutory footing as a non-departmental public body. Will this increase the independence of the Commissioners?

6. Putting the Commission on a statutory footing is likely to lead to an increase in the independence of the Commissioners but it is arguable as to whether it will have the same effect on its function. For example, the Commission will not have the power to launch an investigation without the agreement of the Government when the latter is the employer. This may bring about conflict of interest on the part of the Government in circumstances where investigation outcomes are likely to impact negatively on the Government. This would, in effect, limit the scope for achieving mutual agreement.

Under the Draft Bill, the Commission retains the right to hear appeals from civil servants and make recommendations, but the Draft Bill does not state who recommendations should be made to. Should this be included in statute?

7. Yes, the statute should indicate who recommendations should be made to. It is recommended that they are made to the Head of the Civil Service, in the first instance.

Should the Commission be given the power and resources to initiate investigations without an appeal being made to it?

8. Yes, as this will increase the Commission's independence.

Appointments to the civil service must be made on merit following open and fair competition, but the Draft Bill sets out a number of exceptions to this (in clause 34(3). Are these exceptions appropriate?

9. The exemptions listed under clause 34(3) appear to be a departure from what was listed under clause 8 (3) of the Civil Service Bill 2004. Whereas the exemptions in the 2004 Civil Service Bill are precise and clear, thereby leaving little room for misinterpretation, those listed in the Draft Bill under clause 34(3) are ambiguous, and therefore open to misinterpretation. We would recommend

that further consideration is given to this clause, and in particular clarity in terms of what will actually be the impact on the ground.

10. Clause 34 also raises a number of other issues which are not covered by the Draft Bill. For example, clause 34 (2) of the Draft Bill states that "a person's selection must be on merit on the basis of fair and open competition". There can, of course, be no objection to that provision, which simply repeats in statutory form the current position in relation to the appointment of civil servants under the Civil Service Order in Council 1995.

11. A key issue which arises from that, however, is the question as to what the legal status of an employment contract of a civil servant would be if, through no fault of his / her own, he / she had not been appointed on merit on the basis of fair and open competition. Treasury Solicitors have argued on behalf of the Crown in, for example, the agency worker cases taken on behalf of PCS members; and in other PCS cases (e.g. Stirling -v - DWP, a Scottish Employment Tribunal case) that if appointment has not been made on merit on the basis of fair and open competition, the appointment is null and void and therefore void of legal effect. In the case of Mr Stirling, that meant that his seven years service with the CSA counted for nothing when he was told that his employment was null and void, and he was dismissed immediately.

12. It is entirely unsatisfactory that persons who have not been appointed on the basis of fair and open competition through no fault of their own, be liable to have their employment terminated at any point (in effect amounting to "employment at the pleasure of the Crown and liable to be dismissed at will"). Such a position is an anachronism and outdated. We would therefore recommend that there be a further subsection 5 added to section 34, to read as follows:

"(5) An appointment of a person to the Civil Service will not be deemed to be ultra vires by reason that the individual has not been appointed in accordance with subsection (2)".

The Draft Bill does not define the number or role of special advisors. Instead, special advisers must comply with a Code of Conduct published by the Government and the Government must lay an annual report containing information about the number and cost of special advisers. Are these provisions appropriate?

13. The provisions in themselves are appropriate in so far as accountability is concerned. However, PCS and Prospect remain concerned at repeated attempts by some Ministers to expand the role of special advisers.

14. We also believe that referring to special advisers as "temporary civil servants" in paragraph 190 of the White Paper when the Bill does not give a clear definition of what constitutes the civil service and, for that matter, a civil servant is not particularly helpful.

Is the way the Draft Bill defines 'civil servants' and 'the civil service' appropriate? Are the exclusions in clause 25(2) appropriate?

Definition and Scope

15. the Bill does not define who is a civil servant. It also does not define what constitute "Crown Servant", "Servant of Crown", or "Crown Employee" - all of which are used in legislation - and how they relate to a civil servant. In particular there is a need to clarify the position of those working for NDPBs.

16. Instead, clause 25 says that the relevant Part of the Bill "applies to the civil service of the State" with the exclusion of the Secret Intelligence Service, the Security Service, GCHQ and the Northern Ireland Civil and Court Services - clause 25(2). The same clause then blandly states that references to the civil service and civil servants "are to be read accordingly" - clause 25(3).

17. In particular, despite previous consultation on the possible definition of civil servants and submissions as to their status, the Bill does not address such long-standing issues as the contract of employment, the identity of the employer, whether to place civil servants on the same footing as other employees and whether to amend or revoke entirely those provisions that deny a range of employment rights to civil servants and others in Crown employment.

18. Putting the civil service on a statutory footing will enable all civil servants to enjoy the full benefit of employment status, something that has not always been asserted with confidence. The civil service has been managed under the Royal Prerogative by Orders in Council. Civil servants are Crown servants who, at common law, are employed at the pleasure of the Crown and could be dismissed at will and without notice.

19. In addition, a clearer definition of what constitutes a civil servant would provide greater certainty over the benefits and protections that employees of NDPBs are able to access. Current legislation refer to 'crown employment' being employment of a government department 'or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision'. This would mean that some, though not necessarily all NDPBs would be covered.

20. That said, employment protection legislation has gone some way to mitigate the uncertainty by including provisions that extend to relevant protection to those in Crown employment including civil servants. However, such devices are an incoherent and poor substitute for a modern, rational and comprehensive treatment of civil servants.

21. It is therefore recommended the Draft Bill needs to clarify what constitute "Crown Servant", "Servant of Crown", or "Crown Employee", and how they relate to a civil servant. It us further recommended that the Bill should be amended by adding a new clause 25(4) to provide that those civil servants that fall within Part 5 should be deemed to have contract of employment within the meaning of Section 230 (1) and (2) of the Employment Rights Act 1996 (ERA). PCS and Prospect considers that taking such a step would permit the repeal of the special provisions that extend employment protection to civil servants, and suggests that Section 191 of ERA 1996 could be repealed, except for (1), (3), (4), (da) and (e) and (6).

Exclusion of Employment Protection Rights

22. There currently exists exclusion of employment rights for civil servants, which may survive any measure to confer statutory status on them. We set out below some of the key relevant exceptions and exclusions and a full list is attached as an Appendix.

Employment Rights Act 1996

23. The most obvious is that section 191 of the Employment Rights Act 1996 does not extend to civil servants its rights under:

(a) Pt IV, together with ss 45 and 101 (rights for shop and betting workers in relation to Sunday working);

(b) ss 86-91 (minimum periods of notice);

(c) Pt XI (redundancy rights) (further provisions excluding redundancy rights are contained in ss 159 and 160; and

(d) Pt XII (rights on employer's insolvency).

