These notes refer to the Constitutional Reform and Governance Bill as introduced in the House of Commons on 20 July 2009 [Bill 142]

CONSTITUTIONAL REFORM AND GOVERNANCE BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Constitutional Reform and Governance Bill as introduced in the House of Commons on 20 July 2009. They have been prepared by the Ministry of Justice, in conjunction with the Cabinet Office, the Foreign and Commonwealth Office, the Home Office and HM Treasury. These notes have been prepared in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE BILL

3. The Constitutional Reform and Governance Bill has 9 Parts and 9 Schedules. The explanatory notes are divided into 9 Parts, reflecting the structure of the Bill. A summary of each Part and background in relation to the Bill as a whole and each Part separately is provided below. Commentary on each Part is then set out in number order, with the commentary on the various Schedules included in the section to which they relate.

SUMMARY

4. A summary of the Bill is set out below.

Part 1: The Civil Service

5. Part 1 of the Bill provides for:

- A power for the Minister for the Civil Service to manage the Civil Service, and a parallel power for the Secretary of State in relation to the Diplomatic Service;
- A requirement for a code of conduct for civil servants which specifically requires civil servants to carry out their duties in accordance with the core Civil Service values of integrity, honesty, objectivity and impartiality. There is also a requirement for a separate code of conduct for special advisers;
- The establishment of a Civil Service Commission with functions in relation to selections for appointments to the Civil Service and in relation to hearing complaints that the Civil Service and diplomatic service codes have been breached;
- A requirement for appointments to the Civil Service to be made on merit on the basis of fair and open competition;
- Requirements as to the appointment of Special Advisers. The appointments are to be exempt from the fair and open competition principle.

6. The new statutory Civil Service Commission will take on the functions of the existing Civil Service Commissioners. The Civil Service Commission will publish principles on the application of the fundamental requirement that selections for appointment be made on merit on the basis of fair and open competition, and will investigate complaints under the code of conduct for civil servants. The First Civil Service Commissioner and the other Civil Service Commissioners will be the members of the new Civil Service Commission. Transitional arrangements will enable those serving as Civil Service Commissioners automatically to move across to the new Commission when it becomes operational.

7. Whilst the draft Bill removes the prerogative powers for the management of the Civil Service, the prerogative will be retained in relation to security vetting and the management of the parts of the Civil Service of the State which will not be covered by the provisions in Part 1.

Part 2: Ratification of Treaties

8. Part 2 of this Bill puts Parliamentary scrutiny of treaty ratification on a statutory footing and gives legal effect to a resolution of the House of Commons or Lords that a treaty should not be ratified. This means that should the House of Commons take the view that the Government should not proceed to ratify a treaty, it can resolve against ratification and thus make it unlawful for the Government to ratify the treaty. The House of Lords will not be able to prevent the Government from ratifying a treaty,

but if they resolve against ratification the Government will have to produce a further explanatory statement explaining its belief that the agreement should be ratified.

Part 3: The House of Lords

9. Part 3 of the Bill contains provisions to end the system of by-elections for making hereditary peers members of the House of Lords. It also contains provisions for the removal of members of the House of Lords in specified circumstances. The Bill provides that when a member of the House of Lords (a) is convicted of an offence and sentenced to a term of imprisonment exceeding one year or indefinitely, or (b) is made the subject of a bankruptcy restrictions order or undertaking (or equivalent in Scotland or Northern Ireland) or a debt relief restrictions order or undertaking, that person will cease to be a member of the House of Lords.

10. The Bill also provides a power for the House of Lords to discipline its members through either expulsion or suspension and to withhold a writ of summons from a member who has been expelled or suspended.

11. The Bill also provides for a peer, whether life or hereditary, to resign from the House. It also provides for peers who have resigned or been excluded from the House to disclaim the peerage.

Part 4: Public Order

12. *Clause 32* of the Bill provides for the repeal of sections 132 to 138 of the Serious Organised Crime and Police Act 2005, thereby removing the distinct legislative framework for the policing of demonstrations around Parliament. Repeal of these sections will remove the requirement to give notice of demonstrations in the designated area around Parliament and the offence of holding such demonstrations without the authorisation of the Metropolitan Police Commissioner.

13. *Clause 32* also gives effect to *Schedule 4* which inserts new powers on maintaining access to Parliament into Part 2 of the Public Order Act 1986. Those provisions give the police discretionary powers to impose conditions on public processions or assemblies around Parliament in order to maintain access to and from the Palace of Westminster. Conditions may be imposed only where in the senior officer's reasonable opinion they are necessary for ensuring that specified requirements are met in relation to maintaining access to Parliament. The requirements which may be specified in a Statutory Instrument might include requirements as to the number or location of entrances to the Palace of Westminster which must be kept open, and to and from which there must always be an access route for pedestrians and vehicles through the area around Parliament.

Part 5: Time Limits for Human Rights Actions Against Devolved Administrations

14. Part 5 of the Bill inserts a time limit for actions against the Northern Ireland Ministers or Departments under the Northern Ireland Act 1998 or against the Welsh Ministers under the Government of Wales Act 2006 where it is claimed that they have acted

incompatibly with Convention rights.

Part 6: Courts and Tribunals

15. Part 6 of the Bill provides for:

a) a guarantee that the salaries of judicial office holders in certain tribunals may not be reduced;

b) a correction of a cross-reference in the Courts Act 1971;

c) the removal of the Prime Minister's role in the process for appointing Supreme Court judges;

d) a new method of obtaining medical assessments from candidates for judicial office;

e) confidential information being disclosed to the police for specified purposes relating to the prevention or investigation of crime including for the purposes of criminal proceedings; and

f) the removal of magistrates from Schedule 14 to the Constitutional Reform Act 2005.

Part 7: National Audit

16. This part of the Bill modernises the governance arrangements for national audit. It continues the office of Comptroller and Auditor General ("C&AG") as an independent officer of the House of Commons but limits the term of appointment to that office to ten years. It provides for the establishment of a new corporate body, the new National Audit Office ("NAO"), whose functions will include providing resources for the C&AG's functions, monitoring the carrying out of those functions and approving the provision of certain services. In common with most other corporate structures, the NAO will have a majority of non-executives and be led by a non-executive chair. The C&AG will be the NAO's chief executive but will not be an NAO employee. Within the new governance framework, the C&AG continues to have complete discretion in the carrying out of the C&AG's functions.

Part 8: Transparency of Government Financial Reporting to Parliament

17. Part 8 contains two clauses. *Clause 51* amends the Government Resources and Accounts Act 2000 (the GRAA 2000) in order to allow the Treasury to issue directions about the way departments prepare Supply Estimates and to direct that such Estimates are to include information relating to "designated bodies". It also includes provision preventing the designation of a body if it is funded solely from the Scottish Consolidated Fund, the Consolidated Fund of Northern Ireland or the Welsh Consolidated Fund and makes consequential amendments to the GRAA 2000. *Clause 52* amends the Government of Wales Act 2006 to make corresponding provision in relation to Wales.

BACKGROUND

18. The provisions contained within the Constitutional Reform and Governance Bill stem from *The Governance of Britain* Green Paper (Cm 7170) published on 3 July 2007. This document can be found at:

http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf

19. This Green Paper set out the Government's proposals for constitutional renewal. It stated that those goals are:

- To invigorate our democracy;
- To clarify the role of Government, both central and local;
- To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account; and
- To work with the British people to achieve a stronger sense of what it means to be British.

20. As part of this wider agenda of work, the Green Paper set out the Government's intention to reform the complex and multifaceted role of the Attorney General, to alleviate conflicts or the appearance of them. The Government made a commitment to explore the future of its role in judicial appointments. The Government sought to improve the ways in which people can influence decisions and participate in the political process. One of the specific proposals here was to review restrictions on people's rights to protest.

21. The Green Paper proposed that the power to make key decisions that affect the whole country, such as whether to ratify treaties, should not stem solely from the Royal Prerogative, but rest on a more formal footing, with Parliament key in determining the exercise of the power. Similarly, the Government proposed that the governance of the Civil Service, also based on the Royal Prerogative, and the fundamental values of the Civil Service – impartiality, integrity, honesty and objectivity – should be set out in statute.

22. Following the publication of the Green Paper, the Government published a number of consultation documents on particular policies. These are referred to where relevant in the background to each separate Part of the Bill.

23. In March 2008, the Government published a draft Constitutional Renewal Bill. This can be found at:

http://www.official-documents.gov.uk/document/cm73/7342/7342_ii.pdf

24. It contained draft provision in relation to:

- Demonstrations in the vicinity of Parliament;
- The Attorney General and prosecutions;

- Courts and tribunals;
- Ratification of treaties; and
- The Civil Service.

25. The draft Bill was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2008 and its report (HL Paper 166 and HC Paper 551) can be found at:

http://www.publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166.pdf

26. In addition, the Justice Committee of the House of Commons held an enquiry into the provisions relating to the Attorney General. Its report (Fourth Report of the 2007-8 Session, HC 698) can be found at:

http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/69802.htm

27. The Public Administration Committee of the House of Commons also held an enquiry which largely focused on the Civil Service provisions of the draft Bill, although it did also consider the proposals on Treaties. Its report (Tenth Report of the 2007-8 Session, HC 499) can be found at:

http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/499/49902.htm

28. Since the draft Bill was published, the Government has added provisions to the Bill on:

- Conduct and discipline in the House of Lords;
- National audit;
- Transparency of Government financial reporting to Parliament; and
- Time-limits for human rights cases brought against Ministers within the Devolved Administrations under the devolution Acts.

29. The following provides background on each Part of the Bill.

Part 1 Background - The Civil Service

30. The basis of the Civil Service as we know it today dates back to the Northcote-Trevelyan Report of 1854. The Report set out the enduring core values and key principles that underpin the role and governance of the Civil Service – integrity, honesty, impartiality and objectivity. The Report also recommended that these values and principles should be enshrined in legislation. However, no Government ever took forward this recommendation. Instead, over the last 150 years or so, Ministers have exercised powers in relation to the Civil Service under the Royal Prerogative.

31. In recent years, the merits of Civil Service legislation have been the subject of considerable debate, and there have been growing calls to implement the Northcote-

Trevelyan recommendation and bring forward legislation for the Civil Service. In 2003, the House of Commons Public Administration Select Committee published a draft Civil Service Bill and, building on this, the Government launched a consultation *A draft Civil Service Bill – A Consultation Document* (Cm 6373, November 2004). This document can be found at

http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/consultation_bill_cm_6373.pdf

32. A detailed analysis of the consultation responses can be found in *The Governance of Britain – Analysis of Consultations* (Cm 7342-3).

33. These consultation processes and other public debates have revealed a considerable body of opinion in favour of Civil Service legislation. Therefore, the Government announced in July 2007, in its Green Paper, *The Governance of Britain* (Cm 7170), that it intended to bring forward legislation which would *"include measures which will enshrine the core principles and values of the Civil Service in law"*. The Joint Committee on the draft Constitutional Renewal Bill concluded that the Civil Service provisions received "overwhelming support".

Part 2 Background - Ratification of Treaties

34. The current procedure for the Parliamentary scrutiny of treaties is known as the Ponsonby Rule. It provides that treaties which do not come into force on signature, but which instead come into force later when governments express their consent to be bound through a formal act such as ratification, must be laid before both Houses of Parliament as a Command Paper for a minimum period of 21 sitting days. In 2000, the Government undertook that it would normally provide the opportunity to debate any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so requested. Explanatory Memoranda are provided with each treaty laid before Parliament to keep it informed about the UK's treaty intentions. Parliamentary debates on treaties are rare. At present there is no legal effect to objections raised by Parliament, in a resolution of either House or by a Select Committee, to the ratification of an agreement.

35. *The Governance of Britain* Green Paper (Cm 7170, July 2007) set out the Government's belief that Parliament should have the right to scrutinise treaties prior to their ratification. In the Green Paper the Government went on to propose that the procedure for allowing Parliament to scrutinise treaties should be formalised and committed to consulting on an appropriate means for putting the Ponsonby Rule on a statutory footing.

36. A consultation document *The Governance of Britain – War powers and treaties: Limiting Executive powers* (Cm 7239) was published on 25 October 2007. The document can be found at:

http://www.justice.gov.uk/docs/cp2607a.pdf

37. The document invited comments on an appropriate means to put the Ponsonby Rule on a statutory footing. The consultation period ran until 17 January 2008. A detailed analysis of the consultation responses can be found in *The Governance of Britain – Analysis of Consultations* (Cm 7342-3). The draft Bill provided for treaties to be laid before Parliament for 21 sitting days prior to ratification with provision for flexibility and exceptions based on established practice and for the effect of a negative vote in either House of Parliament.

Part 3 Background – The House of Lords

38. Under the House of Lords Act 1999, membership of the House of Lords by virtue of a hereditary peerage was brought to an end. A transitional arrangement was made to except 92 hereditary peers from the effect of the Act. Two hereditary office holders, the Earl Marshal and the Lord Great Chamberlain, continued to be members of the House. In addition, 75 hereditary peers were elected by the hereditary peers in the groups of Conservative, Labour, Liberal Democrat and crossbench peers, in proportion to their membership of those groups. A further 15 hereditary peers were elected by the whole House to be available to serve as Deputy Speakers or Chairmen of Committees. When excepted peers died, they were to be replaced. Until the end of the first session of the Parliament following that in which the Act was passed (which turned out to be November 2002), the replacement was the peer who had been next on the list in the relevant election. Since then, replacement has been by means of by-elections held in accordance with the Standing Orders of the House.

39. The only restrictions which presently apply to membership of the House of Lords are on the grounds of nationality or age. Once someone is a member of the House, they cannot be removed from the House except by an Act of Parliament (whether generic, as in the House of Lords Act 1999, or personal, as in the Titles Deprivation Act 1917). Members may be temporarily disqualified for sitting or voting in the House if convicted of treason, on insolvency grounds and, once section 137 of the Constitutional Reform Act 2005 comes into force, while holding judicial office. Life peers are similarly disqualified while members of the European Parliament.

40. The nomination of life peers to the House of Lords is overseen by the non-statutory House of Lords Appointments Commission. That commission makes nominations to the Prime Minister for peerages for those not recommended by a political party. It also vets for propriety the nominations made by a political party. Life peerages are conferred by the Queen on the advice of the Prime Minister.

41. The White Paper *An Elected Second Chamber: Further reform of the House of Lords* (Cm 7438, July 2008) can be found at:

http://www.official-documents.gov.uk/document/cm74/7438/7438.pdf

The paper proposed that there should be restrictions on the membership of the reformed second chamber on similar lines to those which applied to the House of Commons. That is, that members who had been convicted of an offence and sentenced to more than twelve months' imprisonment, those who were subject to

a bankruptcy restrictions order and those who had been detained under mental health legislation should lose their seats. That White Paper also proposed that members of the reformed second chamber should be able to resign their seats.

42. On 25 January 2009, the Sunday Times newspaper published allegations that four peers had broken the House of Lords Code of Conduct on paid advocacy. The Leader of the House announced the setting up of two House of Lords inquiries, one by the Lords Sub-Committee on Lords' Interests and the other by the Committee for Privileges. The Lord Chancellor and Secretary of State for Justice also announced that he was working on a package of measures which would introduce legislation to remove from the House of Lords peers who were convicted of serious offences. He said he was also looking at whether provision should be made to permit the House of Lords to expel peers for grossly improper conduct that did not amount to a serious offence and at making provision for resignation.

43. On 14 May 2009, the House of Lords Committee for Privileges published its report into the allegations against the four peers. It also published a report into its investigation into the powers of the House. The report, *The Powers of the House of Lords in respect of its Members* (First Report 2009-10, HL 87) concluded that the House had the power to suspend a member for a defined period. This period however could not be longer than the remainder of the current Parliament because the House did not have the power to require that a writ of summons be withheld from a member otherwise entitled to receive it. The Report can be found at:

http://www.publications.parliament.uk/pa/ld200809/ldselect/ldprivi/87/8702.htm

Part 4 Background – Public Order

44. *The Governance of Britain* Green Paper committed the Government to consult widely on the provisions covering demonstrations in the vicinity of Parliament, with a view to ensuring that people's right to protest was not subject to unnecessary restrictions and with a presumption in favour of the freedom of expression.

45. The Government subsequently published the consultation paper *The Governance of Britain - Managing Protest around Parliament* (Cm 7235, 25 October 2007) which sought views on whether there remained a sufficiently strong case for a distinct legislative framework to apply to the policing of protests around Parliament. This document can be found at:

http://www.homeoffice.gov.uk/documents/cons-2007-managing-protest?version=1

46. The majority of responses called for the repeal of the current provisions in sections 132 to 138 of the Serious Organised Crime and Police Act 2005. A detailed analysis of the consultation responses can be found in *The Governance of Britain – Analysis of Consultations* (Cm 7342-3). Following this consultation the Government decided to seek to repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005.

47. The Government also invited Parliament to clarify whether additional provision was needed to keep access leading to the Palace of Westminster free and open.

During pre-legislative scrutiny, the Joint Committee on the draft Constitutional Renewal Bill examined these proposals and made a number of recommendations.

48. On the issue of maintaining access to Parliament, the Committee said "there should be unrestricted access to the Houses of Parliament for Members, staff and the public, but there must also be a willingness to accept some disruption during large scale protests. As a minimum there should be one point of entry at each end of the Houses of Parliament open to both pedestrians and vehicles, particularly to enable disabled users to gain access. Our provisional view is that Black Rod's Garden entrance and the main entrance to Portcullis House are best suited to accommodate pedestrian access, while Carriage Gates and Peers Entrance are the most appropriate for vehicles. In light of the conflicting evidence we have received during our inquiry, we are concerned that the police may not have adequate powers upon the repeal of SOCPA to maintain the level of access that we call for above. We urge the Home Office to work with the police and other interested parties to resolve this issue." [paragraph 36]

Part 5 Background – Time Limits for Human Rights Actions Against Devolved Administrations

49. Under the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006 ("the Devolution Acts"), the devolved administrations, Parliament and Assemblies have no power to act in breach of the rights set out in the European Convention on Human Rights which are incorporated into UK law by the Human Rights Act 1998, that is those rights and freedoms drawn from the European Convention on Human Rights set out in Schedule 1 to the Act ("the Convention rights"). An act, including a failure to act, which is incompatible with Convention rights is therefore *ultra vires*. A person who alleges that they are a victim of an act which is a breach of convention rights can bring proceedings against the devolved body.

50. Under section 6(1) of the Human Rights Act 1998, it is also unlawful for a public authority to act in a way which is incompatible with a Convention right. If a person claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1), they may bring proceedings against the public authority under the Human Rights Act in the appropriate court or tribunal. A person is permitted to do so only if they are, or would be, a victim of the unlawful act. A "public authority" includes the members of the Scottish Executive, Northern Ireland Executive and Welsh Assembly Government.

51. The Human Rights Act requires that proceedings must generally be brought within one year from the date of the alleged breach, unless a stricter time limit applies to the proceedings in question. A court or tribunal may permit proceedings beyond this time limit if it considers it equitable having regard to all the circumstances.

52. The Devolution Acts, however, make no such provision. As a result of the decision of the House of Lords in *Somerville v Scottish Ministers* [2007] UKHL 44, those bringing their claim under the Scotland Act are not subject to a specific time limit, notwithstanding that their claim may be identical in all other respects to proceedings under the Human Rights Act. Although the judgment did not deal with claims

brought under the Northern Ireland Act 1998 and the Government of Wales Act 2006, those Acts are similarly silent as to the time in which proceedings may be brought.

53. These clauses therefore insert a one year time limit for bringing claims involving Convention rights against actions of Ministers in Wales and Departments or Ministers in Northern Ireland**.**

54. Similar amendments will, subject to Royal Assent, shortly be made to the Scotland Act by the Convention Rights Proceedings (Amendment)(Scotland) Bill, which has been passed by the Scottish Parliament. Once that Bill has received Royal Assent, the Government intends to re-enact these amendments to the Scotland Act.

Part 6 Background - Courts and Tribunals

55. Part 6 of the Bill provides for the protection of the salaries of various members of tribunals. The current position is that members of tribunals do not have salary protection but certain judicial office holders in the courts' system do have salary protection. Effect is also given to Schedule 5 to the Bill.

56. Schedule 5 makes adjustment to the existing functions of the executive and judiciary in relation to judicial appointments and other judiciary related matters in the context of the Government's wider programme, *The Governance of Britain*. The Government published *The Governance of Britain - Judicial Appointments* (Cm 7210) on 25 October 2007. This document can be found at:

http://www.justice.gov.uk/docs/cp2507.pdf.

57. A detailed analysis of the consultation responses can be found in *The Governance of Britain - Analysis of Consultations* (Cm 7342-3).

58. The proposals remaining in the Bill have been pared down from those outlined in the publications above but continue to address the functions of the executive and judiciary in relation to judicial appointments.

59. The provisions also remove the Prime Minister from the process of appointments of the President, Deputy President and judges of the Supreme Court.

Part 7 Background – National Audit

60. The office of Comptroller and Auditor General ("C&AG") was created in 1866 when the role of the Comptroller of the Exchequer was combined with that of the Commissioners for Audit. The C&AG is still appointed under the Exchequer and Audit Departments Act 1866 ("the 1866 Act"). The National Audit Act 1983 (the 1983 Act) built on that framework and provided for the C&AG to be head of the National Audit Office ("NAO"), an office which consists of the C&AG and the staff appointed by the C&AG. The C&AG audits the accounts of government departments and a wide range of other public bodies under a number of statutory powers. Under the 1983 Act, the C&AG carries out "value for money" examinations of the

way in which departments and other public bodies have used their resources. In addition, the C&AG audits certain public funds and has rights of inspection and examination over other bodies which receive public money.

61. Under the 1983 Act, a committee of Members of Parliament, the Public Accounts Commission ("the Commission"), was set up to oversee the activities of the C&AG and the NAO. Its functions include agreeing the voted resources of the NAO. In July 2007, the Commission initiated a review of the corporate governance arrangements of the NAO to ensure that they conformed to best practice. The Commission's Report was published as HC 402 on 6 March 2008. That document is available here:

http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpacomm/402/402.pdf

62. The Commission recommended that the NAO should remain the Government's auditor, independent of Government and answerable directly to Parliament through the Commission. Its audit reports, both financial and value for money, should continue to be laid in Parliament and the Committee of Public Accounts (PAC) would continue to hold scrutiny hearings on some of them. As chief executive of the NAO, the C&AG should continue to lead its audit work and to make professional judgements on its audit reports.

63. However, the Commission said that the NAO should also have a board with a majority of non-executives, including a non-executive chair. The board would be charged with setting the strategic direction for the NAO and supporting the C&AG. The C&AG would have a fixed term of ten years instead of the current unlimited term. Former C&AGs would not be able to work for bodies that are subject to NAO's audit or inspection for two years after they leave office.

64. The Government accepted the Commission's recommendations and agreed to implement them through the Constitutional Reform and Governance Bill. When the Commission met on 16 December 2008, it published the Government's draft clauses and (subject to a recommendation that the C&AG's pay should be linked to that of the Lord Chief Justice and that the employment restrictions for former C&AGs should last for five years) said it was content with the draft clauses. Its recommendations are available here:

http://www.parliament.uk/parliamentary_committees/public_accounts_commission/tpacfm161208.cfm

Part 8 Background – Transparency of Government financial reporting to Parliament

65. There are a number of different systems for presenting Government expenditure. These include budgets, Supply Estimates presented to Parliament for approval and resource accounts prepared by departments at the end of each financial year.

66. These different systems mean that there is significant misalignment between the different bases on which financial information is presented to Parliament and the public. Government financial documents are published in different formats, and on

a number of different occasions during the year. This makes it difficult to understand the links and inter-relationships between them.

67. The Government announced in *The Governance of Britain* Green Paper in July 2007 a Clear Line of Sight (Alignment) Project to simplify its financial reporting to Parliament by better aligning budgets, Estimates and resource accounts. The Treasury submitted detailed proposals for better alignment to Parliament in a Memorandum in March 2009 (Cm 7567). The Liaison Committee of the House of Commons responded to the Government's proposals in its report *Financial Scrutiny: Parliamentary Control over Government's Budgets (HC 804)*, published on 3 July 2009. The report accepts, on behalf of the relevant House of Commons Select Committees, all of the Government's proposals for a better aligned public spending framework as set out in Cm 7567.

68. Part 8 deals with one aspect of the work of that Project. At present, the spending of Non-Departmental Public Bodies and other central government bodies falls within the budget of the parent department (the government department with policy responsibility for that activity) but falls outside the departmental boundary for Supply Estimates (departmental spending plans approved by Parliament) and resource accounts. *Clause 51* amends the Government Resources and Accounts Act 2000 in order to allow the Treasury to issue directions about the way departments prepare Supply Estimates and to direct that such Estimates are to include information relating to "designated bodies". It also includes provision preventing the designation of a body if it is funded solely from the Scottish Consolidated Fund, the Consolidated Fund of Northern Ireland or the Welsh Consolidated Fund and makes consequential amendments to the GRAA 2000.

69. *Clause 52* amends part 5 of the Government of Wales Act 2006 ("GOWA 2006"). The changes are intended to simplify the arrangements for financial reporting and accountability to the National Assembly for Wales (the "Assembly"). This will be achieved by better aligning the contents of the annual budget motion with the use of the resources set out in the resource accounts produced by Ministers and other persons to whom the Assembly votes resources.

70. There are a number of Assembly Government Sponsored Public Bodies ("AGSBs") and other organisations in Wales that are classified as central government bodies and are funded, wholly or to a significant degree, by Welsh Ministers. At present, the Assembly is not asked to authorise the use of resources by AGSBs and other central government bodies operating in Wales, and it is therefore more difficult for Ministers to align the resources included within the annual budget motion with those included in the Welsh Ministers' resource accounts.

71. As referred to above, the Assembly votes resources to some persons other than the Welsh Ministers. These persons are described as "relevant persons" in section 124(3) of the GOWA 2006. They are: the National Assembly for Wales Commission, the Auditor General for Wales and the Public Services Ombudsman for Wales. These other "relevant persons" could also fund bodies in Wales that would be classified as belonging to central government. Therefore, the changes to the GOWA 2006 made by

clause 52 apply to those "relevant persons", as well as to the Welsh Ministers.

72. *Clause 52* amends the GOWA 2006 in order to give Welsh Ministers the power to designate bodies for the purpose of enabling a budget motion to include information relating to the resources expected to be used by that body. It also includes provision that requires the Welsh Ministers to obtain the consent of the Treasury before designating any body that receives funding from the UK Consolidated Fund or a devolved Consolidated Fund other than the Welsh Consolidated Fund. This is intended to avoid duplicate or erroneous designations, and the accounting problems that would ensue.

TERRITORIAL EXTENT

73. The provisions of the Bill extend to England and Wales while certain provisions also extend to Scotland and Northern Ireland. The Bill largely addresses reserved and excepted matters although there are some provisions that affect the functions of the Devolved Administrations.

74. At introduction this Bill contains provisions that trigger the Sewel Convention in relation to Scotland. The provisions relate to the Civil Service clauses and are outlined below:

- **Civil Service Codes** – *clause 5* requires the First Minister of Scotland to lay before the Scottish Parliament any separate Civil Service code that applies to civil servants serving the Scottish Executive.
- **Special Advisers Code** – *clause 8* requires the First Minister of Scotland to lay the special advisers code before the Scottish Parliament.
- **Special Advisers** – *clause 15* prescribes requirements that the First Minister for Scotland must apply when appointing Special Advisers to assist members of the Scottish Executive.
- **Special Advisers Report –** *clause 16* requires the First Minister of Scotland to prepare an annual report about special advisers appointed to assist members of the Scottish Executive and to lay this before the Scottish Parliament.
- **Civil Service Commission's Report** – Schedule 1, *paragraph 17(5)* requires the First Minister of Scotland to lay the Civil Service Commission's report before the Scottish Parliament.
- **Requirements to provide information** – *clauses 9(6), 13(4), 14(2) and 17(3)* impose requirements to provide information to the Civil Service Commission. Those requirements can apply to parts of the Scottish Administration.

75. The Sewel Convention provides that the UK Parliament will not normally legislate with regard to devolved matters in Scotland, or alter the executive competence of Scottish Ministers, without the consent of the Scottish Parliament. If there are any

amendments to the Bill during its passage which trigger the Convention, the consent of the Scottish Parliament will also be sought for those amendments.

76. The Bill contains provisions which confer functions on Welsh Ministers and affect their responsibilities:

- These include provisions in Part 1 requiring that they are consulted about the Civil Service and special advisers code and requiring them to lay the codes and the Commission's reports before the Assembly.
- In Part 5 creating a time limit for human rights claims brought against them under the Government of Wales Act 2006.
- In Part 8 giving them the power to designate bodies that must be included in Assembly budget motions.

77. The Bill also contains other provisions that do not require a Legislative Consent Motion but which make incidental changes to Scots law and the law in Northern Ireland.

COMMENTARY ON CLAUSES

PART 1: THE CIVIL SERVICE

CHAPTER 1

Clause 1: Application of Chapter

78. *Clause 1* applies Part 1 of the Bill to the Civil Service of the State, subject to the exclusions listed in *subsections (2) and (3)*. The terms Civil Service and civil servant throughout this Part are therefore to be read as excluding those parts of the Civil Service listed in *subsections (2) and (3)* and the civil servants in those parts of the Civil Service.

Clause 2: Establishment of the Civil Service Commission

79. *Subsection (1)* establishes the Civil Service Commission as a body corporate with legal personality.

80. *Subsections (3) and (4)* set out the main function of the Commission. This concerns recruitment to the Civil Service, covered in *clauses 11 to 14*. Reference is also made to the Commission's other functions concerning complaints to the Commission under the Civil Service and Diplomatic Service codes of conduct *(clause 9)*.

Clause 3: Management of the Civil Service

81. *Clause 3* provides a power for the Minister for the Civil Service to manage the Civil Service and a parallel power for the Secretary of State in relation to the Diplomatic Service. The power to manage includes the power to appoint and dismiss. The general power to manage the Civil Service, including the power of appointment and dismissal, set out in the Bill must be read in conjunction with other clauses in the Bill, in particular provisions about the Civil Service Commission and requirements about fair and open competition. The power to appoint and dismiss individual civil servants will, as now, continue to be delegated to the Head of the Civil Service and the permanent Heads of Departments provided for under existing statutory powers in the Civil Service (Management Functions) Act 1992.

82. *Subsection (4)* expressly excludes national security vetting from the power to manage the Civil Service and the Diplomatic Service. This confirms that national security vetting will continue to be carried out under existing prerogative powers.

83. *Subsection (5)* requires the Secretary of State to seek the agreement of the Minister for the Civil Service in relation to remuneration and retirement conditions for civil servants in the diplomatic service.

Clause 4: Other statutory management powers

84. *Subsections (1), (2)* and *(3)* provide that statutory powers of management of the Civil Service (whether before or after the Act comes into force) are subject to the powers to manage the Civil Service in *clause 3*.

85. *Subsection (5)* expressly excludes the statutory management powers set out in the Superannuation Acts from the general power to manage by the Minister for the Civil Service provided in *clause 3*.

Clause 5: Civil service code

86. *Clause 5* makes provision for codes of conduct for the Civil Service (with the exception of the diplomatic service). *Clause 5* enables the Minister to publish separate codes of conduct for civil servants in the Scottish Executive or the Welsh Assembly Government after first consulting the First Ministers for Scotland and Wales on the content of the code relevant to their respective administrations. The codes published under this clause will be along the lines of the existing Civil Service codes, covering civil servants in the UK Departments in the Civil Service, the Scottish Executive and the Welsh Assembly Government respectively. Copies of the existing codes can be viewed at the following websites:

www.civilservice.gov.uk/about/work/codes/csmc/index.aspx;

http://www.scotland.gov.uk/Resource/Doc/923/0030759.doc;

http://new.wales.gov.uk/humanresources/publications/civilservicecode/codee.pdf?lang=en

87. There is no Parliamentary procedure attached to the obligation in *subsection (5)* for the Minister of the Civil Service to lay the Code before Parliament. The First Ministers for Scotland and Wales are also required to lay the code relevant to their administration before the Scottish Parliament and Welsh Assembly respectively. Under *subsection (8)* the applicable code or codes form part of a civil servant's terms and conditions.

Clause 6: Diplomatic service code

88. *Clause 6* makes provision for a code of conduct for the diplomatic service which will be along the lines of the existing code for the diplomatic service, the *Diplomatic Service Code of Ethics*. The code reflects the core principles of the Civil Service code of conduct. This code must be laid before Parliament, but there is no Parliamentray procedure. Under *sub-section (4)* the code forms part of the terms and conditions for civil servants in the diplomatic service.

Clause 7: Minimum requirements for Civil Service and diplomatic service codes

89. *Clause 7* sets out the minimum requirements for the Civil Service and diplomatic service codes of conduct. *Subsections (2)* and *(3)* require civil servants in the UK, Scotland or Wales, to serve the administration of the day, whatever its political complexion. By *subsection (4)* the code must contain an obligation on civil servants to carry out their duties in accordance with the core Civil Service values of integrity, honesty, objectivity and impartiality. *Subsection (5)* concerns the provisions of the codes as they apply to special advisers. *Clause 8* makes separate provision for the special advisers code.

Clause 8: Special advisers code

90. *Clause 8* makes provision for a code of conduct for special advisers. The code published under this *clause* will be along the lines of the existing special advisers' code, which can be viewed at the following website:

www.cabinetoffice.gov.uk/propriety_and_ethics/special_advisers/code.aspx

91. The Minister for the Civil Service must consult the First Ministers for Scotland and Wales on the content of the code before publishing the code. The First Ministers are required to lay the code before the Scottish Parliament and Welsh Assembly respectively.

92. There is no parliamentary procedure attached to the obligation in *subsection (4)* for the Minister for the Civil Service to lay the code before Parliament.

93. Under *subsection (7)*, the code forms part of a special adviser's terms and conditions.

Clause 9: Conduct that conflicts with a code of conduct: complaints by civil servants

94. *Clause 9* makes provision for civil servants to complain to the Civil Service Commission about alleged breaches of the Civil Service and diplomatic codes.

95. *Subsection (4)* provides for the codes to include information on the steps a civil servant must take before making a complaint. It is expected that these will reflect the procedures already set out in the existing code.

96. *Subsection (5)* requires the Civil Service Commission to establish procedures for complaints under *subsection (2)*. It requires the Civil Service Commission to consider complaints in accordance with the procedures established by the Commission and allows for the Commission to make recommendations to resolve the complaint.

97. *Subsection (6)* provides that the Commission can require information from the Civil Service management authority, the civil servant who brought the complaint and any other civil servant whose conduct is involved in the complaint where that is reasonably required to enable the Commission to investigate the complaint.

Clause 10: Selections for appointments to the Civil Service

98. *Clause 10* requires that people can only be appointed into the Civil Service if they have been selected on merit on the basis of fair and open competition. The exceptions to this requirement are set out in *subsection (3)(a)* to *(c)*.