24. It was presumably thought that the second and third of these entitlements were inconsistent with employment at the pleasure of the Crown. PCS and Prospect may consider that with the passage of time, that stance can no longer be justified (if it ever was) and so (again, whether or not civil servants are given contracts of employment) the exclusions should be ended. As we suggest above,

if employee status is conferred on civil servants by the Bill, section 191 should be repealed except for (1) (amended as necessary), (3), (4) (da) and (e), and (5). Part XII should still be excluded for civil servants (since an insolvent Crown could not make payments through the Insolvency Service). Section 159 should also be repealed.

25. Sub-section (4)(da) substitutes a reference to the national interest for the reference to the employer's undertaking in s 98B(2), whilst sub-s (4)(e) provides equivalents for other references in the Act to undertakings. Hence our advice that those provisions should be retained.

26. Section 191(5) imposes a limit on the right to time off for public duties under s 50 where the individual's post is politically restricted, and to the extent that the public duties (eg service as a councillor) would infringe the restriction. We would recommend a repeal of this provision.

27. Section 193 specifically excludes Part IVA of the Act (protection for whistleblowers) in relation to the staff of the Security Service, the Secret Intelligence Service and GCHQ.

28. Section 159 excludes from an entitlement to statutory redundancy payments any employee who is treated as a civil servant for pension purposes. This catches staff of NDPBs who, strictly speaking, are not Crown employees but who are treated as holding public office under the Superannuation Acts or for the purposes of superannuation benefits as being in the civil service of the state e.g. employees of most NDPBs.

TULRCA: Redundancy Consultation

29. Section 273 of Trade Union and Labour Relations (Consolidation) Act 1992 apply most of that statute's provisions to civil servants (see the Appendix for the full section). However section 273(2) excludes section 87(4)(b) (power of tribunal to make order in respect of employer's failure to comply with duties as to union contributions); sections 184 and 185 (remedy for failure to comply with declaration as to disclosure of information); and Chapter II of Part IV (procedure for handling redundancies).

30. Section 273(2) refers to 'Crown employees'. This includes not only civil servants but also employees of NDPBs. See for example the recent case of Adult Learning Inspectorate and Others v Beloff (UKEAT/0238/07/RN) in which the EAT held that employees of ALI were in Crown employment and therefore excluded from the right to collective consultation under section 188 et al of TULR(C)A 1992.

31. For the same reasons as mentioned above, PCS and Prospect consider that the time is now right to remove theses exclusions. The most significant exclusion is the procedure for handling redundancies. That arises from Article 2 of Council Directive 98/59/EC, as enacted by section 273(2). Interestingly, Government previously saw fit to apply the redundancy consultation provisions to local government employees. We would therefore recommend the repeal of section 273(2) of TULR(C)A 1992.

TUPE

32. The Transfer of Undertakings (Protection of Employment) Regulations 2006 implement the Acquired Rights Directive of the European Union (ARD). TUPE does not per se exclude civil servants - regulation 2(1) defines employee as "any individual who works for another person whether under a contract of service or apprenticeship or otherwise..."

33. However, Regulation 3(5) (which mirrors Article 1(c) of the Directive) excludes from the definition of a relevant transfer "an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities". This effectively excludes much (though by no means all) public sector reorganisation from the scope of TUPE in its entirety i.e. not only the individual protection rights but also the collective rights to information and consultation.

34. It should be noted, however, that this exclusion depends not on the employment status of civil servants but on the European policy that such reorganisations should be exempt from the Directive. It may therefore be argued that this exclusion could survive any measure to confer employment status on civil servants. However, in line with the above recommended modernisation of the status and rights of civil servants, we would recommend that Regulation 3(5) be repealed.

Special Provisions

35. We now turn to consider some special provisions that apply to civil servants.

TULRCA: Trade Disputes

36. Over and above the provisions of section 273 of Trade Union and Labour Relations (Consolidation) Act 1992, there are two issues that arise out of trade disputes.

37. The first concerns the protection conferred by section 219 on trade unions that conduct a ballot of relevant members and serve relevant notices on employers in accordance with the Act. That protection extends to inducements to break contracts of employment or interfere with their performance etc.

38. It was held in Associated British Ports v TGWU (1989) that the protection does not extend to inducing statutory torts i.e. breaches of a statutory duty. We have considered whether the Bill, by placing the Civil Service Codes on a statutory footing, might create a risk for PCS and other civil service unions that otherwise lawful industrial action might leave them exposed. On balance we do not think that that would happen, since the Codes will not themselves have statutory force. However, it would be helpful if we can be given assurances to that effect.

39. The second issue concerns the special provision in section 244, which defines a trade dispute. Subsection (3) provides that a dispute between a Minister of the Crown and any workers shall be a trade dispute, despite the fact that the Minister is not their employer, if it relates to matters which have been referred for consideration by a joint body on which the Minister is represented by virtue of provision made by or under any enactment; or if the dispute cannot be settled without the Minister exercising a power conferred by or under an enactment.

40. PCS is very familiar with this provision. It would seem desirable to retain this measure.

Sections 171 and 177 ERA 1996

41. As stated above, the provisions of Part XI of The Employment Rights Act 1996 (i.e. in relation to Redundancy) do not apply to civil servants (see sections 159 and 191 ERA 1996). Further, enabling Regulations have not been made (pursuant to section 171 ERA 1996), applying the provisions of part XI to civil servants.

42. Section 177 of ERA 1996 gives certain potential rights to those whose employment falls within section 159 ERA 1996 (which basically means civil servants, together with those working for NDPBs who are entitled to be members of the PCSPS). The right under section 177 (1) is to take a claim to an employment tribunal for entitlement to a payment under a redundancy compensation scheme (which the CSCS would amount to) where the terms and conditions upon which a person is employed include provision for the making of such a payment (which arguably is the case for civil

servants and NDPB employees) and where the terms and conditions include provision "for referring to an employment tribunal any question as to the rights of any person to such a payment in respect of that employment or as to the amount of such a payment" (177(1)(b) ERA 1996). This latter condition does not appear to have been met, since the terms and conditions of civil servants or those working for NDPBs do not contain, to our knowledge, such a term. Further, the CSCS does not appear to contain any general right to take a claim to an Employment Tribunal in relation to a payment under the CSCS.

43. Were civil servants to be deemed to have contracts of employment, as recommended above, and were the provisions of section 159 ERA 1996 and 191, to be amended / repealed as recommended, sections 171 and 177 would no longer have relevance to civil servants (although they could still have relevance to the other classes of employees set out in subsection 171(3). If Government cannot be persuaded to take such steps, then at the very least an additional provision ought to be added to the Constitutional Renewal Bill, to make it clear that for the purposes of section 177 ERA 1996, all of that class of employees as set out in section 159 ERA 1996 are deemed to be employed on terms and conditions which include a provision for referring to an employment tribunal any question as to the right of any person to a payment to which section 177 applies, including the right to payments under the CSCS.