99. Further provision on special adviser appointments and appointments excepted by the recruitment principles are set out in *clauses 15 and 12* respectively.

100. *Subsection (4)* provides that those appointed under *subsection (3)(a) to (c)* (Heads of Mission or Governors of overseas territories in the diplomatic service, special advisers and appointments excepted in the Commission's Recruitment Principles) are excepted from the requirement for selection on merit on the basis of fair and open competition only for the duration of that particular appointment. The persons holding such appointments would therefore be subject to the requirements of *clause 10* (in particular, the requirement of selection on merit on the basis of fair and open competition) in relation to any further appointments to the Civil Service unless specified to the contrary in the Commission's Recruitment Principles.

Clause 11: Recruitment principles

101. *Clause 11* requires the Commission to publish principles on the application of the requirement in *clause 10* of selection on merit on the basis of fair and open competition. These are referred to as "the recruitment principles". The Commission must consult the Minister for the Civil Service before publishing the recruitment principles.

102. *Subsection (4)* requires Civil Service management authorities to comply with the recruitment principles. Civil service management authorities are any body or person with the power to make appointments in the Civil Service.

Clause 12: Approvals for selections and exceptions

103. *Subsection (1)(a)* enables the recruitment principles to specify those appointments (which are subject to the requirement in *clause 10* of selection on merit on the basis of fair and open competition) that require the approval of the Commission before they can be made. *Subsections (2) and (3)* enable the Commission to participate in the selection process for any such appointments as they see fit.

104. *Subsection (1)(b) and subsection (4)* enable the recruitment principles to set out exceptions to the requirement of selection on merit on the basis of fair and open competition where justified by the needs of the Civil Service or in the interests of enabling the Civil Service to participate in Government employment initiatives, such as initiatives to relieve unemployment.

105. *Subsection (6)* make provision for the recruitment principles to specify the procedures and the terms and conditions for appointments made under the exceptions contained in the recruitment principles under *subsections (3)(c)* of *clause 10. Subsection (7)* allows the recruitment principles to give the Commission or Civil Service Management Authorities discretion in applying aspects of the recruitment principles.

Clause 13: Complaints about competitions

106. *Clause 13* allows people to complain to the Commission about selections to the Civil Service if that person has reason to believe the selection was made in breach of the requirement in *clause 10*.

107. *Subsection (3)* requires the Civil Service Commission to establish procedures for complaints under *subsection (1)*. It requires the Civil Service Commission to consider complaints in accordance with the procedures established by the Commission and allows for the Commission to make recommendations to resolve the complaint. The Commission can require information from Civil Service management authorities and the complainant where that information is reasonably required for the purpose of considering the complaint.

Clause 14: Monitoring by the Commission

108. *Clause 14* requires the Commission where it considers necessary, to review departments' recruitment policies and practices, to establish whether the requirement in *clause 10* and the recruitment principles are being complied with and are not being undermined. For these purposes the Commission may require a Civil Service management authority to provide it with information if the Commission reasonably requires that information.

Clause 15: Definition of "special adviser"

109. *Clause 15* makes provision about the appointment of special advisers and their terms and conditions of appointment. Special adviser appointments by a Minister of the Crown are approved by the Prime Minister. Special advisers appointed to assist Scottish or Welsh Ministers must be selected for appointment by the First Minister for Scotland or Wales as appropriate.

110. The terms and conditions of all special advisers are approved by the Minister for the Civil Service. Appointments of special advisers are exempt from the requirement in *clause 10* of selection on merit on the basis of fair and open competition.

111. In each administration, a special adviser appointment ends when the appointing Minister's term of office ends. In the United Kingdom, this is the earlier of either the date on which the Minister ceases to hold office or the end of the day after the relevant election day. In Scotland and Wales, this is when the First Minister's term of office ends or, under *sub-section (2)*, where the First Minister's functions are performed by a temporary First Minister under the terms of the Scotland Act 1998 or the Government of Wales Act 2006.

Clause 16: Annual reports about special advisers

112. *Clause 16* makes provision for annual reports about special advisers, and the laying of such reports before Parliament, the Scottish Parliament and the National Assembly for Wales. Similar reports are already published by the Minister for the Civil Service and the First Minister in Scotland and can be viewed at:

www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080722/wmstext/80722m0004.htm#08072253000033

www.scottish.parliament.uk/business/pqa/wa-08/wa0609.htm#43

Clause 17: Arrangements for Civil Service Commission to carry out additional functions

113. *Clause 17* enables the Minister for the Civil Service and the Commission to agree that the Commission carries out additional functions in relation to the Civil Service. The Commission must carry out those functions. The additional functions may be directly or indirectly related to their existing functions.

CHAPTER 2

114. *Clause 19* gives effect to Schedule 2.

CHAPTER 3

115. *Clause 20* amends the Northern Ireland Act 1998 to list the appointment of the Civil Service Commissioners for Northern Ireland as a reserved matter under the Act.

SCHEDULE 1 - CIVIL SERVICE COMMISSION

CIVIL SERVICE COMMISSION

116. Schedule 1 makes provision for the Civil Service Commission. It contains provisions relating to: membership of the new Civil Service Commission; appointment of the First Civil Service Commissioner (who in practice will chair the Commission), and its other members the Commissioners, and their tenure of office; status and powers of the Commission; regulation of its proceedings; appointment of staff; arrangements for assistance, delegation and committees; financial provision and accounts; publication of its annual report; and transitional arrangements relating the old Civil Service Commission.

Part 1: The Commissioners

117. *Paragraph 1* provides for a minimum of seven members of the Civil Service Commission, one as the First Civil Service Commissioner ("the First Commissioner") and the others Civil Service Commissioners ("the Commissioners").

118. *Paragraphs 2 and 3* provide for the appointment of the First Commissioner and Commissioners, and the terms of appointment. Provision is also made for the appointment of ex-officio Commissioners. This might include for example, the appointment of the Public Appointments Commissioner as a Commissioner.

119. *Paragraph 4* makes provision for the terms of appointment of a Commissioner

to include provision for remuneration, allowances and pensions.

120. *Paragraph 5* sets out the circumstances in which the First Commissioner or Commissioner may resign or be removed from office by Her Majesty on the recommendation of the Minister for the Civil Service.

121. *Paragraph 6* makes provision for compensation for the loss of the office of First Commissioner or Commissioner.

Part 2: The Commission

122. *Paragraph 7* establishes the status of the Civil Service Commission as a non Crown body. It provides that the Commission is not to be regarded as a servant or agent of the Crown and is not to enjoy any status, immunity or privilege of the Crown. It provides that any property held by the Commission is not held on behalf of the Crown.

123. *Paragraph 8* sets out the powers of the Commission and enables it to take any action that facilitates or is incidental to its functions. Borrowing by the Commission is subject to the agreement of the Minister for the Civil Service.

124. *Paragraph 9* makes provision for committees and sub-committees to assist the Commission in carrying out its functions, and *paragraph 10* the procedure of the Commission and its committees and sub-committees.

125. *Paragraph 11* enables the Civil Service Commission to employ staff.

126. *Paragraph 12* enables pension provision to be made for the staff of the Commission and the First Commissioner. It provides for such persons to be eligible for membership of a pension scheme under section 1 of the Superannuation Act 1972. It places an obligation on the Civil Service Commission to cover the costs involved in membership of the pension scheme, and to pay the sums involved to the Minister for the Civil Service.

127. *Paragraph 13* enables the Civil Service Commission to enter into arrangements with other parties for the provision of assistance to the Commission. In particular, it enables the Commission to make arrangements with the Minister for the Civil Service for serving civil servants to provide assistance to the Commission.

128. *Paragraph 14* makes provision for the delegation of the Commission's functions.

129. *Paragraph 15* requires the Minister for the Civil Service to pay a grant or grant-in-aid to the Civil Service Commission to enable it to carry out its functions. Conditions may be attached to the payment of the grant or grant-in-aid. This is in line with the requirements and procedures set down in *Managing Public Money*. The Minister must consult with the Commission before setting the level of grant or grant-in-aid, or attaching any conditions to its payment.

130. *Paragraph 16* makes provision for the accounts and records of the Civil Service

Commission. The preparation and content of the annual statement of accounts must comply with HM Treasury requirements, and provide a fair and true view of the Commission's income and expenditure and cash flows over the financial year and the state of its affairs at the end of the financial year. The Commission must send the annual statement of accounts to the Minister for the Civil Service by the date specified by the Minister. The Minister then sends the statement to the Comptroller and Auditor General who is required to examine, certify and report on it, and to lay copies of the statement and report before Parliament, unless the Minister for the Civil Service arranges to do so himself.

131. *Paragraph 17* makes provision for the preparation and laying of the Commission's annual report. The Report is laid before the Parliament by the Minister for the Civil Service (unless it has been arranged for the Comptroller and Auditor General to do so where the annual report has been combined with the annual statement of accounts in a joint document). Copies of the report are also laid before the Scottish Parliament and National Assembly for Wales by the First Minister for Scotland and Wales respectively.

132. *Paragraph 18* provides a definition of the financial year for the purposes of *paragraphs 16 and 17*. The period begins when *clause 2* comes into force (that is, when the Commission is established), and ends with the following 31 March. Thereafter it runs in successive 12 month periods.

133. *Paragraph 19* makes provision for the authentication of the Commission's seal and the execution of documents by the Commission.

SCHEDULE 2

Part 1: Consequential Amendments

134. *Paragraphs 1* to *18* make amendments to various Acts to change references to the "Home Civil Service" and the "Civil Service Commissioners" to reflect the new terminology as set out in the Constitutional Reform and Governance Bill. The Bill preserves the Minister for the Civil Service's overarching power to manage, and appoint to, the Civil Service. *Paragraphs 9* and *15* make clear that Scottish and Welsh Ministers' existing powers to manage and appoint to the Civil Service will be exercisable under the Bill but those management powers will continue to be delegable to Scottish and Welsh Ministers under the Civil Service (Management Functions) Act 1992.

Part 2: Consequential Amendments to other Legislation

135. *Paragraphs 19* and *20* revoke the Civil Service Order in Council 1995, the Diplomatic Service Order in Council 1991 and all amending Orders in Council.

136. *Paragraphs 21* to *24* amend subordinate legislation to change references to the

"Home Civil Service" or the "Civil Service Commissioners" to changes in terminology.

Part 3: Transitional Provision Relating to the old Commission

137. *Paragraphs 25 to 37* make transitional provision relating to the Civil Service Commissioners who operated under the prerogative (the "old Commission").

138. *Paragraph 26* provides for the First Civil Service Commissioner in the old Commission, to become the First Civil Service Commissioner in the Civil Service Commission when it becomes operational. The First Civil Service Commissioner who moves to the new Commission on this basis will be entitled to hold office for the remaining period of their original appointment. For example, where the serving First Civil Service Commissioner has been appointed for a five year term, and has served two years at the time the new Civil Service Commission becomes operational, he or she will be entitled to remain in office for a further three years, making a total period of appointment of five years. The other terms of the original appointment will continue to apply, unless the individual concerned agrees different terms.

139. *Paragraph 27* makes provision to restrict the period of office of the First Commissioner where that person was previously head of the old Commission. The aggregate of time the individual concerned served as First Civil Service Commissioner in the old Commission, and as First Commissioner in the new Commission, must not exceed a total of five years.

140. *Paragraph 28* provides for Commissioners who hold office in the old Commission immediately prior to the establishment of the Commission to become Commissioners in the new Commission when it becomes operational. A Civil Service Commissioner who moves to the new Commission on this basis will be entitled to hold office for the remaining period of their original appointment. For example, where the serving Civil Service Commissioner has been appointed for a three year term, and has served two years at the time the new Civil Service Commission becomes operational, he or she will be entitled to continue to serve as a Commissioner for a further year, making a total period of appointment of three years. Under these transitional arrangements, the other terms of the original appointment will continue to apply, unless the individual concerned agrees to different terms.

141. *Paragraph 29* makes provision to restrict the period of office of a Commissioner where that person was previously a Commissioner in the old Commission. The aggregate of time the individual concerned served as a Civil Service Commissioner under the old arrangements, and as a Civil Service Commissioner in the new Commission, must not exceed a total of five years. *Paragraph 29(4)* contains an exception from that in respect of the Commissioner for Public Appointments who currently holds office as a Civil Service Commissioner on an *ex officio* basis.

142. *Paragraphs 31 to 36* provide that certain functions that the old Commission are performing when the provisions are commenced can be continued by the Civil Service

Commission and for property, rights and liabilities to transfer as appropriate to the new Commission.

143. *Paragraph 37* establishes that in the period between the passing of the Act and the new Civil Service Commission becoming operational, the serving First Civil Service Commissioner and the other serving Civil Service Commissioners in the old Commission may undertake functions conferred on the new Civil Service Commission by the Act, on behalf of the new Commission.

Part 4: Transitional Provision Relating to the Management of the Civil Service

144. *Paragraphs 38 and 39* preserve actions done under existing prerogative powers including decisions to appoint civil servants who, *paragraph 39(4)* makes clear, will continue to hold their positions under the new power contained in *clause 17*.

145. *Paragraph 40* provides for the parts of the Civil Service of the State expressly excluded from the provisions in Part 1 to be managed under existing prerogative powers and preserves the position of civil servants who were managed under the revoked Orders in Council.

146. *Paragraphs 41 and 42* specify that any appointments to the Civil Service made under an exception permitted by the old Commission cannot be considered to have entered the Civil Service on merit following fair and open competition unless the Commission has specified that is permissible in the Recruitment Principles.

147. *Paragraph 43* provides for terms and conditions of special adviser appointments agreed before the enactment of the Constitutional Reform and Governance Act to continue as agreed between the passing of the Act and the commencement of the provisions.

PART 2: RATIFICATION OF TREATIES

Clause 21 – Treaties to be laid before Parliament before ratification

148. This *clause* sets out the main procedure to be adopted in relation to treaties before they are ratified on behalf of the United Kingdom. The procedure described is based upon the convention known as the Ponsonby Rule, which has been applied to the ratification of treaties since 1924 (see *Erskine May*, 23rd edition, page 264). *Clause 21* provides that a treaty is to be laid before Parliament for a period of 21 sitting days, during which time both Houses have the opportunity to resolve that a treaty should not be ratified. If the 21 sitting days expire with no such resolution being passed by either House, the Government can proceed to ratify the treaty.

149. If the House of Commons resolves that a treaty should not be ratified, the Government cannot at that stage proceed to ratify the treaty. If it wishes to do so it must instead

lay a statement explaining why it believes the treaty should be ratified, and then wait a further 21 sitting days, before it can again proceed to ratify the treaty. Should the House of Commons resolve against the ratification of the treaty during this second 21 sitting day period, the Government remains blocked from ratifying the treaty; if it still wishes to do so it must re-lay its statement and start the 21 sitting day period again.

150. If the House of Lords resolves that a treaty should not be ratified, the Government must then lay a statement explaining why it believes the treaty should be ratified. However, in this instance the Government does not need to provide the House of Lords with a further 21 sitting days to consider its statement and can proceed to ratify the treaty as soon as the statement has been laid.

151. *Clause 21* stipulates that a treaty cannot be ratified by the Government unless Parliament has had the opportunity to review the treaty in question for a set time period. To facilitate the review of the treaty, it must be laid before Parliament and published in an appropriate manner.

152. *Subsection (1)* states that a treaty may not be ratified unless (a) a Minister of a Crown has in the first instance laid before Parliament a copy of the treaty, (b) the treaty has been published in a way that he or she thinks appropriate and (c) period A (as to which, see paragraph 157 below) has expired without either House having resolved that the treaty should not be ratified.

153. *Subsection (2)* explains the meaning of period A, which is referred to in *subsection (1)* (above). It is a defined as a period of 21 sitting days beginning with the first sitting day after the date on which the treaty has been laid.

154. *Subsection (3)* then explains that a further procedure, which is set out in *subsections (4) to (6)* (see below), will apply if the House of Commons resolves that the treaty should not be ratified (whether or not the House of Lords did so too).

155. *Subsection (4)* provides that a treaty may still be ratified if, after the House of Commons has resolved that a treaty should not be ratified during period A, (a) a Minister of the Crown has laid before Parliament a statement explaining why the treaty should nevertheless be ratified, and (b) period B (as to which, see below) has expired without the House of Commons having (again) resolved that the treaty should not be ratified.

156. *Subsection (5)* then explains that period B is a period of 21 sitting days beginning with the first sitting day after the date on which the Minister has laid the statement referred to in *subsection (4)(a)*(a statement as to why the treaty should nevertheless be ratified).

157. *Subsection (6)* states that such a statement as to why the treaty should be ratified may be laid more than once. This means that the process outlined in *subsection (4)* can start again, should the House of Commons resolve during the second 21 sitting day period that a treaty should not be ratified.

158. *Subsections (7) and (8)* then explain the condition that must be met in order for a treaty to be ratified if the House of Lords has resolved to the contrary (but the

House of Commons did not do so). The condition is that a Minister of the Crown should lay before Parliament a statement explaining why the treaty should nevertheless be ratified.

159. *Subsection (9)* explains that a "sitting day", as referred to in *subsections (2) and (5)*, means a day on which both Houses of Parliament sit.

Clause 22: Extension of 21 sitting day period

160. This clause provides a mechanism for Parliament to request extensions to the 21 sitting day period. Extensions are to be granted in blocks of up to 21 sitting days and will be at the discretion of the relevant Minister of the Crown. By *subsection (1)* the Minister may extend the period by 21 days or less. *Subsections (2) and (3)* provide that this can be done by laying a statement before Parliament before the expiry of the relevant period that indicates the period to be extended and the length of that extension. *Subsection (4)* requires the Minister to publish the statement in a way that the Minister thinks appropriate. *Subsection (5)* provides that the period can be extended more than once.

Clause 23: Section 21 not to apply in exceptional cases

161. This clause makes provision for exceptional cases. This clause provides an alternative procedure for treaties to be scrutinised by Parliament in exceptional cases where it is not possible for a treaty to be laid for the full 21 sitting day period before it is ratified.

162. *Subsection (1)* provides that the procedure does not apply if a Minister of the Crown is of the view that, for exceptional reasons, a treaty should be ratified without having to meet the conditions for which that clause provides.

163. *Subsection (2)* provides that *subsection (1)* may not be invoked where either House has resolved against ratification in accordance with *clause 21(1)(c)*.

164. *Subsection (3)* provides that if, exceptionally, the treaty is to be, or has been, ratified without fulfilling the conditions in *clause 21*, the Minister of the Crown must either before, or as soon as practicable after, the treaty is ratified, lay before Parliament a copy of the treaty and a statement indicating why the conditions in clause 21 are not met. The Minister of the Crown must also arrange for the treaty to be published in a way that he or she thinks appropriate.

Clause 24: Section 21 not to apply to certain descriptions of treaties

165. This clause makes provision in respect of those classes of treaties that have traditionally been dealt with outside the Ponsonby Rule, because they are scrutinised by other means. These are (i) treaties covered by the European Parliamentary Elections Act 2002 and European Union (Amendment) Act 2008, (ii) double taxation conventions and arrangements, and international tax enforcement

arrangements and (iii) treaties concluded under an authority given by the UK Government by any of the Channel Islands or of the Isle of Man or any of the Overseas Territories.

166. *Subsection (1)* states that the procedure does not apply to a treaty covered by section 12 of the European Parliamentary Elections Act 2002 (which provides for treaties resulting in an increase in the European Parliament's powers not to be ratified unless approved by Act of Parliament) or by section 5 of the European Union (Amendment) Act 2008 (which provides for amendments to the founding treaties not to be ratified unless approved by Act of Parliament).

167. *Subsection (2)* exempts treaties in relation to which an Order in Council may be made under section 158 of the Inheritance Tax Act 1984 (double taxation conventions), section 788 of the Income and Corporation Taxes Act 1988 (double taxation arrangements) or section 173 of the Finance Act 2006 (international tax enforcement arrangements).

168. *Subsection (3)* states that the procedure does not apply to treaties concluded by the government of a British Overseas Territory, the Channel Islands or the Isle of Man where that treaty is concluded under the authority given by the United Kingdom Government.

169. *Subsection (4)* provides for treaties that have already been laid before Parliament for 21 sitting days before the legislation comes into force. It states that these treaties will not be covered by section 21. This means that the legislation does not cover treaties that have already been laid under the Ponsonby Rule.

Clause 24: Meaning of "treaty" and "ratification"

170. This clause defines "ratification" and "treaties". "Treaty" is defined as being an agreement between states (or between states and international organisations) which is binding under international law. *Subsection (2)* clarifies that certain instruments made under a treaty are not within the definition given in *subsection (1)*. But amendments to a treaty are within the definition of "treaty".

171. *Subsection (3)* provides a definition for "ratification" to include those acts that are considered equivalent to ratification (accession, approval or acceptance, or deposit of a notification that domestic procedures have been completed) and which establish as a matter of international law the consent of the United Kingdom to be bound by the treaty.

PART 3: THE HOUSE OF LORDS

Clause 26: Ending of by-elections for hereditary peers

172. *Clause 26* removes the provision for by-elections to elect hereditary peers to make up the number of 90 excepted hereditary peers when one of their number dies. Section 2(2) of the House of Lords Act 1999 provides that 90 hereditary peers shall be excepted from the effect of section 1 of that Act, which ended membership of the House by virtue of a hereditary peerage. Section 2(4) provides the mechanism for replacing excepted hereditary peers when they die, so that the number is maintained. *Clause 26* replaces section 2(4) so that instead of the number of 90 being fixed, it is reduced by one every time an excepted hereditary peer dies. It also replaces section 2(4) so that there is no longer a mechanism for selecting new hereditary peers for membership of the House. *Subsection (2)* makes it clear that if a death occurs before the section comes into force, but the necessary by-election has not yet been held, then the by-election will proceed.

Clause 27: Removal of members of the House of Lords etc

173. *Subsection (1)* identifies the persons to whom the clause applies. It provides that the clause applies to anyone who is an excepted hereditary or a life peer and who either:

(a) meets a condition set out in Part 1 of Schedule 1 (that is, is convicted of a serious criminal offence, is subject to a bankruptcy restrictions order or undertaking or debt relief restrictions order or undertaking in England and Wales or the corresponding provisions in Scotland or Northern Ireland); or

(b) is the subject of an expulsion resolution of the House; or

(c) has resigned from the House.

174. *Subsection (2)* provides that a person to whom the clause applies shall cease to be a member of the House of Lords. Any writ of summons issued to that person shall cease to have effect and no further writs shall be issued to that person. A writ of summons is the mechanism by which an eligible peer takes up his or her seat in the House of Lords. It requires the peer to attend the sitting of the Parliament for which it is issued. It cannot be issued to anyone who is not a peer, but may not be withheld from any peer who is eligible to receive one.

175. *Subsection (5)* provides definitions of the terms used in the clause. In relation to hereditary peers, it defines those to whom the clause applies as those excepted from the effect of the House of Lords Act 1999. Under that Act, the majority of hereditary peers ceased to be members of the House. However, 90 hereditary peers, to be chosen by ballot, together with the Earl Marshal and the person holding the office of Lord Great Chamberlain, were excepted from the effect of the Act and remained members of the House. *Subsection (5)* therefore provides that for the purposes of this Bill,

the term "hereditary peer" applies only to those 92 peers. It defines life peers as both those appointed to the House under the Life Peerages Act 1958 and those appointed under the Appellate Jurisdiction Act 1876 ("the 1876 Act"). The latter, commonly known as the Law Lords, are appointed specifically to carry out the judicial business of the House. They are full members of the House even after they retire from judicial business under the statutory retirement provisions for members of the judiciary. The clause confirms that their appointment to the House counts as a peerage for the purposes of the Bill. Under the Constitutional Reform Act 2005, the active judicial members will transfer to the new UK Supreme Court and will be disqualified for sitting and voting in the House while they are members of that Court. However, retired judicial members who were appointed under the 1876 Act will continue to sit as members of the House.

176. *Subsection (6)* provides that peers in certain categories who are temporarily barred from receiving a writ of summons are not, by virtue of that bar, taken outside the provisions of the Bill. Under the Forfeiture Act 1870, anyone convicted of treason is ineligible to receive a writ of summons until he has served his sentence or received a pardon. Under the Insolvency Act 1986, peers who are subject to a bankruptcy restrictions order or a debt relief restrictions order, or corresponding provision in Scotland and Northern Ireland, are disqualified for sitting and voting in the House and from receiving a writ of summons while so disqualified. Under the European Parliament (House of Lords Disqualification) Regulations 2008, a life peer who is elected as a member of the European Parliament is disqualified for sitting and voting in the House and no writ of summons is to be issued to them while so disqualified. A peer who has not received a writ of summons because he is suspended from the House is also not, by virtue of that, taken outside the provisions of the Bill.

Clause 28: Expulsion and suspension of members of the House of Lords

177. *Subsection (1)* provides that the House may make Standing Orders under which the House may expel or suspend a member. Although the House of Commons has a power to expel or suspend a member, the consistent view of those who have considered the issue in relation to the House of Lords (for example, in the 1955-6 Report on The Powers of the House in Relation to the Attendance of its Members (HL 67), and the 2009 Report on the Powers of the House of Lords in respect of its Members (First Report 2009-10, HL 87)) is that the House of Lords has lost the power permanently to expel members when sitting in a legislative capacity. The 2009 Report also concluded that the House did have the power to suspend a member temporarily, but only within a lifetime of a Parliament. It had no power to suspend a member in such a way that a writ of summons could be withheld from a member at the beginning of a Parliament. The purpose of the clause is therefore to confer a power on the House to expel a member permanently and to impose a period of suspension which would remove entitlement to receive a writ of summons at the beginning of a Parliament.

178. *Subsections (2) and (3)* define an expulsion resolution and suspension resolution respectively. They make it clear that the resolution must contain a statement that the

resolution is passed on the basis of the conduct of the peer in question.

179. *Subsection (4)* provides that a writ of summons issued to a person subject to a suspension resolution ceases to have effect for the period of the suspension. If a new Parliament is summoned and therefore a new writ would be issued during the course of the suspension, no writ is to be issued until the period of suspension is completed.

180. *Subsection (8)* provides that an expulsion or suspension resolution can contain provisions other than those mentioned in *subsections (2) and (3)*.

Clause 29: Resignation from House of Lords

181. There is presently no mechanism by which a peer can resign from the House of Lords. The clause sets in place a mechanism for either an excepted hereditary peer or a life peer to resign from the House.

Clause 30: Disclaimer of peerage

182. *Subsection (1)* provides for a person who has resigned from the House of Lords, or who has been expelled or disqualified for membership, also to disclaim the peerage by virtue of which he or she had been a member of the House.

183. *Subsections (2) to (5)* set out the procedure which the peer must follow.

184. *Subsection (6)* provides that where an excepted hereditary peer disclaims, the peer (and his or her spouse or children) lose all rights, interest, titles, offices, privileges and precedence associated with the peerage (such as the title of Lady for the wife of a male peer or the title 'Honourable' for the children). It will also relieve the peer of all obligations and disabilities arising under it. The most significant effect of this latter provision is that the peer will cease to be disqualified by virtue of the peerage from voting at elections to the House of Commons and being, or being elected as, a member of that House.

185. *Subsection (7)* makes similar provision to subsection (6) in relation to a life peer who disclaims.

Clause 31: Supplementary provision

186. *Subsection (1)* provides that the proceedings of the House are not invalidated if a peer who is not a member has taken part in the proceedings. For example, if a peer concealed an overseas conviction that means he or she were not a member of the House, his or her participation in proceedings would not affect their validity.

187. *Subsection (2)* provides that the Bill does not apply to the Lords Spiritual. The Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester and the 21 next most senior diocesan bishops in the Church of England are *ex officio* members of the House of Lords. They are not peers. They lose their

seats as Lords Spiritual when they leave episcopal office. There are internal discipline mechanisms within the Church of England which apply in similar circumstances to the mechanisms provided for in the Bill concerning Lords Temporal. A Lord Spiritual adjudged to be unfit to hold episcopal office and deprived of that office will automatically lose his seat in the House of Lords.

SCHEDULE 3: CONDITIONS FOR REMOVAL OF MEMBERS OF THE HOUSE OF LORDS ETC

Part 1: Conditions for removal

Condition 1: serious criminal offence

188. *Paragraph 1(1)* sets out condition 1 for the purposes of *clause 27*. Condition 1 is met where a person has been convicted of a criminal offence committed after *clause 1* comes into force, has been sentenced to be imprisoned or detained for the offence for more than a year or indefinitely, and is so imprisoned or detained, or would be if the person were not unlawfully at large.

189. *Paragraph 1(2)* provides that condition 1 is met when the person is first imprisoned or detained after conviction in pursuance of the sentence or order or would have been were the person not unlawfully at large.

Paragraphs 1(3) and (4) provide that the Bill applies regardless of whether the offence or the subsequent conviction, sentence or imprisonment have occurred in the United Kingdom or elsewhere.

Condition 2: bankruptcy restrictions orders etc

190. *Paragraph 2* sets out the conditions under which a person is disqualified by reason of insolvency. These are where a person is subject to either a bankruptcy restrictions order or undertaking, in England and Wales, Scotland or Northern Ireland, or a debt relief restrictions order or undertaking in England and Wales.

Part 2: Supplementary provision for section 2(2)

Supplementary provision relating to expected hereditary peers

191. *Paragraph 3* provides that if an excepted hereditary peer is removed from the House under the terms of *clause 27* of the Bill, or resigns in accordance with *clause 29*, then

he or she ceases to be excepted from the effect of the House of Lords Act 1999. A vacancy in the number of 90 excepted peers is not created. Instead, the number is reduced by one.

Supplementary provision relating to life peers

192. *Paragraph 4(2)* provides that where a life peer resigns from the House but does not choose to disclaim his or her peerage, that person ceases to be disqualified by virtue of that peerage from voting at elections to the House of Commons or being, or being elected as, a member of that House. The barrier on peers voting, standing or sitting is a common law one and it applies to the peerage, not to membership of the House. Therefore, unless it is removed, a peer outside the House will be unable either to take part in the deliberations of the House or to take part in elections to the House of Commons. An excepted hereditary peer who ceases to be an excepted hereditary peer through resignation from the House will cease to be disqualified by virtue of that peerage from voting at elections to the House of Commons, or being, or being elected as, a member of that House under the terms of the House of Lords Act 1999.

Representation of the People Act 1985

193. *Paragraph 5* provides that where a peer who has resigned from or been permanently excluded from the House wishes to be included on the register of electors as an overseas elector, he may qualify to do so on the basis of previous registration as a local government elector. Ability to register as an overseas elector is otherwise dependent on previous inclusion on the register of parliamentary electors, to which a peer is not entitled.

194. Under *paragraph 6* anyone who has previously been excluded from the House can have a new peerage conferred on them which will entitle them to sit and vote in the House. The fact of having been removed is not itself a reason for a lifetime bar, if the Appointments Commission concludes that the person is, by reason of the passage of time or for other reasons, a fit and proper person to sit in the House. Paragraph 6(4) makes provision for a hereditary peer who inherits the office of Earl Marshal or Lord Great Chamberlain. Under the terms of the 1999 Act, these hereditary office holders are entitled to membership of the House and the provisions on hereditary by-elections do not apply to them.

Part 3: Reversal of effect of Section 27(2)

Claims for reversal

195. *Paragraph 7(1)* provides that a peer who has been disqualified from the House on the grounds of conviction for a criminal offence can seek reinstatement to the House if the conviction is overturned or quashed, or the sentence is reduced so that the condition is no longer met.

196. Under *paragraph 7(2)* a peer who has been disqualified from the House on the grounds of insolvency can seek reinstatement to the House if the bankruptcy restrictions order or undertaking or the debt relief restrictions order or undertaking is annulled.

197. *Paragraph 7(3) to (5)* provide that it is for the Lord Chancellor to determine whether a claim for reversal is justified and sets out the procedure which must be followed in making that determination.

198. *Paragraph 8* provides for the Lord Chancellor's powers under this Part to be included in paragraph 4 of Schedule 7 to the Constitutional Reform Act 2005. This means that they can be transferred to another minister only with the agreement of Parliament.

Convictions outside the United Kingdom

199. *Paragraph 9* provides that the House of Lords may resolve that an overseas conviction and sentence does not have the effect of disqualifying the peer.

PART 4: PUBLIC ORDER

Clause 32: Demonstrations etc in the vicinity of Parliament

200. *Subsection (1)* repeals sections 132 to 138 of the Serious Organised Crime and Police Act 2005 ("the 2005 Act") which regulate demonstrations and the use of loudspeakers in a designated area around Parliament. Repeal of sections 132 to 138 of the 2005 Act means that it will no longer be a requirement to give notice of demonstrations in the designated area and there will no longer be an offence for such demonstrations to be held without the authorisation of the Metropolitan Police Commissioner. There will no longer be an offence under the 2005 Act for a person to use a loudspeaker in the designated area; 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. Repeal of sections 132 to 138 of the 2005 Act also means that there will no longer be a designated area around Parliament as set out in the Serious

Organised Crime and Police Act 2005 (Designated Area) Order 2005 (S.I. 2005/1537). Additionally, repeal will restore the applicability of section 14 of the Public Order Act 1986 (imposition of conditions on public assemblies) to a public assembly in the vicinity of Parliament.

201. *Subsection (2)* gives effect to Schedule 4 which inserts new powers on maintaining access to Parliament into Part 2 of the Public Order Act 1986 and makes other consequential amendments.

SCHEDULE 4: AMENDMENT TO PART 2 OF THE PUBLIC ORDER ACT 1986 ETC

202. Schedule 4 amends Part 2 of the Public Order Act 1986 which regulates public processions and assemblies. *Paragraph 1* inserts, after section 14 of the Public Order Act 1986, a new section 14ZA which provides the police with discretionary powers to impose conditions to maintain access to and from the Palace of Westminster.

Section 14ZA: Access to and from the Palace of Westminster

203. New section 14ZA (1) applies to public processions which are wholly or partly within the area around Parliament or a public assembly which is held or intended to be held within that area.

204. *Subsection (2)* provides that the senior officer may give directions imposing conditions on those organising or taking part in a procession or assembly, if it is the officer's reasonable opinion that such conditions are necessary for ensuring that the specified requirements are met in relation to maintaining access to and from the Palace of Westminster. *Subsections (3) and (4)* provide the Secretary of State with power to make an order specifying the requirements that must be met. These might include requirements as to the number or location of entrances to the Palace of Westminster which must be kept open, and to and from which there must always be an access route for pedestrians and vehicles through the area around Parliament. *Subsection (6)* provides that such orders would be subject to the negative resolution procedure.

205. *Subsections (7) and (8)* apply to section 14ZA the same limitations on the conditions that may be imposed on a public procession and a public assembly as exist in sections 12 (1) and 14 (1) of the Public Order Act 1986. *Subsections (9) and (10)* apply elements from sections 12 and 14 of the Public Order Act to section 14ZA. These include the definition of the senior police officer, the requirement for a direction given by a chief officer to be in writing and the offences and penalties for failing to comply with a condition imposed.