44. Finally, PCS and Prospect are disappointed that the Draft Bill does not deal with nationality issues in relation to civil service employment, which are likely to affect black and ethnic minorities disproportionately. This is in spite of the numerous commitments given by the Cabinet Office and Ministers, as well as the private member's bill brought by Andrew Dismore MP, which supports our position, and was also supported by the Government. Matters concerning nationality are part and parcel of the recruitment process and therefore their inclusion in the Draft Bill would be more than appropriate.

9 June 2008

APPENDIX

RELEVANT STATUTORY CLAUSES

Sections 159, 160, 171, 177 and 191 ERA 1996

159 Public offices etc

A person does not have any right to a redundancy payment in respect of any employment which-

(a) is employment in a public office within the meaning of section 39 of the Superannuation Act 1965, or

(b) is for the purposes of pensions and other superannuation benefits treated (whether by virtue of that Act or otherwise) as service in the civil service of the State.

160 Overseas government employment

(1) A person does not have any right to a redundancy payment in respect of employment in any capacity under the Government of an overseas territory.

(2) The reference in subsection (1) to the Government of an overseas territory includes a reference to-

(a) a Government constituted for two or more overseas territories, and

(b) any authority established for the purpose of providing or administering services which are common to, or relate to matters of common interest to, two or more overseas territories.

(3) In this section references to an overseas territory are to any territory or country outside the United Kingdom.

171 Employment not under contract of employment

(1) The Secretary of State may by regulations provide that, subject to such exceptions and modifications as may be prescribed by the regulations, this Part and the provisions of this Act supplementary to this part have effect in relation to any employment of a description to which this section applies as may be so prescribed as if-

(a) it were employment under a contract of employment,

(b) any person engaged in employment of that description were an employee, and

(c) such person as may be determined by or under the regulations were his employer.

(2) This section applies to employment of any description which-

(a) is employment in the case of which secondary Class 1 contributions are payable under Part I of the Social Security Contributions and Benefits Act 1992 in respect of persons engaged in it, but

(b) is not employment under a contract of service or of apprenticeship or employment of any description falling within subsection (3).

(3) The following descriptions of employment fall within this subsection-

(a) any employment such as is mentioned in section 159 (whether as originally enacted or as modified by an order under section 209(1)),

(b) any employment remunerated out of the revenue of the Duchy of Lancaster or the Duchy of Cornwall,

(c) any employment remunerated out of the Queen's Civil List, and

(d) any employment remunerated out of Her Majesty's Privy Purse.

177 References to [employment tribunals]

(1) Where the terms and conditions (whether or not they constitute a contract of employment) on which a person is employed in employment of any description mentioned in section 171(3) include provision-

(a) for the making of a payment to which this section applies, and

(b) for referring to an [employment tribunal] any question as to the right of any person to such a payment in respect of that employment or as to the amount of such a payment,

the question shall be referred to and determined by an [employment tribunal].

(2) This section applies to any payment by way of compensation for loss of employment of any description mentioned in section 171(3) which is payable in accordance with arrangements falling within subsection (3).

(3) The arrangements which fall within this subsection are arrangements made with the approval of the Treasury (or, in the case of persons whose service is for the purposes of pensions and other superannuation benefits treated as service in the civil service of the State, of the Minister for the Civil Service) for securing that a payment will be made-

(a) in circumstances which in the opinion of the Treasury (or Minister) correspond (subject to the appropriate modifications) to those in which a right to a redundancy payment would have accrued if the provisions of this Part (apart from section 159 and this section) applied, and

(b) on a scale which in the opinion of the Treasury (or Minister), taking into account any sums payable in accordance with-

(i) a scheme made under section 1 of the Superannuation Act 1972, or

(ii) the Superannuation Act 1965 as it continues to have effect by virtue of section 23(1) of the Superannuation Act 1972,

to or in respect of the person losing the employment in question, corresponds (subject to the appropriate modifications) to that on which a redundancy payment would have been payable if those provisions applied.

191 Crown employment

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to-

(a) Parts I to III,

[(aa) Part IVA,]

(b) Part V, apart from section 45,

[(c) Parts VI to VIIIA]

(d) in Part IX, sections 92 and 93,

(e) Part X, apart from section 101, and

(f) this Part and Parts XIV and XV.

(3) In this Act 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)-

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,

(b) references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment,

(c) references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d) references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment,

[(da) the reference in section 98B(2)(a) to the employer's undertaking shall be construed as a reference to the national interest, and]

(e) [any other reference] to an undertaking shall be construed-

(i) in relation to a Minister of the Crown, as references to his functions or (as the context may require) to the department of which he is in charge, and

(ii) in relation to a government department, officer or body, as references to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Where the terms of employment of a person in Crown employment restrict his right to take part in-

(a) certain political activities, or

(b) activities which may conflict with his official functions,

nothing in section 50 requires him to be allowed time off work for public duties connected with any such activities.

(6) Sections 159 and 160 are without prejudice to any exemption or immunity of the Crown.

Section 273 TULR(C)A 1992

273 Crown employment

(1) The provisions of this Act have effect (except as mentioned below) in relation to Crown employment and persons in Crown employment as in relation to other employment and other workers or employees.

(2) The following provisions are excepted from subsection (1)-

[section 87(4)(b) (power of tribunal] to make order in respect of employer's failure to comply with duties as to union contributions);

sections 184 and 185 (remedy for failure to comply with declaration as to disclosure of information),

Chapter II of Part IV (procedure for handling redundancies).

(3) In this section 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by an enactment.

(4) For the purposes of the provisions of this Act as they apply in relation to Crown employment or persons in Crown employment-

(a) 'employee' and 'contract of employment' mean a person in Crown employment and the terms of employment of such a person (but subject to subsection (5) below);

(b) 'dismissal' means the termination of Crown employment;

(c) ...

(d) the reference in 182(1)(e) (disclosure of information for collective bargaining: restrictions on general duty) to the employer's undertaking shall be construed as a reference to the national interest; and

(e) any other reference to an undertaking shall be construed, in relation to a Minister of the Crown, as a reference to his functions or (as the context may require) to the department of which he is in charge, and in relation to a government department, officer or body shall be construed as a reference to the functions of the department, officer or body or (as the context may require) to the department, officer or body.

(5) Sections 137 to 143 (rights in relation to trade union membership: access to employment) apply in relation to Crown employment otherwise than under a contract only where the terms of employment correspond to those of a contract of employment.

(6) This section has effect subject to section 274 (armed forces) and section 275 (exemption on grounds of national security).

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

MEMORANDUM BY KIRON REID, SCHOOL OF LAW,

UNIVERSITY OF LIVERPOOL (Ev 22)

The consultation paper Managing Protest around Parliament followed the Governance of Britain Green Paper (Cm 7170) in which the Government committed to consulting on the sections of SOCPA covering demonstrations near Parliament. This was one of the first acts of the Gordon Brown Government in July 2007. The White Paper, The Governance of Britain: Constitutional Renewal, (Cm 7342-1) in March 2008 followed the consultation. It is apparent from this process that the consultation was a genuine consultation where the Government and civil servants listened to the submissions relating to restrictions on protest and proposed action that was consistent with the consultation response. This in itself is a significant change in emphasis from the way in which much legislation on criminal justice has been passed from 1994 to the present.