Section 14ZB: The area around Parliament

206. *Paragraph 1* also inserts a new section 14ZB into the Public Order Act 1986. *Subsection (1)* of that new section provides for the area around Parliament to be specified in an order made by the Secretary of State. *Subsection (3)* states that no point in the area around Parliament may be more than 250 metres in a straight line from the point nearest to it in Parliament Square. *Subsection (4)* provides that the order made by statutory instrument will be subject to the negative resolution procedure.

Section 14ZC: Special provision if a House meeting outside Palace of Westminster

207. New section 14ZC mirrors the powers in new sections 14ZA and 14ZB in the event that either or both Houses of Parliament (including committees) are sitting or conducting meetings outside the Palace of Westminster which may happen should, for example, the Palace of Westminster undergo large-scale refurbishment.

208. *Subsection (1)* provides that the Secretary of State can, by order, specify a building situated outside the Palace of Westminster and specify an area, which can be no further than 250 metres from the specified building.

209. *Subsection (3)* makes it clear that the special provisions in new section 14ZC apply to public processions or public assemblies held wholly or partly within the specified area. *Subsection (4)* provides that a senior officer may give directions imposing on persons organising or taking part in a procession or assembly any conditions which in the officer's reasonable opinion are necessary to ensure that specified requirements are met. *Subsection (5)* provides that the Secretary of State may, by order, specify the requirements that must be met in order to maintain access to and from the specified building in relation to a week during which the building is used or planned to be used by a House of Parliament. *Subsection (7)* provides that the requirements may include requirements as to the number or location of entrances to the specified building which must be kept open and to and from which there must be access routes for pedestrians and vehicles through the specified area. *Subsection (9)* provides that an order made by statutory instrument will be subject to the negative resolution procedure. *Subsection (10)* applies subsections (7) to (11) of new section 14ZA to new section 14ZC. This applies the various aspects of the Public Order Act regime to this new provision.

210. *Paragraph 2* of Schedule 4 is a consequential amendment which removes the reference to section 137(1) of the Serious Organised Crime and Police Act 2005 (loudspeakers in designated area) from paragraph 1(1) of Schedule 2 to the Noise and Statutory Nuisance Act 1993. *Paragraph 3* is a consequential amendment which removes the entries in the Table in section 175(3) of the Serious Organised Crime and Police Act 2005 relating to the penalties in section 136 of that Act. Section 175 contains transitional modifications to penalties for certain offences committed

in England and Wales. *Paragraph 4* makes a consequential amendment by omitting paragraph 64 of Schedule 6 to the Serious Crime Act 2007, which deals with penalties for inchoate offences committed in relation to offences under section 136 of the Serious Organised Crime and Police Act 2005. *Paragraph 5* sets out a transitional provision which makes it clear that the new sections will apply to any public assemblies or processions which started or were being planned before the new sections 14ZA to 14ZC came into force.

PART 5: HUMAN RIGHTS ACTIONS AGAINST DEVOLVED ADMINISTRATIONS

Clause 33: Time limit for human rights actions against Northern Ireland Ministers etc

211. *Subsection (1)* inserts new sections 71(2D), (2E) and (2F) into the Northern Ireland Act 1998.

212. New section 71(2D)(a) and (b) set out a one year time limit for claims involving Convention rights against Northern Ireland Ministers and Departments. This time limit may be extended to such longer time as a court or tribunal considers necessary to achieve fairness, taking into account all the circumstances of the case. These provisions are subject to any other rule which imposes a stricter time limit in the proceedings in question. This is equivalent to section 7(5) of the Human Rights Act 1998.

213. New section 71(2E)(a) and (b) mean that the one year time limit does not apply to claims that secondary legislation made, approved or confirmed by the Northern Ireland Ministers is incompatible with Convention rights, and nor does it apply to proceedings brought by the Law Officers listed in section 71(2). This preserves the power of those officers to challenge the actions of the Northern Ireland Ministers or Departments if they believe they have acted incompatibly with the Convention rights.

214. New section 71(2F) applies the definition of "rule" as set out in the Human Rights Act 1998 where "rules" are able to establish time limits for bringing claims.

215. *Subsection (2)* applies the time limit as set out in new section 71(2D) to (2F) to all proceedings brought by claimants after this clause comes into force, whenever the act complained of took place.

Clause 34: Time limit for human rights actions against Welsh Ministers etc

216. *Subsection (1)* inserts new sections 81(3A), (3B) and (3C) into the Government of Wales Act 2006.

217. New section 81(3A)(a) and (b) set out a one year time limit for claims involving

Convention rights against the Welsh Ministers. This time limit may be extended to such longer time as a court or tribunal considers necessary to achieve fairness, taking into account all the circumstances of the case. These provisions are subject to any other rule which imposes a stricter time limit in the proceedings in question. This is equivalent to section 7(5) of the Human Rights Act 1998. The time limit will also apply to any claims that maybe be brought under the Government of Wales Act 1998, despite its repeal (subsection (4)).

218. New section 81(3B)(a) and (b) mean that the one year time limit does not apply to claims that secondary legislation made, approved or confirmed by the Welsh Ministers is incompatible with Convention rights, and nor does it apply to proceedings brought by the Law Officers listed in section 81(3). This preserves the power of those officers to challenge the actions of the Welsh Ministers if they believe they have acted incompatibly with the Convention rights.

219. New section 81(3C) applies the definition of "rule" as set out in the Human Rights Act 1998 where "rules" are able to impose shorter time limits for bringing claims.

220. *Subsection (3)* amends section 81(5) of the Government of Wales Act 2006 to ensure that the reference to the Welsh Ministers in new section 81(3B) includes the First Minister for Wales and Counsel General to the Welsh Assembly Government.

221. *Subsection (5)* applies the time limit as set out in new section 81(3A) to (3C) (above) to all proceedings brought by claimants after this clause comes into force, whenever the act complained of took place.

PART 6: COURTS AND TRIBUNALS

Clause 35: Judicial appointments etc

222. *Clause 35* gives effect to Schedule 5.

Clause 36: Salary protection for members of tribunals

223. *Clause 36* provides that the salaries of certain tribunal office holders once determined may not be reduced. The purpose is to provide similar protection for these office holders as is already available to office holders in the courts.

224. The protection applies to those with salaries determined under the following provisions:

- Section 5(1)(a) to (c) of the Employment Tribunals Act 1996 (Presidents and Chairmen of Employment Tribunals);

- Paragraph 10(a) of Schedule 4 to the Nationality, Immigration and Asylum Act 2002 (Immigration Judges);
- The specified provisions in Schedules 1, 2, 3 and 4 to the Tribunals, Courts and Enforcement Act 2007 (Senior President of Tribunals; those serving on the First-Tier Tribunal and Upper Tribunal; and Chamber Presidents, Deputy Chamber Presidents and acting Chamber Presidents).

SCHEDULE 5: JUDICIAL APPOINTMENTS ETC

The Courts Act 1971 (c.23)– Section 21(5).

225. This corrects a typographical error in section 21(5) of the Courts Act 1971, which deals with the extension of the term of appointment of recorders. Section 21(5) refers to subsection (4) whereas it should refer to subsection (4A).

Paragraphs 2, 3, 4 and 9: Amendments to Part 3 of the Constitutional Reform Act 2005 – Sections 26, 29, 60 and Schedule 8

226. These provisions remove the Prime Minister from the appointment process of the President, Deputy President and judges of the Supreme Court. *Paragraph 2* amends section 26 of the Constitutional Reform Act 2005 with the effect that, when presented with a candidate chosen by a Selection Commission, recommendations for appointment will now be made by the Lord Chancellor instead of the Prime Minister. Instead of notifying a selection to the Prime Minister, the Lord Chancellor is to make a recommendation for appointment.

227. *Paragraphs 3, 4 and 9* make various consequential amendments to sections 29 and 60(5) of, and paragraphs 10, 13(2) and 14(2) of Schedule 8 to, the Constitutional Reform Act 2005.

Paragraphs 5 and 6: Amendments to Chapter 2 of Part 4 of the Constitutional Reform Act 2005 – Sections 96 and 97

228. Sections 96 and 97 of the Constitutional Reform Act 2005 provide for medical assessments of those who have been selected for appointments, to be conducted by the Judicial Appointments Commission. These amendments transfer the responsibility for medical assessments to the Lord Chancellor.

229. *Paragraph 5* of the Schedule makes amendments to the provisions in section 96 of the Constitutional Reform Act 2005 relating to medical assessments. *Sub-paragraph (3)* adds new subsections (2A) and (2B) to section 96 to enable the Lord Chancellor to request a person who has been selected for appointment by the Judicial Appointments

Commission ("the candidate") to provide information about his or her physical or mental condition. The Lord Chancellor may specify a period in which the information has to be supplied.

230. *Sub-paragraph (4)* amends section 96(3). The amendment made to section 96(3) provides that the Lord Chancellor may also request a candidate to undergo a medical assessment and for a report of that assessment to be made available to the Lord Chancellor.

231. These provisions replace the existing section 96(3) under which the Lord Chancellor may direct the Judicial Appointments Commission to make arrangements for any assessment of the health of those who have been selected for appointment.

232. *Sub-paragraph (5)* modifies section 96(4) and *Sub-paragraph (6)* inserts new subsections (4A) and (4B). These provide that the Lord Chancellor may after consultation with the Lord Chief Justice notify the Judicial Appointments Commission that he is not proceeding with an appointment if the circumstances specified in the new subsection (4A) apply. These circumstances are if the candidate does not comply with a request to provide information under the new subsection (2B) or to undergo a medical assessment under subsection (3)(a); or if the Lord Chancellor is not satisfied on the basis of a medical report under subsection (3)(b) that it would be appropriate to proceed with the appointment. Selections can also be disregarded where the candidate does not accept an appointment when it is offered or is not available within a reasonable time to take up a post.

233. *Sub-paragraph (7)* amends section 96(5) to make it clear that if a candidate is rejected then any other selection for the same appointment or recommendation is to be disregarded; and the candidate must not be selected again pursuant to that request for the same appointment or recommendation.

Paragraph 8: Amendment to Part 7 of the Constitutional Reform Act 2005 – Section 139

234. *Paragraph 8* amends section 139(4) to make explicit that information obtained during the appointments or disciplinary process of certain judicial office holders can be disclosed to the police for the purposes of a criminal investigation or criminal proceedings, or for the purpose of preventing crime without the necessity for a court order.

Paragraphs 7 and 10: Amendment to Chapter 3 of Part 4 of, and Part 2 of Schedule 14 to, the Constitutional Reform Act 2005

235. Magistrates were included in Schedule 14 (under the title of Justices of the Peace) as it was originally intended that recruiting and selecting for the role should be a part of the Judicial Appointments Commission's remit. By removing Magistrates from Schedule 14, *Paragraph 10* removes them from the list of offices that comprise the statutory recruitment and selection remit of the Judicial Appointments Commission. This follows an agreement between the Lord Chancellor, the Judicial

Appointments Commission, the Lord Chief Justice and the Magistrates' Association that the Judicial Appointments Commission will not in future take responsibility for the recruitment and selection of magistrates. This function will remain for the foreseeable future with the Lord Chancellor's Advisory Committees on Justices of the Peace.

236. *Paragraph 7* amends section 118 to ensure that even though Magistrates have been removed from Schedule 14 they will remain within the scope of the disciplinary powers exercised by the Lord Chief Justice and the Lord Chancellor.

PART 7: NATIONAL AUDIT

Clause 37: The office of the Comptroller and Auditor General

237. This clause provides for the office of Comptroller and Auditor General ("C&AG") to continue. It carries forward the appointment process of section 1 of the National Audit Act 1983 ("the 1983 Act") under which the C&AG is appointed by Her Majesty by Letters Patent following an Address of the House of Commons. The Prime Minister moves the motion for that address with the agreement of the Chairman of the Committee of Public Accounts. Because by convention the Chairman of the Public Accounts Committee is from an opposition party, this requirement means that the choice of C&AG requires cross-party agreement. *Subsections (7) and (8)* limit the term of office to a single ten-year appointment instead of an unlimited term, as now.

Clause 38: Status of the Comptroller and Auditor General etc

238. This clause sets out the status of the C&AG as a corporation sole and officer of the House of Commons. The C&AG may not be a member of the House of Lords; is not to be regarded as a servant or agent of the Crown, and may not hold any other position which is appointed by or on the recommendation of the Crown. Subject to other statutory provisions, the C&AG is to have complete discretion in the carrying out of the office's functions.

239. *Subsection (8)* sets out some specific limitations to the C&AG's powers and in particular signposts the provisions in the Bill that affect how the C&AG carries out the functions of the office.

Clause 39: Provision of services

240. This clause sets out the broad framework within which the functions of the C&AG are to be carried out. It gives the C&AG a general power to enter into agreements and arrangements to provide services in the United Kingdom and elsewhere. This

power is additional to specific powers which the C&AG has under other legislation.

Clause 40: Remuneration package of the Comptroller and Auditor General

241. This clause provides for the determination of the C&AG's remuneration package.

242. Subsections (1) to (2) provide that the C&AG will have a remuneration package that may include an annual salary, allowances, provision for a pension and other benefits. To preserve the independence of the C&AG, the remuneration package has to be agreed by the Prime Minister and the Chairman of the Committee of Public Accounts ("PAC") before the C&AG is appointed.

243. By *subsection (3)*, the C&AG will continue to be eligible for a pension under the Principal Civil Service Pension Scheme. Alternative pension agreements may also be agreed as part of the remuneration package. These provisions are simplified from the current arrangements under section 13 of the Superannuation Act 1972.

244. Together the powers in this clause allow some flexibility over the terms and conditions which may be offered to the C&AG, to suit the requirements of different possible appointees. As happens for the Directors of Public Prosecutions and of the Serious Fraud Office, the Bill does not specify the level of remuneration itself. The remuneration package may include arrangements for automatic uprating during the term of the C&AG's appointment, for example through a formula or a link to an established uprating mechanism. However, by *subsection (4)*, performance-based incentives are not permitted since they could constrain the operational independence of the C&AG.

245. *Subsection (6)* provides that the remuneration package will be charged on and paid out of the Consolidated Fund, as now, with no need for the resources to be voted annually by Parliament.

246. *Subsection (7)* allows the Treasury to make regulations to give supplementary effect to any agreed pension arrangements under this clause by disapplying or modifying other statutory provisions. Such regulations are subject to annulment by the House of Commons, by *subsection (9)*. A similar power currently exists under section 13(10) of the Superannuation Act 1972.

Clause 41: Resignation or removal of the Comptroller and Auditor General

247. This clause sets out the procedure for the resignation or removal of a C&AG from the office. *Subsection (1)* provides that a C&AG may resign from the office by giving written notice to the Prime Minister. *Subsection (2)* carries forward the procedure from section 3 of the Exchequer and Audit Departments Act 1866 by which the C&AG can be removed from office following Addresses to The Queen of each House of Parliament.

Clause 42: Employment etc of a former Comptroller and Auditor General

248. This clause creates restrictions on the public sector employment of former C&AGs. These restrictions apply to former C&AG's who have been appointed under the provisions of this Bill.

249. Under *subsections (2) to (3)*, a former C&AG will have to consult a person specified for that purpose by the Public Accounts Commission before taking up any other office or position, or entering into an agreement or other arrangement of a type specified by the Commission. This arrangement would allow the Commission an opportunity to make its views clear in public if a former C&AG should ever contemplate employment it considers inappropriate after leaving office.

250. *Subsections (4) to (6)* provide a stricter regime to prevent conflicts of interest during the two years immediately after a C&AG's term of office ends. A former C&AG must not within two years of leaving office hold any Crown office or position, or provide services to persons acting on behalf of the Crown or a body whose accounts are required to be audited by, or are open to examination and inspection by, the C&AG.

251. There is an exception in *subsection (7)* which allows former C&AGs to hold office as Auditor General in Wales or Scotland, or as Comptroller and Auditor General in Northern Ireland during the two years after they leave office.

Clause 43: Incorporation of the National Audit Office

252. This clause establishes a new corporate body, the National Audit Office ("NAO"). Further detail of the new NAO's constitution and functions, including rules on membership and status and the appointment of members and staff are set out in Schedule 6.

253. The existing NAO is not a corporate body. Instead it is composed of the C&AG (who is a corporation sole) and the staff appointed by the C&AG. The new corporate NAO will be a separate legal entity with a newly-established governance structure and constitution, and functions which include providing resources for the C&AG. These structures are based on established good practice, adapted for the unique role of the C&AG.

Clause 44: Interaction between NAO and the Comptroller and Auditor General

254. This clause introduces Schedule 7, which provides more detail on the relationship between the NAO and the C&AG.

Clause 45: NAO's expenditure

255. This clause sets out the arrangements for the NAO's expenditure and approval of its estimates.

256. The new NAO will be funded from money voted annually by Parliament for that purpose. There are three exceptions to that. The remuneration packages of the C&AG and the chair of the NAO will both be paid directly from the Consolidated Fund (under *clause 40(6*) and *paragraph 6(2)* of Schedule 6 respectively, as will any sums necessary to pay for the indemnities given under *clause 47(1)* in respect of liabilities for audits, examinations and inspections carried out as part of the C&AG's functions.

257. *Subsections (2) and (3)* provide that the NAO must prepare an estimate of the resources it requires for each financial year. That estimate must in particular cover the resources that are required for C&AG functions, as set out in *paragraph 2(1)* of Schedule 7.

258. *Subsections (4) to (6)* provide that the chair of the NAO and the C&AG must jointly submit the estimate to the Commission. The Commission must review the estimate and lay it before the House of Commons with any modifications that it thinks appropriate. In doing this, the Commission must have regard to any advice given by the Public Accounts Committee or the Treasury.

Clause 46: Efficiency etc

259. *Subsection (1)* requires both the C&AG and the NAO to aim to carry out their respective functions in an efficient and cost-effective manner.

260. *Subsection (2)* requires the C&AG to have regard to the standards and principles that an expert professional provider of accounting and auditing services would be expected to apply insofar as the C&AG thinks it appropriate to do so.

Clause 47: Indemnification

261. This clause provides for the liabilities of certain persons to be indemnified by the Consolidated Fund. Those persons are the C&AG; the NAO; past and present members of the NAO; and past and present employees of the NAO. The indemnity covers liabilities which are incurred by those persons for a breach of duty which arises from an audit, examination or inspection which is carried out as part of the C&AG's functions. This indemnity is based on one currently set out in section 4(6) of the National Audit Act 1983.

Clause 48: Definitions

262. This clause defines certain terms used in this Part of the Act.

Clause 49: Transitional provision and consequential amendments

263. This clause introduces Schedules 8 and 9, which respectively contain transitional provisions and consequential amendments.

Clause 50: Power to make Companies Act companies subject to audit of Comptroller and Auditor General

264. This clause amends section 25 of the Government Resources and Accounts Act 2000 ("GRAA 2000"). The Treasury can, by an order under subsection (6) of that section, provide for bodies that exercise functions of a public nature or which are wholly or substantially funded from public money to be audited by the C&AG. New provisions in section 482 of the Companies Act 2006 allow companies that have been made subject to public audit under section 25 to be exempt from the statutory audit requirements that otherwise apply to companies.

265. These amendments provide for orders under section 25 of the GRAA 2000 to be subject to annulment by a resolution of either House of Parliament provided such an order only covers non-profit-making companies. This would provide a simpler procedure for enabling the C&AG to audit those non-profit-making companies which exercise functions of a public nature or receive substantial public funding.

SCHEDULE 6: THE NATIONAL AUDIT OFFICE

266. This schedule is in seven parts: Part 1 sets out the membership and status of the NAO; Part 2 provides for the appointment of non-executive members; Part 3 provides for a Chief Executive; Part 4 makes provision for the appointment and termination of NAO employee members; Part 5 deals with NAO employees; Part 6 deals with the regulation of NAO procedure; and Part 7 deals with some miscellaneous matters.

Part 1: Membership and status

267. *Paragraph 1* provides for the NAO to have nine members consisting of five non-executives, the C&AG and three employee members.

268. *Paragraph 2* states that NAO, its members and its employees are not to be servants or agents of the Crown, nor to enjoy any status, immunity or privilege of the Crown. NAO property is not to be regarded as Crown property.

Part 2: Non-executive members

269. *Paragraph 3* provides for the NAO to have a non-executive chair. The appointment process follows that for the C&AG in *clause 37*. The chair is appointed by Her Majesty by Letters Patent following an Address of the House of Commons. The motion for the Address has to be moved by the Prime Minister with the agreement of the Chairman of the PAC. The Queen may extend the appointment on the recommendation of the Prime Minister with the agreement of the Chairman of the PAC. In the case of an extension, there is no requirement for a motion in the Commons or an address to the Queen but an extension counts towards the two term limit (see *paragraph 5*) so the chair can serve a maximum of six years in total.

270. *Paragraph 4* provides that the other non-executive members of the NAO are to be appointed by the Commission, following a recommendation by the NAO chair. In the event that the Commission chooses not to appoint a recommended individual, the Commission may require the chair to recommend another person until an appointment is made.

271. *Paragraph 5* provides that NAO non-executive members are appointed for a period of up to three years. They may be appointed for a second term of up to three years.

272. *Paragraph 6* deals with the remuneration of non-executive members.

273. Under *sub-paragraph (1)* the chair's remuneration package is to be jointly determined by the Prime Minister and the chair of the PAC. *Sub-paragraph (2)* provides for the NAO chair's remuneration package to be paid from the Consolidated Fund rather than annually voted resources. *Sub-paragraph (3)* provides for the Commission to determine the remuneration packages of the other non-executives. Under *sub-paragraph (4)*, those packages are to be paid for by the NAO from voted resources. By *sub-paragraph (5,)* the remuneration package of the non-executive members package may include an annual salary, allowances and other benefits, but not a pension.

274. *Paragraph 7* states that the Commission may determine terms of appointment for non-executive members that are not specifically provided for in the Bill. Those terms may include restrictions on the offices and other positions that non-executive members can hold during and after their terms of appointment. Restrictions can also be imposed on other agreements and arrangements which non-executives can be party to during and after their appointment. Those agreements might include, for example, arrangements which fall short of holding office or employment but which share similar characteristics, such as consultancy agreements.

275. *Paragraph 8* requires the Commission to consult an appropriate person who has oversight of public appointments before setting remuneration or other terms under *paragraphs 6 and 7*.

276. *Paragraph 9* deals with the resignation of non-executive members. Under *sub-paragraph (1)*, the chair may resign by giving written notice to the Prime

Minister. The other non-executive members may resign by giving written notice to the Commission.

277. *Paragraph 10* provides for the termination of the appointments of non-executive members of the NAO. *Sub-paragraph (1)* provides that the NAO chair's appointment may be terminated following an Address of each House of Parliament. This is the same process that applies to the C&AG.

278. *Sub-paragraph (2)* sets out the bases on which the Commission may terminate the appointment of the other non-executive members of the NAO. In all cases, the Commission must give the member written notice.

Part 3: Chief Executive

279. *Paragraph 11* provides for the C&AG to be the chief executive of the NAO. The C&AG is not, however, to be an NAO employee.

Part 4: Employee members

280. This part of the Schedule provides for the appointment, terms and termination of the three employee members of the NAO.

281. *Paragraph 12* provides that NAO employee members are to be appointed by NAO non-executive members, on a recommendation by the C&AG. When there is a vacancy for an employee member, the C&AG is to recommend a person for appointment to the non-executive members. The non-executive members may appoint that person or require the C&AG to recommend someone else. That process can be repeated until an appointment is made.

282. By *paragraph 13*, the terms of appointment for the employee members are set by the non-executive members. The terms may provide for an annual salary, allowances and other benefits, but not a new pension. Employee members will have the same pension entitlements as they had as NAO employees, including a pension under the Principal Civil Service Pension Scheme.

283. *Paragraph 14* provides that an employee member's appointment shall terminate either at the end of any period set for the appointment, or in any case when the employee member ceases to be employed by the NAO.

284. *Paragraph 15* provides that an employee member may resign by giving written notice to the non-executive members.

285. *Paragraph 16* sets out the bases on which the non-executive members may terminate the appointment of employee members of the NAO. They are the same as those on which the Commission can terminate the appointments of non-executive members under *paragraph 10(2)*.

Part 5: Employees

286. *Paragraph 17* gives the NAO a power to employ staff. The terms of employment for NAO staff are to be kept broadly in line with those of civil servants. NAO employees are barred from holding any office or position that is made or recommended by the Crown.

Part 6: Procedural rules

287. *Paragraph 18* requires the NAO to make internal procedural rules.

288. *Paragraph 19* provides that if the procedural rules set a quorum for any NAO meetings, a majority of those present must be non-executive members to constitute a quorum.

289. *Paragraph 20* allows the NAO to establish committees and sub-committees and to make rules for regulating those committees. NAO employees may serve as committee and sub-committee members. Provided no functions of the NAO are delegated to a committee or sub-committee, those committees may also include persons who are neither NAO employees nor members of the NAO.

Part 7: Other matters

290. This part deals with a number of miscellaneous provisions for the carrying out of NAO functions.

291. *Paragraph 21* is an incidental power which permits the NAO to do anything which is calculated to facilitate, or which is incidental or conducive to the carrying out of its functions.

292. By *paragraph 22,* a vacancy or a defective appointment does not affect the validity of the proceedings of the NAO, its non-executive members, its committees or its sub-committees.

293. *Paragraph 23* deals with the powers of the NAO to delegate its functions. The NAO is permitted to delegate functions to members, employees or committees. Its committees may delegate functions to sub-committees. In either case, a delegation does not prevent the NAO or one of its committees from carrying out a delegated function itself.

294. Under *sub-paragraph (4)* the following exceptions to the general power of delegation apply:

- the preparation of resource estimates under *clause 45(2)*;

- making rules for regulating NAO procedure under *paragraph 18* of Schedule 6;
- the appointment of the NAO's auditor under *paragraph 25(1)* of Schedule 6;
- the preparation and review of NAO strategy under *paragraph 1(1)* of Schedule 7;
- approval of, and the resources to be given to the C&AG to carry out services under *paragraph 3(1) or (3)* of Schedule 7;
- authorising (with the Commission's agreement) an employee to carry out C&AG functions in the event of a vacancy or ill health under *paragraph 7(3)* of Schedule 7;
- the preparation of an annual report under *paragraph 9(1)* of Schedule 7; and
- with the C&AG, the responsibility under *paragraph 10(1) to (5)* of Schedule 7 to prepare, review and revise the code of practice.

295. The NAO is required by *paragraph 24* to prepare resource accounts for each financial year. Those accounts must be of the type described in section 5 of the Government Resources and Accounts Act 2000. That is, they must be resource accounts which detail the resources acquired, held or disposed during that year by the NAO and the use by the NAO of those resources. By *sub-paragraph (2),* the Commission must appoint the C&AG or another appropriate person to be the Accounting Officer who is to be responsible for preparing the NAO's resource accounts. By *sub-paragraph (3),* the Accounting Officer must also carry out any other functions determined by the Commission.

296. *Paragraph 25* sets out the arrangements for the audit of NAO's resource accounts. *Sub-paragraph (1)* requires the NAO to appoint an auditor for each financial year. *Sub-paragraph (2)* makes the appointment of the auditor and the terms of the auditor's appointment subject to the approval of the Commission. Under *sub-paragraph (3)*, the auditor must be eligible to audit companies under chapter 2 of Part 42 of the Companies Act 2006. *Sub-paragraph (5)* requires the auditor to examine the NAO's resource accounts for each financial year.

297. *Sub-paragraph (6)* provides that the provisions of sections 6(1) and 25(2) of the Government Resources and Accounts Act 2000 apply to the NAO's auditors in their examination of the NAO accounts as if it was the C&AG carrying out the examination. This means that the auditor must operate to professional standards and that it must examine the accounts with a view to being satisfied that:

- the accounts present a true and fair view;
- money provided by Parliament has been expended for the purposes approved by Parliament;
- resources authorised by Parliament to be used have been used for the purposes for which the resources were authorised; and

- the NAO's financial transactions are in accordance with any relevant authority.

298. *Sub-paragraphs (7) and (8)* require that, once the accounts have been examined, the auditor must certify them and send them, together with the auditor's report on the accounts, to the Commission. The Commission must then lay the accounts and the report before the House of Commons.

299. *Paragraph 26* provides that the NAO's auditor may be required to carry out value for money examinations on the use of NAO resources and send its report to the Commission. This power is a parallel one to the C&AG's own power to carry out value for money examinations on other bodies under Part 2 of the National Audit Act 1983. The Commission must lay any value for money reports prepared by the NAO's auditor before Parliament. This allows the Commission to satisfy itself that the NAO is operating professionally and acceptably.

300. *Paragraph 27* gives the auditor information and access powers to carry out its functions of audit under *paragraph 25* and value for money examinations under *paragraph 26*. The auditor may require access to any document which the auditor considers is necessary to carry out its functions. Any person holding or who is accountable for any document may be required to provide any information or explanation that the auditor thinks necessary.

301. *Paragraph 28* provides that the NAO seal may be authenticated by a member of the NAO or any person authorised for that purpose by a member of the NAO. *Sub-paragraph (2)* provides that a document executed under NAO seal or signed on its behalf is to be received in evidence and is taken to be executed or signed in that way, unless the contrary is proven.

SCHEDULE 7: INTERACTION BETWEEN NAO AND THE COMPTROLLER & AUDITOR GENERAL

302. Schedule 7 contains provisions that govern the relationship between the NAO and the C&AG. These include:

- the preparation by the NAO and the C&AG of a national audit strategy;
- the obligation of the NAO to provide resources for the carrying out of the C&AG's functions;
- the need for the C&AG to obtain the approval of the NAO to perform certain services;
- the NAO's duty to monitor and provide advice to the C&AG;
- the ability of the C&AG to delegate functions;
- the arrangements for dealing with vacancy in office or the incapacity of the C&AG;

- powers to charge fees;
- the obligation to prepare an annual report; and
- the preparation and contents of a code of practice to deal with the relationship between the CA&G and the NAO.

Strategy

303. *Paragraph 1* provides for the preparation and approval of a strategy for the exercise of the national audit functions. The strategy will serve as the business plan for the NAO and the C&AG. By *sub-paragraph (1),* the NAO and C&AG must jointly prepare a strategy for the national audit functions. Those functions consist of the NAO's functions and those of the C&AG. The strategy must be reviewed and revised at least once every 12 months.

304. *Sub-paragraph (2)* provides that the strategy is to include a plan for the use of resources. In addition it must specify the amount of resources which the NAO will provide for the C&AG functions for the purposes of *paragraph 2(1)* of Schedule 7. In particular, for each financial year covered by the strategy, it must specify a maximum amount of resources which the NAO is to provide to the C&AG.

305. *Sub-paragraphs (3) to (6)* require the strategy to be approved by the Commission. The process for achieving that is for the NAO chair and the C&AG jointly to submit the strategy to the Commission. Before approving the strategy, the Commission must review and may modify it. In doing so, the Commission must have regard to any advice given by the Treasury.

306. *Sub-paragraph (8)* requires the NAO and the C&AG each to carry out the strategy.

NAO to provide resources for the Comptroller and Auditor General's functions

307. *Paragraph 2* gives the NAO a duty to provide the resources to the C&AG that that C&AG requires to carry out the functions of the office. A maximum level of resource will be agreed by the NAO and the C&AG, and approved by the Commission, under *paragraph 1(2)* of Schedule 7. The resources that are thus available for the C&AG's functions fall into two categories:

- those whose allocation is at the discretion of the C&AG; and
- those for services which require NAO-approval.

308. For the activities that are set out in *paragraph 3(2)* of Schedule 7, the C&AG will determine the level of resources that are required without needing approval from NAO. In such cases, the NAO must provide the resources that the C&AG asks for. These functions are mainly those which the C&AG is given by statute, including services as Comptroller of the issue of public funds, as auditor of government

departments and many other public bodies, and in the exercise of powers under Part 2 of the National Audit Act 1983 to carry out value for money examinations. The C&AG will be bound by the maximum resource provision set out in the strategy (under *paragraph 1(2)* of Schedule 7) and by the resources voted by Parliament to NAO for the year under *clause 43*. Subject to that, the C&AG's independence will be guaranteed by giving the C&AG the final say in setting the resources required for these functions.

309. For other activities, including audit and consultancy services provided by agreement, for example to international bodies and other countries, the C&AG will require the NAO's approval before providing such services. For these "NAO-approved" services, the NAO (not the C&AG) will be responsible for setting the maximum resource provision, under *paragraph 3(3)* of Schedule 7. The NAO must work within the maximum headroom set by the strategy and the annual provision voted by Parliament. In addition, those resources whose allocation is at the discretion of the C&AG have a prior claim.

310. *Sub-paragraph (2*) gives the NAO responsibility in particular for:

- employing staff to assist in carrying out the C&AG's functions;
- buying in services to support the functions;
- holding information; and
- keeping records.

311. *Sub-paragraph (3)* limits the maximum amount of resources that the C&AG may require under *sub-paragraph 1* in any financial year to the maximum amount set out in the strategy for that year.

Provision of certain services by the Comptroller and Auditor General to require NAO's approval

312. *Paragraph 3* provides for the C&AG to seek the approval of the NAO before providing certain services. These "NAO-approved services" are services other than those set out in *sub-paragraph (2)*.

313. *Sub-paragraph (3)* explains that the NAO is to set a maximum amount of resources for the "NAO approved services". In respect of NAO-approved services, then, the C&AG's ability to provide and resource these services is subject to the need for prior approval by the NAO board, and to the level of resource agreed by NAO.

NAO to monitor and provide advice

314. *Paragraph 4* gives the NAO a duty to monitor the carrying out of the C&AG's functions. The NAO's monitoring function can be expected to provide it

with the information it needs as a precursor to discharging its duty under *paragraph 5* to provide advice to the C&AG.

315. Under *paragraph 5* the NAO must provide such advice as it considers appropriate to the C&AG on the exercise of the C&AG's functions. The C&AG must have regard to any advice given by the NAO.

Delegation of the Comptroller and Auditor General's functions

316. *Paragraph 6* provides that the C&AG may prepare a scheme for the delegation of the functions of that office to NAO employees. The scheme and any revisions of it must be approved by the Commission. If the Commission approves the scheme, the C&AG may delegate functions in accordance with it. A delegation does not prevent the C&AG from doing anything personally.

Vacancy in office of the Comptroller and Auditor General or incapacity of Comptroller and Auditor General

317. *Paragraph 7* makes provision for the C&AG's functions to be carried out by a duly authorised employee of NAO on a temporary basis if the office is vacant or the C&AG is incapable.

318. In the case of incapacity, before NAO can authorise an employee to carry out the C&AG's functions, a certificate from the Speaker of the House of Commons is required. Under *sub-paragraph (2)(b)*, the Speaker would certify that in the Speaker's view the current C&AG's ability to carry out that office's functions was seriously impaired because of ill health. The period of ill health starts when the Speaker certifies to the House that the C&AG is impaired and ends when the Speaker certifies to the House that the C&AG is able to carry out the office's functions.