The Analysis of Consultations document gave a clear impression of submissions on managing protest around Parliament. The Ministry of Justice press release was unequivocal that the Government had accepted the overwhelming sentiment expressed in the consultation exercise:

"The Home Secretary Jacqui Smith will remove the legal requirement to give notice of demonstrations around Parliament and obtain the authorisation of the Metropolitan Police Commissioner." 25 March 2008.

This is a fundamental change in attitude from previous Government announcements on criminal justice measures which often seemed to pursue stated policy with little regard to consultation or evidence.[1]

Indeed it is evident that sensible and rational suggestions in the consultation paper to revise the law about conditions on processions and assemblies were overlooked because of the strength of feeling of respondents who supported repealing the restrictions and did not consider the detailed suggestions for amendments to the regulation in Part II Public Order Act 1986. Specifically the suggestion that the conditions that can be imposed on assemblies and marches should be harmonised (question 2), subject to appropriate modifications, it is submitted would give the police more flexibility in deciding the appropriate steps to take in a public order situation. Arguably the senior police officer should be given a greater degree of discretion to impose such conditions as are reasonable and proportionate in the circumstances while promoting the right of freedom of

assembly and association and the right of freedom of expression. In relation to assemblies it is probably not helpful if the current list in the Public Order Act 1986 is seen as being an exhaustive one rather than examples. Although I am not aware of any caselaw regarding this others may know if this has caused difficulties for protesters or police in practice. Section 14 Public Order Act could simply be amended to make it clear that the conditions imposed can include but are not limited to those listed.

Section 12 states that the senior police officer "may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions."

Whereas s. 14 states that the senior police officer "may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation."

(The relevant parts of ss. 12 and 14 are included at the end of this paper).

It might be clearer if the wording of s. 14 was amended to give consistency with s. 12. Amended the wording might be that the senior police officer "may give directions imposing on the persons organising or taking part in the assembly such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it." I believe this would make clear that the list was not intended to be exhaustive but a statement that the conditions are including but not limited to those listed could be included if thought necessary by the draughtsman.

Arguably SOCPA gave the Commissioner no ability to add conditions on protesters that is not already covered by existing pre-2005 legal powers. However there was possible ambiguity about noise nuisance and further thought is needed about unreasonable use of noise to disrupt the business of those working in and around Westminster on a more than temporary basis. If time-limited noise nuisance generally were to be penalised this would surely remove politicians from the necessity of being always able to deal with hecklers, which surely is a part of the skill of the job. (The issue of noise is covered specifically in s. 134(4)(f) and s. 137 on use of loudspeakers in designated area). Section 3 of the consultation considered whether there should be a different position around Parliament than in other locations. The concerns about Members of Parliament not being obstructed and allowing the business of Parliament to proceed unhindered (paras. 3.2 and 3.3) are both important. The same issues though apply to every local Council up and down the land and it would be a self-obsessed and out of touch local council that called in the police to resolve such matters.

They would look out of touch and elitist and as if they did not care about the views of their residents. It is noticeable though that noise nuisance is not covered by breach of the peace or except by possible inference by Public Order Act powers and even the breathtakingly broad section 54 para. 14 of the Metropolitan Police Act 1839 appears to omit protests from this offence (nor is there an equivalent provision for other areas in the eclectic s. 28 Town Police Clauses Act 1847). Clearly while banning many other forms of nuisance and disturbance of the day, one might term it 'anti-social behaviour', the Victorians were not as concerned about noise nuisance in cities as people and politicians are today.

It is right that there should not be a criminal offence for a person to use a loudspeaker in the designated area (with repeal of the 2005 Act provisions). The Explanatory Notes to the Draft Constitutional Renewal Bill tell us that "the use of loudspeakers will continue to be governed by section 62 of the Control of Pollution Act 1974 and section 8 of the Noise and Statutory Nuisance Act 1993."

Section 62 'Noise in streets' generally prohibits operation of a loudspeaker in a street between the hours of nine in the evening and eight in the following morning (and for commercial purposes not relevant here).[2] SOCPA used the same wording relating to certain exceptions which include the proviso that the equipment "is so operated as not to give reasonable cause for annoyance to persons in the vicinity". It is possible that this wording could be incorporated into a condition that police could impose on users of loudspeakers at processions and assemblies under the POA. However I would assert that any such provision (in this case condition) should be subject to a warning before any escalation - and that escalation thereafter be initially by means of a fixed penalty. Alternatively if it was felt that restriction was only needed near Parliament because of its unique status then amendment could be made by way of an amendment to the Metropolitan Police Act 1839. This might cover actual disruption rather than simply annoyance. How this might be done is considered below. Officers would also it is suggested need a power to confiscate equipment if reasonable and this is also noted.

The clearest explanation of the penalty notice system that I am aware of is that on the Home Office website:

"Once a penalty notice has been issued the recipient must either pay the amount shown on the notice or request a court hearing. This must be done within the 21 days of the date of issue.

Payment of the penalty by the recipient discharges their liability to conviction of the offence for which the notice is issued. Payment involves no admission of guilt and removes both the liability to conviction and a record of criminal conviction."

(http://police.homeoffice.gov.uk/operational-policing/crime-disorder/index.html/).

It is suggested that any provisions considered here be subject to the lower tier penalty.

Another specific concern raised was Parliament as an obvious terrorist target. It must be noted that police and Government interpretation of what is a security risk has been highly discriminatory, particularly in the Metropolitan Police area - peace campaigners and protesters have generally been held to be a security risk necessitating high levels of policing but sporting-related processions or large crowds related to film and pop stars or alleged 'celebrities' have not. The distinction appears to be that legal powers are used where there is a political motive but not on large crowds without political background, ignoring the same or possibly greater security risks obvious in relation to groups that would not otherwise come to any particular attention of the police and may not (though they may) be organised by professional or experienced stewards. (The warnings about terrorist risk associated with the George Bush visit to London on 20 November 2003 can be contrasted with the much more low key policing of the England Ruby World Cup victory procession less than one month later, 8 December 2003).[3] The argument of Parliament as a particular security risk could apply to Premiership football grounds, mainline railway stations and many other particularly symbolic locations in the life of Britain as well as strategic ones. (The Counter-Terrorism Bill 2008 highlights policing at gas facilities, clauses. 77 - 82). Security and vigilance by the authorities, employees and the public at all of these locations is vitally important but restricting protest is not the same as security and vigilance.

Parliament is of course not a local Council office and the consultation paper and occasionally Government ministers as well as opposing MPs and Lords have highlighted that it correctly is a focus for protest by a wide range of people wanting to exercise their freedom of expression. If there really is a specific issue in relation to obstruction this merits further consideration though existing police powers are probably adequate. In part the Sessional Orders should be revised so that they directly cover the area around Parliament and the language modernised so that it reflects the Human Rights Act era language rather than apparently the antiquated language of the pre-Victorian era. A specific and limited legal provision relating to access to Parliament could be included here if necessary however police powers relating to both obstruction of highways and obstruction of officers probably give them sufficient powers at present. A specific power to deal with this and related offence if required could be included in an amendment to the Metropolitan Police Act 1839. It is interesting to note that this may not have been a significant issue before the modernisation of public order law twenty years ago. Card suggested that in London informal agreements usually worked in the past prior to the Public Order Act 1986.[4] It was certainly the case by contrast that on stop and search weak and informal controls did not work prior to the safeguards introduced in PACE at about the same time.

Conclusion.

Specific recommendations.

(1) Repeal the restrictions on protest around Parliament as included in the Bill.

(2) Keep the Sessional Orders but modernise the language - if thought necessary add a specific new clause to s. 54 para. 14 Metropolitan Police Act 1839 to cover obstruction of access to Parliament. This should initially include a requirement of a warning before an officer or CSO can take any further action. Escalation should then be by means of a fixed penalty with arrest only if necessary. Keeping the Sessional Orders is suggested because Parliament is of particular significance in the life of our democracy and that should be recognised.

(3) Regarding use of loudspeakers. The above clause could include a specific provision regarding use near Parliament. On complaint received if a police officer or CSO reasonably believes that noise from a loudhailer is excessive and hindering the work of any person in Parliament they may warn the user to reduce the volume. If the user does not do so within a reasonable time the officer must tell them that if they fail to do so they will be subject to a penalty notice and the equipment liable to confiscation. If the user still persists then the officer or CSO can give a penalty notice and / or confiscate the equipment. The notice should initially be a civil matter unless not paid and the equipment should be returned by the police in a reasonable time after application in writing by the user and payment of an administrative fee. Alternatively there could be a general amendment to the Public Order Act conditions.

(4) The Public Order Act 1986. As suggested in the original consultation paper the conditions that can be imposed if reasonable and proportionate should be standardised for conditions and assemblies. Rather than an exhaustive list it is suggested that the current lists be regarded as examples and the senior police officer given greater discretion, always subject to protection of the right to peaceful protest and freedom of assembly and association, the application of the Human Rights Act and the rule of law in general.

Public Order Act 1986 (extract).

12.- Imposing conditions on public processions.

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that-

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

14.- Imposing conditions on public assemblies.

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that-

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.

June 2008

This is based on a shorter extract from a detailed draft paper on protest and police powers in England and Wales in the last decade. I have amended and expanded the section on this topic with additional legal detail and some references added on the specific questions of interest to the Committee. (Most background references omitted dealing with points which the Committee will be familiar with).

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[1] Discussed by Reid, 'Law and Disorder: Victorian Restraint and Modern Panic' ch. 5 in Behaving Badly: Visible crime, social panics and legal responses - Victorian and modern parallels, ed. J. Rowbotham & K. Stephenson (Aldershot: Ashgate, 2003), pp. 83-4, 93.

[2] Section 8 and Sch. 2 of the 1993 Act covers consent of local authorities to the operation of loudspeakers in streets or roads. Paras. 214 - 216 of the commentary on the draft bill considers the ECHR implications of the provisions relating to noise.

[3] See 'England 750,000, Australia nil' A. Anthony, The Guardian 9/12/2003; cf 'Thousands protest against Bush' BBC News online, 21/11/2003.

[4] R. Card, Public Order: the New Law, (Butterworths, London, 1987), para. 4.5.

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

MEMORANDUM BY MARK RYAN

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University. My submission, however, is made in my own personal capacity and indicates my personal observations on the Draft Constitutional Renewal Bill. It in no way reflects the views of my employers (Coventry University).

2. At the outset, the Government should be commended on its inclusive approach to constitutional reform in relation to the Draft Constitutional Renewal Bill 2008 (hereafter the Bill). Indeed, producing the Bill in draft form will ensure that it is subject to effective pre-legislative scrutiny and provide those outside Government with an opportunity to shape its provisions. Unlike other countries which are required to adhere to specified procedures in order to modify their constitution, in the United Kingdom, our uncodified constitutional arrangements can be amended at will and with little fanfare. In this context therefore, it is imperative that any constitutional changes are secured in the most consensual and participatory way possible. After all, as has been said before, the British Constitution is not the preserve of any one political party, or indeed the Government of the day for that matter. My observations will be confined to selected aspects of the Draft Constitutional Renewal Bill.

3. In terms of the overarching questions, the Bill is consistent with the United Kingdom's historical approach to reforming the constitution which is to amend it on an incremental basis (Q1). There is also no objection in principle to the Bill containing disparate elements and provisions (Q2). In fact, the Constitutional Reform Act 2005 simultaneously (and successfully) comprised provisions relating to the reform of the Lord Chancellor, the reform of judicial appointments and the creation of a Supreme Court. The Bill as a whole does re-balance the relationship between the executive and Parliament in favour of the latter; however this constitutional shift of power could have been made more pronounced (Q3).

4. In terms of the Civil Service (Part 5), by enshrining the core values which underpin the Civil Service, the Bill will enhance the accountability of civil servants. The Bill will, however, also (and arguably more importantly) provide the Civil Service with protection by preventing the above values from being undermined or diluted by any future Government (Q4). Placing the Civil Service Commission on a statutory basis should enhance the independence of the Commissioners (Q5) and the Bill should specify to whom Civil Service Commissioners should make recommendations (Q6). In terms of initiating investigations, the Civil Service Commission should be authorised to initiate investigations, thereby equipping it with a pro-active role (Q7).

5. Given the nature of the advice that Special Advisers provide (and the relatively short duration of their employment), it does not seem problematic for their appointment to be excluded from the principle of selection on merit based upon open and fair competition (Q8). The Bill should be amended so as to specify the number of Special Advisers, thereby creating a statutory cap on their numbers (Q9). The Bill should also specify their precise constitutional role and powers - in this way their responsibilities would be limited by stipulating exactly what they are expressly permitted to do. Although clause 39 of the Bill provides for the Minister for the Civil Service to lay an annual report before Parliament concerning Special Advisers, in effect, this provides Parliament with information (e.g., the number and cost of Special Advisers), rather than any de facto control. On a related issue, the Bill should be amended so as to provide for the Special Advisers Code of Conduct (clause 33) to be subject to Parliamentary approval, and not just simply laid before Parliament.

6. In terms of protests (Part 1), by repealing sections 132-138 of the Serious Organised Crime and Police Act 2005, the Bill will re-balance the constitutional equilibrium between the right to protest within the vicinity of Parliament and the rights of Parliamentarians to perform their constitutional responsibilities without interference (Q11). Notwithstanding this, Parliament remains a special case (not least because of its symbolic constitutional importance) and it may, therefore, be necessary to provide the police with residual powers, to be exercised on an ad hoc basis and only when strictly necessary, in order to regulate access to Parliament (for example, to take account of a specific and urgent security threat) (Qs12/13).

7. In terms of the Attorney General (Part 2), my preference is that from a constitutional perspective, the office of the Attorney General should be separated from that of a Government Minister and a member of one of the Houses of Parliament (Q14). As the Bill, however, does not adopt this approach, my observations will be predicated on the model advocated in the 2008 White Paper (paragraph 51) and adopted in the Bill viz., that the Attorney General will continue to be a Government Minister and a Parliamentarian.

8. The powers of the Attorney General are circumscribed and decreased to some extent by the current provisions of the Bill (Q15). In terms of the power of the Attorney General under clause 12 to intervene in order to safeguard national security, although it is appears inevitable that such a residual power should exist, its use however must be tightly constrained and involve Parliament at some point in the process. At present, under clause 14 the Attorney General is required to lay a report before Parliament after a direction has been issued under clause 12. It is suggested that the Bill be amended so as to provide that any proposed use of the power under clause 12 is immediately brought to the attention of a specially appointed Select Committee. This committee could thereafter alert Parliament if concerned about the Attorney General's proposed use of his/her power under clause 12. The committee would ideally be a joint one comprising very experienced politicians embracing all political parties as well as independent members. The use of judicial review in relation to the use of the Attorney General's power under clause 12 would, however, not be appropriate as not only would the nature of matters concerning national security inevitably be regarded as non-justiciable, but it would also infringe the separation of powers. In doing so, it could threaten the independence of the judiciary.

9. The issuing of an annual report (clause 16) by the Attorney General appears to be a sensible provision (Q16), although the report provides Parliament with information only, rather than control. The Attorney General should attend Cabinet only where it is strictly necessary (i.e., to clarify and advise on legal issues) (Q18). A provision to this effect should be inserted into the Bill. It should be possible for any likely issues requiring the input of the Attorney General to be clearly identified in the Cabinet agenda beforehand. The content of the Protocol appears appropriate, although Parliament should approve it formally (Q19). Any review of its provisions should, similarly, be subject to Parliamentary consent.

10. The Attorney General's constitutional role to protect and advance the rule of law should be made a statutory requirement (Q20). This statement (Oath of Office) would be declaratory and reflect the importance and symbolic value of the rule of law in our uncodified constitutional arrangements. Given the varying interpretations of the rule of law, however, this statement should not be justiciable and so not enforceable before the courts. The power of the Attorney General to enter a nolle prosequi should be abolished (Q21) and the setting out of the tenure of office for the various Prosecutorial Directors is appropriate and should enhance their independence (Q22). The verbatim legal advice provided by the Attorney General should not be disclosed (Q23), however, a very general and broad outline of such advice should be provided in the event of Parliament formally requesting it.

11. In terms of judicial appointments (Part 3), it is never too early to revisit and reform judicial appointments if it is deemed necessary to do so (Q24). It is appropriate to remove the Prime Minister from the process of appointing Supreme Court Justices to the nascent Supreme Court, as such a role under the Constitutional Reform Act 2005 is superfluous (Q25). It is opined that reducing the role of the executive in the process of judicial appointments would not leave a gap in constitutional accountability. In fact, it would help to realign our constitutional arrangements in accord with a purer separation of powers (Q26). The Judicial Appointments Commission Panel should be established and is to be welcomed (Q29).

12. In terms of treaties (Part 4), the problem with this aspect of the Bill (Q31) is that it has been drafted in the context of a partially reformed House of Lords. Indeed, the process is still ongoing and very much a live constitutional issue. It is imperative that constitutional amendments - such as Part 4 of this Bill - are not viewed in isolation and purely in terms of their own individual merits, but also how they relate to (and impact upon) other aspects of the constitution. As a result of the debates and votes that took place in March 2007, the Government has made it clear that it is currently working towards reform of the House of Lords on a cross-party basis with a view to creating a largely or wholly elected second chamber. As currently drafted, clause 21 of the Bill ascribes more importance to a resolution of the House of Commons that a treaty should not be ratified, than to a similar resolution by the Lords. This state of affairs would appear to be constitutionally and politically acceptable in the context of the Parliament of June 2008, in which the Upper House is partially reformed. If, however, reform of the House of Lords takes place along the lines as envisaged by the Government (ie, a largely or fully elected second chamber is created), then in these changed circumstances, the Upper House should be conferred with an equal power to veto the ratification of a treaty. It is Parliamentary approval which is sought after all. As a result, a

sunrise clause should be inserted into the Bill so as to provide both Houses with an equal veto in the event of a largely or fully elected second chamber being established. This provision would reflect the greater constitutional legitimacy associated with a largely or wholly elected second chamber.

13. There is going to be, inevitably, constitutional concern expressed about whether a Secretary of State should be able to repeatedly place a treaty before the House of Commons after it has already rejected it (Q31). This raises an issue of constitutionalism and whether the executive should just simply accept a decision of the democratically elected House of Commons that a treaty should not be ratified. It is submitted that the House of Commons Public Administration Select Committee made a valid point when it recommended in its recent report (May 2008 - paragraph 89) that in the event of the House of Commons voting not to ratify a treaty, the Secretary of State should be prevented from re-introducing it during that particular Parliamentary session. The Bill should be amended so as to give effect to this sensible recommendation.

14. It is opined that there is also likely to be concern about clause 22 which in effect enables the Secretary of State to by-pass Parliament (and the requirements set out in clause 21) so that it does not have the opportunity to vote on a treaty. The exceptional circumstances which trigger the power in clause 22 should be specifically set out in the Bill. It is also suggested that any proposed use of the power under clause 22 should be subject to the scrutiny of a joint Parliamentary committee which could report to Parliament if it was not satisfied that the circumstances identified by the Secretary of State fell within the category of being exceptional (Q34).

15. In respect of the negative resolution procedure proposed by the Bill, this should be replaced with a positive resolution, thereby providing Parliament with more control over the process. This would help achieve the Government's primary objective of redressing the executive/Parliamentary balance. In fact, during his Parliamentary Statement on the Bill, the Secretary of State for Justice and Lord Chancellor indicated that he would look at the issue of a positive resolution.

Mark Ryan BA, MA, PCGE, Barrister (non-practising).

9th June 2008.

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the UK Parliamentary Ombudsman

1. In a letter to the Prime Minister dated 19 December 2007 (copy and enclosure attached) [Submitted but not printed] I set out my views on the constitutional role of the UK Parliamentary Ombudsman and drew attention to two specific issues: citizens' access to the Ombudsman; and the status of the Ombudsman's findings and recommendations. This note is intended as an addendum to the short paper enclosed with that letter and should be read in conjunction with it.

2. Since I wrote that letter the February 2008 Court of Appeal judgment in the litigation arising from my report on occupational pensions (Trusting in the pensions promise: government bodies and the security of final salary occupational pensions, 15 March 2006) has clarified the status of my findings and recommendations.

3. In effect, that judgment requires Government to have due regard to such findings and to give a reasoned account of any decision on its part not to comply with them. In my view, this provides an adequate framework for the future effective discharge of my functions and I am content to let the matter rest there.

4. I would, however, like to take the opportunity of drawing to the Committee's attention the wider significance of the work of the UK Parliamentary Ombudsman for the overarching questions that you have identified. In particular, I wish to comment on the aim of giving Parliament more ability to hold the Government to account.

5. As the Committee will no doubt be aware, the Office of Parliamentary Ombudsman was established by the Parliamentary Commissioner Act 1967 to provide an innovative means of investigating and exposing any misuse of Government power in its dealings with the citizen. The broader purpose (in the words of the preceding 1965 White Paper) was 'to humanise the whole administration of the state'.

6. In practice, the work of the Office, which now also includes the role of Health Service Ombudsman for England, has at its centre the investigation of complaints of maladministration brought by individual citizens against central government departments and other national bodies. The core business of the Office is this investigative activity. A key feature of the role of Ombudsman, and one that makes it different from the courts and tribunals, is the ability to detect patterns of administrative failure and to propose systemic remedy. Beyond that, there is the ability

to comment upon the way in which policy has been implemented and its impact on the citizen. I am mindful, for example, of my recent reports into the tax credit system, which proposed practical remedies for individual aggrieved citizens, pointed towards systemic failings in the operation of the system, but also asked searching questions about the ability of the policy design ever to deliver the intended results. The objective is therefore to deliver on the dual function of providing both individual and public benefit.

7. A distinguishing feature of the Office is that this investigative and remedial activity, this dual function, is exercised on behalf of Parliament. The Ombudsman has Officer of the House status and reports directly to Parliament, with specific oversight by the Public Administration Select Committee. Complaints must be referred to the Ombudsman through an MP. This so-called MP filter, although it complicates access to the services of the Ombudsman, does symbolise the close relationship between the work of the Ombudsman and the ability of MPs to hold the executive to account. The very fact that my findings are not binding upon Government further reflects the intention that those findings should contribute to the ongoing process of Parliamentary deliberation about the issues raised and so form part of the material available to Parliamentary debate.

8. This is an aspect of the Office's activity that has perhaps been given less prominence in the past than it might have been. The reasons for this are no doubt various. They include, I suspect, the fact that administrative justice and judicial review in particular have developed rapidly since 1967 and so have drawn particular attention to the role of the Ombudsman as an alternative form of dispute resolution. In fact, that dispute resolution function complements the larger role to which I am now drawing attention and is an essential ingredient of it. It should not, however, be taken to define the entire purpose of the Office.

9. The particular salience of these observations to the matters under consideration by the Committee relates to the overarching ambition of reinvigorating democracy and holding the Government of the day to account. In my experience, the encounters between citizen and state that generate the caseload of the Office are precisely the space where most people get their first, and often only, real taste of the democratic process. It is in these encounters that citizens get a sense of whether they count as individuals or are merely cogs in a bureaucratic machine. It is, for example, in the decision-making process about welfare benefits, tax liability, and health care delivery that citizens experience first-hand the way the state tackles the issues of most pressing concern to them and their families. To the extent that those encounters are marred by maladministration, the democratic process itself is damaged, with attendant loss of confidence and commitment on the part of the citizens who should be most engaged with it.

10. In short, I believe that Parliament in general and MPs in particular should be encouraged as part of the scrutiny of the Constitutional Renewal Bill to reflect carefully upon the resource made available to them by the Office of Parliamentary Ombudsman. When we talk about democratic deficit and the desirability of deliberative democracy, I suggest we should keep in mind the apparatus that Parliament itself, with more than a little foresight, put in place in 1967 to contribute precisely to the process of humanising the administration of the state that remains as urgent as ever

and is a critical constituent of the reinvigorated democracy that The Governance of Britain wishes to promote.

11. I would of course be very pleased to expand on these observations either in person or by further correspondence with the Committee.

11 JUNE 2008

HOUSE OF LORDS
HOUSE OF COMMONS
JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Sir Michael Wood, K.C.M.G.

Summary

1. The present arrangements whereby the Attorney General gives legal advice to the Government are preferable to any of the alternatives that have been canvassed. It is axiomatic that legal advice, if it is to be frank, should not be disclosed.

2. The draft clauses on 'Ratification of Treaties' are satisfactory, though it would be preferable for Clause 23 to contain a power to add new descriptions of treaties to which Clause 21 does not apply.

3. If there is to be any change as regards 'war powers', the better route would be by way of parliamentary resolution, as proposed in the White Paper. The legislative option has grave disadvantages.

Introduction

1. I was the Legal Adviser to the Foreign and Commonwealth Office from 1999 to 2006. I am now a barrister in private practice, specialising in the areas of foreign relations law and international law. My evidence is concerned chiefly with the foreign relations aspects of the proposals in the White Paper (Cm 7342).

I. Attorney General: Legal Advice

2. I welcome the approach in the White Paper, and agree, for the reasons there given, that the Attorney General should remain the Government's chief legal adviser, and that he or she should

remain a Minister, a member of one of the Houses of Parliament, and continue to attend Cabinet whenever necessary (paras. 51-54 and 61-65).

3. My particular concern is with the Attorney General's role in furnishing the Government with advice on questions involving public international law. Given the nature of international law, and the critical nature of many of the matters with which it deals, it is important that legal advice within Government should be advanced firmly and convincingly in high-level policy discussions. The existing arrangements comprise, in addition to the Attorney General, the Legal Advisers at the Foreign and Commonwealth Office and the lawyers in the Attorney General's Office. These arrangements are effective in melding together expertise in international law with the extra weight of the Attorney General's broader experience, and his or her standing as a Member of the Government. They ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. The Attorney General's status as a Minister gives him or her a greater possibility than would be secured by any other arrangement of ensuring that legal considerations are not misunderstood (or ignored) in high-level decision-making on foreign affairs. The current arrangements also ensure that there is a degree of Parliamentary accountability in respect of the legal positions which the Government adopts.

4. I agree with the approach in the White Paper to the disclosure of the Attorney General's advice (paras. 66-69).

5. Suggestions that the legal advice tendered to the Government should be published are misconceived. This is so with regard to the often delicate and uncertain questions of international law as with other areas of the law. The normal rule of confidentiality (the 'Law Officers' convention, enshrined in section 35 of the Freedom of Information Act 2000) needs to be maintained. International situations, and especially crisis situations, are rarely static, but develop, often at great speed. When this happens, and legal questions are involved, seeking legal advice is an iterative process. The advice sought may go to tactics as well as substance. To reveal the legal advice (including whether legal advice has been sought on a particular question) could seriously damage the Government's hand in fast-moving international diplomacy.

II. Treaties

6. Clauses 21 to 24 of the draft Bill (Ratification of Treaties) are technically satisfactory, subject to one point.

7. Clause 23 should contain a power to add further descriptions to the list of descriptions of treaties to which Clause 21 does not apply, as was proposed in the Green Paper. Such flexibility would have

at least two advantages. First, it would enable account to be taken of experience under the legislation, which might show that the procedure set forth in the Act was not necessary or appropriate in certain cases. And it would enable categories of treaties that have been overlooked or that may emerge in future international practice to be brought within Clause 23. Parliament should have the final say on whether this is appropriate, so it would be right for the power to be exercisable by a procedure requiring the assent of Parliament, such as a statutory instrument requiring an affirmative resolution of each House.

8. My (brief) responses to the specific questions listed in the Call for Evidence are as follows:

Question 31

Yes, on all counts.

Question 32

Parliamentary scrutiny of draft treaties (which I take to be a reference to scrutiny while negotiations are ongoing) is not a matter to be dealt with in an Act of Parliament.

In many cases, such scrutiny will not be practical. Treaty negotiations are often conducted behind closed doors. Sometimes the very fact that negotiations are taking place at all is a matter of considerable sensitivity, to one side or the other (or both). In addition, it may well not be possible for the Government to reveal its negotiating hand or its tactics, without damaging consequences.

There are exceptions, particularly in the case of multilateral treaties negotiated within an international organization or at an international conference, where negotiations do take place to some degree in public. I believe that Parliament did, for example, discuss the draft Statute of the International Criminal Court while it was under negotiation.

Question 33

Current arrangements, reflected in the draft Bill, have proved to be satisfactory in practice, and seem to strike the right balance between Parliament and the Executive in this matter.

Question 34

Clause 22 as drafted seems right. It should be for Government to decide whether exceptional circumstances (which are likely to be very rare) exist. Only they will have the necessary

information (including possibly sensitive information) to take such a decision, and be in a position to balance all relevant considerations, foreign policy and other.

Question 35

Yes.

Question 36

This is a matter for Parliament, and I express no view.

III. 'War Powers'

9. It would have been a serious error to have placed new arrangements in respect of 'war powers' on a statutory footing. To have done so would inevitably have involved the judges in the application of the powers. This applies also to the 'hybrid solution'. In addition, detailed legislation would have introduces an inappropriate degree of rigidity into new and untried procedures that relate to the most difficult and crucial of governmental decisions.

10. There is much to be said for leaving matters as they stand at present, with a developing constitutional practice that the House of Commons will, wherever possible be consulted in advance of any major use of force. If, however, that is considered undesirable, proceeding by way of a detailed parliamentary resolution, as proposed in the White Paper, would be the right way to go. This will be effective in formalizing Parliament's role, which seems to be the purpose of the exercise, without opening up matters of war and peace to the risk of inappropriate judicial scrutiny.

11. Unless the aim is to reduce the ability of the United Kingdom's armed forces to participate in overseas operations to the level of, say, those of Germany or Japan, great care should be taken not to 'judicialise' the decision-making process. If matters of war and peace were to become justiciable in the courts of the United Kingdom, this would risk putting serious obstacles in the way of United Kingdom participation in United Nations, NATO, EU peace-keeping and other operations overseas, with the consequent diminution of our standing in the world. And it would risk involving the judiciary in highly political questions. Judges could find themselves having to second-guess the Government, not only as regards the original decision to use armed force, but also as regards decisions to continue to use armed force, to use armed force in a certain way, and so on. Among the difficult issues that might come before the courts would be the interpretation of the scope of a

'conflict decision' and its application to an ongoing conflict. Ministers and military commanders would continually need to have regard to the 'judge over their shoulder.' The distraction of court proceedings (which might well take place in the lead up to or during a conflict), both political and for the individuals implicated, would be considerable, at a time when all concerned are fully stretched by the day-to-day conduct of the conflict. And there would be the prospect of legal proceedings dragging on for years thereafter.

12. To illustrate the kind of issues that could well arise, if the courts were asked to decide whether 'war powers' legislation had or had not been complied with, I draw attention to a very recent Judgment of the German Constitutional Court (BVerfG, 2 GvE 1/03 of 7 May 2008). The Constitutional Court held, in May 2008 (that is, five years after the event) that the Federal Government had violated the rights of the Federal Parliament by not seeking its approval for the participation of German soldiers in NATO aerial surveillance measures (AWACS) over Turkey between 26 February and 17 April 2003. In reaching this conclusion, the judges of the Constitutional Court had to decide whether the participation of German soldiers in the unarmed AWACS fights over Turkey, at a time when Turkey was not itself involved in an armed conflict, amounted to the involvement of German soldiers in armed undertakings. This required a detailed examination of the nature of NATO's 'Operation Display Deterrence.' The judges examined the particular role of the AWACS planes in the NATO Operation, and their communications links to Patriot anti-missile launchers and NATO fighter planes stationed in Turkey for the defence of that country in the event of an attack by Iraq. The judges also had to consider the effect of decisions of NATO's Defence Planning Committee, and the applicable NATO Rules of Engagement (which the NATO authorities changed in the course of the short operation, making them significantly more robust).

13. Among other things, this case illustrates the real difficulty (even in the German system where there already is a substantial case-law on the subject) of drawing a clear line between those deployments that require Parliamentary approval and those that do not. If this were a matter for the British courts, I could foresee a host of interesting and difficult cases.

14. The possibility was raised (in the 'Legislative Option' set out in the October 2007 Green Paper (Cm 7239)) of including a subsection in an Act of Parliament to the effect that 'A conflict decision is not unlawful because it is not approved as required by this Part.' Quite apart from the nonsense involved in saying that something done in violation of an Act of Parliament is 'not unlawful', any such provision would be unlikely to oust the jurisdiction of the courts. The courts traditionally (and rightly) have usually found ways to avoid 'ouster' clauses.

15. The detailed draft resolution in the White Paper gives Parliament an appropriate degree of control over conflict decisions. Certain matters must inevitably be left to Government, and the draft properly reflects that.

16. It is right that approval should not be required for a conflict decision involving Special Forces. It would be incompatible with the effectiveness of the operations of Special Forces to require Parliamentary approval.

17. Whether the term 'conflict decision' has been adequately defined depends on how widely (or narrowly) Parliament wishes the procedure to apply. Whatever definition is used there are bound to be difficult borderline cases (as, for example, in the German case referred to at paragraph 12 above). Experience may well suggest a need for changes in the scope of the new procedure. Proceeding by way of a resolution will allow for improvements to be made in this and other respects much more easily than if the details were enshrined in an Act of Parliament.

Sir Michael Wood, K.C.M.G.

6 June 2008

I am a Senior Fellow of the Lauterpacht Centre of International Law, University of Cambridge, and a barrister at 20 Essex Street Chambers. From 1999 until 2006, I was the Legal Adviser to the Foreign and Commonwealth Office.

This evidence is submitted on an individual basis.