319. NAO must obtain the Commission's agreement before authorising an employee to carry out the C&AG's functions. The temporary arrangement may last no more than six months (by *sub-paragraph (6)*) and is available only once during a C&AG's term of appointment. For longer vacancies and periods of incapacities, or for repeated incapacity, therefore, the expectation is that the gap would be filled by a new appointment.

Audit fees etc

320. *Paragraphs 8(1) to (4)* authorise the NAO to charge fees for audits carried out by the C&AG in accordance with a scheme prepared by the NAO and approved by the Commission. The agreement of a minister of the Crown is required if the accounts to be audited are those of a body or other person who acts on behalf of the Crown.

Sub-paragraph (5) provides that those arrangements do not apply to audits that are carried out as part of NAO approved services. In such cases, the C&AG may charge fees and other amounts but only in accordance with the relevant agreement or arrangement. The fee powers in this paragraph may be used to recover the costs of providing the services in question but not to cross-subsidise other costs of the NAO or the C&AG.

321. *Sub-paragraphs (6) and (7)* require that fees and other amounts received by the C&AG must be paid to the NAO and that the NAO must pay them into the Consolidated Fund.

Reports

322. *Paragraph 9* provides that NAO and the C&AG must, as soon as practicable after the end of each financial year, jointly prepare a report on the carrying out of the NAO and C&AG functions. This annual report must be submitted to the Commission jointly by the chair of the NAO and the C&AG. The Commission must lay the report before Parliament.

Code of practice

323. *Paragraphs 10 to 12* provide for the preparation, approval and content of a code of practice which is to set out the relationship between the NAO and the C&AG. The code will allow detailed arrangements for the operation of the new NAO and its relationship with the C&AG to be set in a flexible and transparent manner. The code will not be a source of further powers for either. Rather it will seek to give practical effect to the provisions of Part 7 of the Bill. It is intended to be a practical way of setting out how the powers are to be used in practice, and may be adjusted from time to time to reflect the evolving requirements of NAO's business and the C&AG's priorities.

324. *Paragraph 10* provides that the NAO and C&AG must jointly prepare a code of practice dealing with the relationship between the NAO and the C&AG. The code is required to reflect the principle enunciated in *clause 38(6) and (7)* of this Bill that, subject to any other statutory provision, the C&AG has complete discretion in carrying out the C&AG's functions.

325. Once it has been prepared, the code must be reviewed regularly by the NAO and C&AG and revised as appropriate. In preparing and revising the code, they must consult the Treasury. They must also consider any proposals for revision made by the Commission.

326. The code requires the approval of the Commission. The chair of the NAO and C&AG are jointly to submit the code or any revision to the Commission. If the Commission approves the code, it must lay it before Parliament.

327. *Sub-paragraph (9)* requires the NAO and the C&AG to comply with the code.

328. *Paragraph 11* provides that the code must be approved by the NAO at a meeting of NAO. Approval can only be given if at least one-half of the non-executive members present and voting vote in favour.

329. *Paragraph 12* sets out a non-exhaustive list of what is to be covered by the code.

330. By *sub-paragraph (1)*, the code must deal with:

- the way in which the strategy is to be prepared, reviewed and revised, and the matters and the periods it should cover;
- the way in which resources are to be provided for the C&AG functions under *paragraph 2(1)* of Schedule 7;
- the way in which estimates for NAO resources under *clause 45* are to be prepared;
- the way in which the NAO makes decisions on approving and setting resources for NAO approved services under *paragraph 3* of Schedule 7;
- the way in which the NAO monitors the C&AG functions under *paragraph 4* of Schedule 7;
- the way in which advice is to be given by the NAO for the purposes of *paragraph 5* of Schedule 7;
- the way in which the C&AG charges fees under *paragraph 8* of Schedule 7; and
- the extent of the delegation of NAO's functions to the C&AG under *paragraph 23* of Schedule 6.

331. The code must also place restrictions on the public comments that a NAO non-executive member may make in relation to the carrying out of the C&AG's functions.

332. *Sub-paragraph (2)* sets out some other matters that may be dealt with in the code. These are:

- the way in which the annual reports required by *paragraph 9* are to be prepared;
- the matters about which the NAO and/or the C&AG are to consult the Commission from time to time; and
- any standards of corporate governance.

Documents and information

333. *Paragraph 13* provides a general power for the NAO to receive information on behalf of, and from, the C&AG. By *sub-paragraph (2)*, information held by NAO on behalf of the C&AG will be treated as being held by NAO for the purposes of section 3(2)

of the Freedom of Information Act 2000. This means NAO will be responsible for discharging obligations under that Act both for itself and for the C&AG.

SCHEDULE 8: TRANSITIONAL PROVISION

334. This schedule makes transitional provision to preserve the continuity of rights and obligations between the old NAO and the new. In particular, it provides for the transfer of property rights and employment obligations. While obligations under audit contracts are expected to remain with the C&AG, the intention is that all other property, rights and liabilities will transfer to the new NAO whose responsibility it will be to provide and manage the resources that the C&AG requires.

Transfer of property etc

335. *Paragraph 1* provides for the C&AG to determine which property, rights and liabilities of the C&AG are to be transferred to the NAO as a consequence of this Bill and to prepare a scheme which describes that property and those rights and liabilities. The scheme has to be approved by the Commission. At the appointed time, (which by *sub-paragraph (12)* is a date set for that purpose by the Treasury), the property, rights and liabilities described in the scheme are transferred to the new NAO.

336. *Sub-paragraphs (5) and (6)* provide for the continuity of employment of NAO staff. The rights and liabilities that may be transferred to the NAO include those under contracts of employment in relation to staff of old NAO (who were appointed under section 3(2) of the 1983 Act). Periods of employment with old NAO are to be treated as employment by new NAO, as are periods of employment in the former Exchequer and Audit Department (for those employees who transferred to old NAO as a result of section 3(2) and paragraph 2 of Schedule 2 to the 1983 Act). A transfer to new NAO is not to be treated as a break in service.

337. *Sub-paragraphs (7) and (8)* provide for the continuing effect of things done by or for the C&AG in relation to anything that is transferred to NAO under sub-paragraph (3) so far as is appropriate. This means, for example, that actions or procedures taken by the C&AG will not need be renewed or retaken by NAO to continue their effectiveness. Things that were in the process of being done by the C&AG in relation to anything transferred (such as ongoing legal proceedings) may be continued after the appointed time by the new NAO. So far as is appropriate as a result of the transfer, by *sub-paragraph (9)* references in agreements to the C&AG are to be read as or including a reference to new NAO. *Sub-paragraphs (10) and (11)* allow a person's employment by old NAO to be treated as employment by new NAO before new NAO comes into existence for limited purposes in connection with the establishment of new NAO.

Tax consequences of transfers by virtue of paragraph 1(3)

338. *Paragraphs 2 to 4* make provision for corporation tax consequences of the

transfer. The effect is to remove tax consequences that would otherwise have arisen only because of the transfer and to provide continuity of tax treatment.

Old Comptroller and Auditor General to continue to be Comptroller and Auditor General

339. *Paragraph 5* provides that the person who is C&AG at the appointed time will continue to hold the office of C&AG and be treated as if appointed under the provisions of this Bill. Although that person will have been appointed under the old legislation for an unlimited term, *sub-paragraph (2)* provides for the ten year period of office of *clause 37(7)* to apply. The ten-year period begins from the day that person took office under the current legislation. The new remuneration arrangements under *clause 40* will apply but will not cover any period before the appointed time, that is, a time appointed for the purposes of this paragraph by an order made by the Treasury. The appointment of a new C&AG designate was announced in January 2009. On 1 June, Amyas Morse was appointed as the new C&AG under the current legislation. He understands the revised terms of appointment and has agreed to accept them.

Provision of services

340. *Paragraph 6* provides for continuity of the powers under which the C&AG acts. Anything done under power which is no longer available is to be treated as having been done under the general power of *clause 39*, so far as necessary or appropriate.

341. *Paragraph 7* provides that existing contracts for the C&AG to provide services will not become subject to the new approval regime of *paragraph 3* of Schedule 7 when that regime first comes into effect. However, the charging provisions of *paragraph 8* of that Schedule will apply as if they were NAO approved services. When a current contract expires or is renewed, it would then become subject to the approval regime.

Indemnification

342. *Paragraph 8* provides for the indemnities in *clause 47* to extend to liabilities that arise before the coming into force of that clause, and liabilities that arise in relation to acts or omissions that occur before then. They also cover persons who were formerly members of NAO staff. This provision is needed to ensure that there is no break in cover between the indemnity set out in section 4(6) of the National Audit Act 1983 and that in *clause 47* of this Bill.

Corporate manslaughter

343. The offence in section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 applies to both old NAO (because it is listed currently in Schedule 1 to the Act) and new NAO (because it is a corporation). *Paragraph 9* ensures that

new NAO will be answerable for any alleged offences committed by old NAO.

NAO's procedural rules before rules made under paragraph 18 of Schedule 6

344. *Paragraph 10* sets out the procedural rules that apply to meetings of NAO before it has drawn up internal rules under *paragraph 16* of Schedule 6. These provisions on the quorums, majorities and casting votes will apply to meetings at which the NAO prepares its internal rules and the draft code under *paragraph 10* of Schedule 7.

SCHEDULE 9: CONSEQUENTIAL AMENDMENTS

345. This schedule contains amendments which are minor or consequential on the measures in the Bill.

Exchequer and Audit Departments Act 1866

346. *Paragraph 2* repeals sections of the Exchequer and Audit Departments Act 1866 that relate to the appointment and tenure of the C&AG. New provision is made in this Bill, in particular in *clauses 37, 38 and 41*.

Exchequer and Audit Departments Act 1957

347. *Paragraph 3* repeals the Exchequer and Audit Departments Act 1957. New provision for the C&AG's salary and powers of delegation are made in *clause 40* of, and *paragraph 6* of Schedule 7 to, this Bill.

Public Records Act 1958

348. *Paragraph 4* provides for the reference in Schedule 1 to the Public Records Act 1958 to be read as a reference to new NAO.

Superannuation Act 1972

349. *Paragraph 5* amends section 13 of the Superannuation Act 1972, which deals with the pension arrangements of the C&AG, so that it will not apply to a C&AG who is appointed under this Bill. New pension arrangements are provided for under *clause 54*. *Paragraph* 6 amends the entry for staff of the NAO in Schedule 1 to the Superannuation Act 1972. This allows NAO employees to continue to be eligible for membership of the Principal Civil Service Pension Scheme. Any entitlement of a

member of staff of the NAO who leaves before the creation of new NAO is not affected.

House of Commons Disqualification Act 1975

350. *Paragraph 7* amends Schedule 1 to the House of Commons Disqualification Act 1975. Members of the NAO (including the C&AG) and NAO employees are disqualified from becoming members of the House of Commons.

Northern Ireland Assembly Disqualification Act 1975

351. *Paragraph 8* amends Schedule 1 to the Northern Ireland Assembly Disqualification Act to disqualify NAO members (including the C&AG) and employees from becoming members of the Northern Ireland Assembly.

Parliamentary and other Pensions and Salaries Act 1976

352. *Paragraph 9* omits section 6(3) of the Parliamentary and other Pensions and Salaries Act 1976. Its provisions on the C&AG's salary are superseded by those in *clause 40*.

Race Relations Act 1976

353. *Paragraph 10* provides for the C&AG and the new NAO to be or continue to be subject to the general statutory duty under section 71 of the Race Relations Act 1976. It also provides for continuity between the old and the new structures for things done or in the process of being done.

Interpretation Act 1978

354. *Paragraph 11* amends the definition of Comptroller and Auditor General in Schedule 1 to the Interpretation Act 1978 to remove the reference to appointments made under Exchequer and Audit Departments Act 1866.

National Audit Act 1983

355. *Paragraph 12* omits a number of sections of the National Audit Act 1983 which are superseded by provisions in this Act. They include provisions on the appointment process of the C&AG (see *clause 38*); the status of the NAO (see *clause 43* and Schedule 6); NAO's expenditure and audit (see *clauses 45* and *paragraph 25* of Schedule 6). The repeal of section 3(4) of the 1983 Act does not affect staff of old

NAO who cease to be members of PCSPS before the transfer of property rights and liabilities under *paragraph 1(3)* of Schedule 8 comes into effect.

356. *Paragraph 13* moves a requirement which is currently in section 1 of the 1983 Act to Part 2 of that Act, as a new section 7A. The requirement is for the C&AG to have regard to proposals made by the Committee of Public Accounts, in considering whether to carry out a value for money examination under that Part of the 1983 Act.

Finance Act 1989

357. *Paragraph 14* amends section 182 of the Finance Act 1989 to ensure that an existing offence for disclosing certain types of information (including tax and social security information) held by the C&AG and members of staff of NAO will continue to cover NAO and its employees under the new structure. The offence will also continue to apply to the C&AG for Northern Ireland, and the staff of the Northern Ireland Audit Office.

Social Security Administration Act 1992

358. *Paragraph 15* amends section 23 of the Social Security Administration Act 1992 to ensure that a disclosure offence which protects social security information related to particular persons continues to apply under the new structure of the NAO. The offence also continues to apply to the C&AG for Northern Ireland and the staff of the Northern Ireland Audit Office.

Taxation of Chargeable Gains Act 1992

359. *Paragraph 16* adds paragraph 4 of Schedule 8 (which provides no gain or loss treatment for a transfer from the C&AG to the new NAO) to a list of "no gain/ no loss provisions" in section 288(3A) of the Taxation of Chargeable Gains Act 1992.

National Lottery etc. Act 1993

360. *Paragraph 17* amends the National Lottery etc. Act 1993 to provide that the National Lottery Commission will continue to be permitted to make disclosures to the C&AG in connection with value for money examinations under Part 2 of the National Audit Act 1983.

Government of Wales Act 1998

361. *Paragraph 18* repeals paragraph 1 of Schedule 12 to the Government of Wales Act 1998. This means that the C&AG will no longer be able to hold the office of

Auditor General for Wales at the same time.

Government Resources and Accounts Act 2000

362. *Paragraph 19* amends paragraph 18 of Schedule 1 to the Government Resources and Accounts Act 2000 to omit provisions related to the preparation of the NAO's accounts which have been superseded by those in *paragraphs 24 and 25* of Schedule 6 to this Bill.

Freedom of Information Act 2000

363. *Paragraphs 20 and 21* provide for the continuity of obligations under the Freedom of Information Act 2000 between the old NAO the new NAO and the C&AG. The new NAO will take on the information obligations of old NAO. It will hold information on behalf of the C&AG under the new structure and be responsible for dealing with requests under that Act.

Constitutional Reform Act 2005

364. *Paragraph 22* omits paragraph 7 of Schedule 6 to the Constitutional Reform Act 2005. This provision is superseded by the new arrangements for delegation of the C&AG's functions in *paragraph 6* of Schedule 7 to this Bill.

Companies Act 2006

365. *Paragraph 23* omits section 1230(3)(a) of the Companies Act 2006 which is superseded by the new duty for NAO to provide the C&AG with resources under *paragraph 2* of Schedule 7 to the Bill.

Corporate Manslaughter and Homicide Act 2007

366. *Paragraph 25* omits the reference to old NAO from Schedule 1 to the Act, but enables proceedings to be taken against old NAO in the event that offences are alleged to have been committed by old NAO before this provision comes into force. The offence in section 1 of the 2007 Act automatically applies to new NAO because it is a body corporate.

Court Funds Rules 1987 (S.I. 1987/821)

367. *Paragraph 26* provides for the C&AG to authenticate a copy of an account relating to a fund in court that has been issued by the Accountant General in response to a

request under rule 63 of the Court Funds Rules 1987.

Official Secrets Act 1989 (Prescription) Order 1990 (S.I. 1990/200)

368. *Paragraph 27* amends the Official Secrets Act 1989 (Prescription) Order 1990 so that members and employees of the new NAO will be treated as if they were Crown servants for the purposes of the Official Secrets Act 1989.

Race Relations (Prescribed Public Bodies) (No. 2) Regulations 1994 (S.I. 1994/1986)

369. *Paragraph 29* provides that new NAO will continue to be prescribed for the purposes of section 75(5) of the Race Relations Act 1976. Prescription allows NAO to apply certain employment restrictions notwithstanding that Act.

Scotland Act 1998 (Transitory and Transitional Provisions) (Publications and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379)

370. *Paragraph 30* amends the definition of the C&AG for the purposes of interpreting legislation made by the Scottish Parliament, by removing the reference to the C&AG's appointment under the Exchequer and Audit Departments Act 1866.

Public Interest Disclosure (Prescribed Persons) Order 1999 (S.I. 1999/1549)

371. *Paragraph 31* amends the description of the C&AG in the Schedule of prescribed persons to whom a protected "whistleblowing" disclosure may be made.

Greater London Authority (Disqualification) Order 2000 (S.I. 2000/432)

372. *Paragraph 32* provides that members and employees of the NAO may not be mayor of London or a member of the London Assembly.

Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (S.I. 2001/2188)

373. *Paragraph 33* allows the National Lottery Commission to disclose confidential information, within the meaning of the Financial Services and Markets Act 2000, to the C&AG for the purposes of value for money examinations under Part 2 of the National Audit Act 1983.

Race Relations Act 1976 (Statutory Duties) Order 2001 (S.I. 2001/3458)

374. *Paragraph 3*4 provides for the C&AG and the new NAO to be or continue be subject to the obligation to prepare a Race Equality Scheme under article 2 of this Order. It also provides for continuity between the old and the new structures for things done or in the process of being done.

Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (S.I.2005/2966)

375. *Paragraph 35* provides for the C&AG and the new NAO to be or continue to be subject to the duty to prepare and implement a Disability Equality Scheme under article 2 of these Regulations. It also provides for continuity between the old and the new structures for things done or in the process of being done in relation to that duty.

Public Contracts Regulations 2006 (S.I. 2006/5)

376. *Paragraph 36* ensures that the new NAO like the old NAO is subject to the procurement obligations and thresholds that apply to a body listed in Schedule 1 to the Public Contracts Regulations 2006 ("GPA Annex 1A contracting authorities").

Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 (S.I. 2006/2930)

377. *Paragraph 37* provides for the C&AG and the new NAO to be or continue to be subject to the general statutory duty to prepare and implement a Gender Equality Scheme. It also provides for continuity between the old and the new structures for things done or in the process of being done in relation to that duty.

Child Support Information Regulations 2008 (S.I. 2008/2551)

378. *Paragraph 3*8 provides that the offence for disclosure of information under section 50 of the Child Support Act 1991 will continue to apply to current and former members and employees of NAO.

PART 8: TRANSPARENCY OF GOVERNMENT FINANCIAL REPORTING TO PARLIAMENT

Clause 51: Inclusion in departmental estimates of resources used by designated bodies

379. *Subsection (1)* provides that the clause amends the Government Resources and Accounts Act 2000 ("the GRAA 2000").

380. *Subsection (2)* inserts a new section 4A into the GRAA 2000. Its provisions are as follows:

381. *New section 4A(1)* gives the Treasury powers to give directions regarding how a government department must prepare a Supply Estimate for approval by the House of Commons in respect of a financial year.

382. *New section 4A(2)* gives the Treasury powers to direct that the departmental Supply Estimate include information relating to resources expected to be used by any body that is a designated body in relation to that department.

383. *New section 4A(3)* provides that a body is a designated body in relation to a government department either if it is designated by an order made by the Treasury or it falls within a description of body designated in relation to the department by a Treasury order.

384. *New section 4A(4)* provides for a body to be designated either for a particular financial year or generally.

385. *New sections 4A(5)* to *4A(8)* make provision in relation to bodies funded out of a devolved Consolidated Fund. *Section 4A(5)* provides that *sections 4A(6) and (7)* apply if the Treasury expect the use of resources by a body in a financial year to involve payments out of a devolved Consolidated Fund to or for the benefit of a body but do not expect the use of resources by the body to involve payments out of the Consolidated Fund of the United Kingdom to or for the benefit of that body. Examples of such bodies would include SportScotland (an NDPB funded entirely by the Scottish Executive) and the Higher Education Funding Council for Wales (also an NDPB, which provides funding to higher education institutions in Wales and is funded by the National Assembly for Wales). There is no intention of designating any body that is wholly funded from a devolved Consolidated Fund. Where, exceptionally, a UK government department were to make a payment to a body operating in a devolved area and largely funded by a devolved administration, the Treasury plans to agree administrative arrangements that would ensure such a body was not designated.

386. *New section 4A(6)* provides that if the conditions in *section 4A(5)* are met the Treasury must notify the relevant government department that the conditions are met and treat the body as though it were not designated for that year.

387. *New section 4A(7)* prevents the Treasury from making an order designating a body if the conditions in *section 4A(5)* are met and no order is already in force in relation to that body.

388. *New section 4A(8)* provides for the Treasury, where appropriate, to consult the Scottish Ministers, the Welsh Ministers or the Department of Finance and Personnel for Northern Ireland before designating a body or a description of body.

389. *New section 4A(9)* provides that in determining for any purpose whether a body has a particular relationship with a government department the fact that a departmental Supply Estimate includes information relating to that body, or departmental resource accounts include information relating to the body, is to be disregarded. This provision is intended to make it clear that designating a body does not of itself alter the existing relationship between that body and the government department.

390. *New section 4A(10)* provides that an order made by the Treasury under *section 4A(3)* must be made by statutory instrument.

391. *New section 4A(11)* provides that a statutory instrument containing such an order will be subject to the negative resolution procedure.

392. New section 4A(12) defines what is meant by 'a devolved Consolidated Fund' (see section 4A(5)).

393. *Subsection (3)* amends section 5(1) of the GRAA 2000. Section 5(1), as amended, will require a government department to include the resources acquired, held or disposed of by any designated body when preparing resource accounts.

394. *Subsection (4)* amends section 6(1) of the GRAA 2000. That section requires the Comptroller and Auditor General to satisfy himself of certain matters when examining any resource accounts which he receives from a department. Section 6(1), as amended, will require the Comptroller and Auditor General to satisfy himself, amongst other things, that the financial transactions of the department and the financial transactions of any designated body are in accordance with any relevant authority.

Clause 52: Corresponding provision in relation to Wales

395. *Subsection (1)* provides that the clause amends Part 5 of the Government of Wales Act 2006 ("GOWA 2006").

396. *Subsection (2)* inserts a new section 126A into the GOWA 2006. Its provisions are as follows:

397. *New section 126A(1)* gives Welsh Ministers the power to include information relating to the use of resources by a designated body in a Budget Motion for the financial year.

398. *New section 126A(2)* provides Welsh Ministers with the power to designate bodies for

these purposes. Ministers can designate individual bodies, or categories of bodies. Designation must be made by order.

399. *New section 126A(3)* provides for a body to be designated either for a particular financial year or generally.

400. *New sections 126A(4)* requires the Welsh Ministers to obtain the consent of the Treasury before designating any body that they expect will receive funding from a "relevant Consolidated Fund" in a particular financial year. Section 126A(5) defines a "relevant Consolidated Fund" as the UK Consolidated Fund, the Scottish Consolidated Fund or the Consolidated Fund of Northern Ireland.

401. *New section 126A(6)* requires the Welsh Ministers to consult with the Treasury before designating a body or a description of body, in cases where Treasury consent is not needed but the Welsh Ministers consider it appropriate to consult.

402. *New section 126A(7)* provides that in determining for any purpose whether a body has a particular relationship with a "relevant person", the fact that the budget motion, or the "relevant person's" resource accounts, include information relating to the body, is to be disregarded. This provision is intended to make it clear that designating a body does not of itself alter the existing relationship between that body and the Welsh Ministers (or other "relevant person").

403. New section *126A(8)* provides that an order made by the Welsh Minister under subsection (2) must be made by statutory instrument.

404. *New section 126A(9) and (10)* provides that a statutory instrument containing such an order will be subject to either the affirmative or negative resolution procedure in the Assembly. The choice of procedure will be made by Welsh Ministers as appropriate in recognition of their key budgetary responsibilities. For instance, the Welsh Ministers may choose to use the affirmative procedure where they are proposing major changes to designated bodies, and it is appropriate for the Assembly to have the opportunity to debate these fully; while Ministers may choose the negative procedure in cases where minor or uncontroversial amendments are to be made.

405. *Subsection (3)* provides that the clause amends Schedule 8 to the GOWA 2006.

406. *Subsection (4)* inserts a new paragraph 13(1A). Paragraph 13(1) of Schedule 8 to the GOWA 2006 provides that the Auditor General for Wales must, for each financial year, prepare accounts in accordance with directions given by the Treasury. The new paragraph 13(1A) provides that such directions to prepare accounts may include directions to prepare accounts relating to financial affairs and transactions of persons other than the Auditor General. This would allow the inclusion of information about bodies designated in relation to the Auditor General.

407. *Subsection (5)* amends paragraph 15 of Schedule 8 to the GOWA 2006, which relates to the audit of accounts prepared by the Auditor General. Subsection (5) makes consequential amendments to paragraph 15 to allow the auditors of the Auditor General for Wales's accounts to obtain necessary information concerning transactions

of designated bodies which are included in those accounts.

408. *Subsection (6)* amends paragraph 17(8) of Schedule 8 to the GOWA 2006 to allow the Auditor General for Wales to have access to documents and financial information relating to the financial affairs of any designated body included in the accounts of the Public Services Ombudsman for Wales.

409. *Subsection (7)* amends Schedule 1 to the Public Services Ombudsman (Wales) Act 2005. Paragraph 16(1) of that Schedule provides that the Ombudsman must, for each financial year, prepare accounts in accordance with directions given to him by the Treasury. Subsection (7) inserts a new paragraph 16(1A) to allow such directions to include directions to prepare accounts relating to financial affairs and transaction of persons other than the Ombudsman. This would allow the inclusion of information about bodies designated in relation to the Ombudsman.

PART 9: FINAL PROVISIONS

Clause 53: Meaning of "Minister of the Crown"

410. *Clause 53* provides that the term "Minister of the Crown" in the Constitutional Reform and Governance Bill will have the same meaning as provided in the Ministers of the Crown Act 1975. This includes Secretaries of State but also, for example, the Attorney General, the Lord Chancellor and the Minister for the Civil Service.

Clause 54: Financial provision

411. *Clause 54* provides that any expenditure incurred by a Minister of the Crown by virtue of the Act can be paid for out of money provided by Parliament.

Clause 55: Power to make consequential provision

412. *Clause 55* contains a power to make changes to primary or secondary legislation in consequence of the Bill by order. *Subsection (1)* provides that the power can be exercised by a Minister of the Crown, or two or more Ministers acting jointly.

413. *Subsection (2)* provides that an order may amend, repeal or revoke provision in primary or secondary legislation and may include transitional, transitory or saving provisions. An order under this clause must be made by statutory instrument (*subsection (3)*). If it amends primary legislation, an order will be subject to the affirmative resolution procedure (*subsection (4)*). Any other order will be

subject to negative resolution procedure *(subsection (5))*.

Clause 56: Extent, commencement, transitional provision and short title

414. *Subsection (1)* provides that Part 2 of the Bill (demonstrations in the vicinity of Parliament) extends to England and Wales only.

415. *Subsection (2)* provides that any other amendment or repeal made by the Bill will have the same extent as the Act or relevant part of the Act to which it relates.

416. *Subsection (3)* provides that the Act, apart from Part 9, will come into force on a day which a Minister of the Crown or two or more Ministers acting jointly, decide by order and that different provisions may be brought into force at different times.

417. *Subsection (4)* provides that a Minister of the Crown or two or more Ministers acting jointly may make an order making transitional, transitory or saving provisions in relation to the commencement of the provisions of the Act.

418. *Subsection (5)* provides that an order under *subsection (3) or (4)* must be made by statutory instrument.

419. *Subsection (6)* sets out the short title of the Bill.

FINANCIAL EFFECTS

420. The Constitutional Reform and Governance Bill provides for new statutory heads of expenditure, in particular, the establishment of the Civil Service Commission (*clause 16*), the powers to manage the Civil Service (*clause 17*) and the establishment of the new National Audit Office (*clause 43*). However, these new statutory heads of power are replacing non-statutory heads or, in the case of the National Audit Office, replacing a current statutory head of expenditure. There will thus be a minimal net impact on public expenditure.

PUBLIC SERVICE MANPOWER

421. The provisions contained with the Constitutional Reform and Governance Bill have no substantial effect on public service manpower.

IMPACT ASSESSMENT

422. The provisions contained in the Constitutional Reform and Governance Bill do not require an Impact Assessment.

EUROPEAN CONVENTION ON HUMAN RIGHTS

432. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

433. Jack Straw, the Secretary of State for Justice, made the following statement of compatibility in accordance with section 19:

"In my view the provisions of the Constitutional Reform and Governance Bill are compatible with the Convention rights."

434. The following paragraphs deal with Convention rights issues raised by the Bill. Where in the Government's view a Part does not give rise to any Convention rights issues it is omitted.

Part 1 – The Civil Service

435. *Clause 2* gives effect to Schedule 1 which makes provision about the Commission. *Paragraph 5* of the Schedule concerns the removal from the office of First Commissioner or Commissioner. *Sub-paragraph (3)* provides that Her Majesty may remove the First Commissioner or a Commissioner, on the recommendation of the Minister, if one of the conditions set out in *sub-paragraph (4)* is met. It is considered that the removal of the First Commissioner or Commissioner is likely to engage Article 6 ECHR (as it is likely to constitute the determination of a civil right within Article 6(1)). The Bill itself does not specify the procedure to be adopted in removing the First Commissioner or Commissioner from office. However, it is envisaged that the procedure will be specified in the terms of appointment. The decision of the Minister recommending removal would also be amenable to judicial review. It is considered that the combination of the procedure which will be set out in the terms of appointment and the possibility of judicial review of the decision of the Minister recommending removal, would satisfy the requirements of Article 6.

436. Given the limited impact that dismissal from the post of Commissioners will have on the personal life of the individual, dismissal is not thought to engage Article 8.

437. *Paragraphs 26 and 28* of Schedule 2 preserve the terms and conditions of the First Civil Service Commissioner and Commissioners who are in office at the date of commencement. Consequently, Article 1 Protocol 1 is not thought to be engaged.

438. *Clause 9* makes provision for civil servants to complain to the Commission about breaches of the codes and for the Commission to investigate breaches of the codes. The consideration of breaches of the codes by the Commission does not engage Article 6 ECHR as it does not involve the determination of a civil right within Article 6(1). The Codes will set out the standards of behaviour expected of civil servants based on the core values of the Civil Service rather than create any civil rights.

439. *Clause 9* provides that civil servants may complain to the Commission where they believe that they are being required to act in a way which conflicts with the codes or where they believe that another civil servant has acted in a way which conflicts with the codes. However, the Commission's role after consideration of a complaint or an investigation, is limited to making recommendations. In practice, these recommendations are likely to be made confidentially to the department and civil servants concerned. So even if it were concluded that the codes conferred on civil servants a right within the meaning of Article 6(1), the Commission's role in making recommendations is not likely to be considered as determinative of that right.

440. It should be noted however, that *subsection (5)(a)* of *clause 9* requires the Commission to determine the procedures for the purposes of an investigation or the making of complaints and for the investigation and consideration of complaints. Furthermore, the act of the Commission in making a recommendation would be amenable to judicial review. So it is considered that even if it were concluded that the Commission's consideration of breaches of the codes constituted the determination of a civil right within Article 6(1), the combination of the procedures for consideration of such matters and the possibility of judicial review of the Commission's decisions, would satisfy the requirements of Article 6.

441. *Clause 13* makes provision for a person to complain to the Commission if he has reason to believe that a selection for appointment breached the requirement that selections be made on merit on the basis of a fair and open competition. The consideration of these complaints does not engage Article 6 ECHR as it does not involve the determination of a civil right within Article 6(1). In particular, selections for appointment do not amount to a civil right. However, the Commission's role after considering the complaint is limited to making recommendations. In practice, these recommendations are likely to be made confidentially to the department and civil servants concerned. So even if it were concluded that there was a right within the meaning of Article 6(1), the Commission's role in making recommendations is not likely to be considered as determinative of that right.

442. It should be noted however, that *subsection (3)(b) of clause 13* requires the Commission to determine the procedures for the making of complaints and for the investigation and consideration of complaints. Furthermore, the Commission's recommendations would be amenable to judicial review. So it is considered that even if it were concluded that the Commission's consideration of complaints constituted the determination of a civil right within Article 6(1), the combination of the procedures for consideration of such matters and the possibility of judicial review of the Commission's decisions, would satisfy the requirements of Article 6.

443. *Clauses 9(6), 13(4) and 14(2)* include provisions which enable the Commission to require that information be given to them if they reasonably require that information for the performance of their functions relating to complaints about conflicts with the Civil Service or Diplomatic Service Codes, recruitment competitions or carrying out reviews of recruitment practices. The requirement might result in personal data, for example about an individual's job application, being disclosed to the

Commission. This could engage Article 8. However, it is considered that any personal data that is shared under these provisions will be done in a way that complies with Article 8 since it must be done in a way that complies with general information law principles – in particular the Data Protection Act 1998. As a result the data may only be shared in so far as is necessary for the purposes of the Commission's functions (for example, the data could be disclosed in an anonymised form unless it is necessary for the Commission to have information about the individual's identity). In so far as he Commission handles any personal data, they will be bound by general information law principles – including the Data Protection Act 1998 so that, for example, they will only be permitted to keep the data for as long as is necessary.

Part 3 – The House of Lords

444. It may be argued that the provision under which members of the House of Lords are removed on meeting a condition in Part 1 of Schedule 3 (the conditions which cover serious criminal offences and bankruptcy restrictions orders) engages Article 6 ECHR (right to fair trial). The first question is whether membership of the House of Lords constitutes a "civil right or obligation" for the purposes of that Article. The weight of Strasbourg case law points towards the conclusion that it does not. In the admissibility decision of *X v United Kingdom* (Application No 8208/78), an applicant complained that in dismissing his peerage claim to the Barony of Eure, the Home Office had not given him a fair hearing. The Commission decided that the claim was inadmissible on the basis that the right to participate in the work of the Lords "falls into the sphere of 'public law' rights outside the scope of Article 6". In addition, the case of *Matthews v Ministry of Defence* [2003] UKHL 4 is authority for the argument that the substantive content of any rights associated with membership would be extinguished by these new statutory provisions. Article 6(1) is not engaged as it is concerned with procedural guarantees and not the substantive content of national law.

445. Case law supports the notion that membership of a legislative body is not a possession for the purposes of Article 1 of Protocol 1 (protection of property), including the authority of *X v United Kingdom* mentioned above. In addition, there is authority that a nobiliary title is not, of itself, a possession within the meaning of Article 1 of Protocol 1. In particular, there is the case of *De la Cierva Osorio De Moscoso v Spain* (Application Nos 41127/98, 41503/98 and 51717/98). There is however an argument that there may be financial loss associated with being removed from the House, for example, no longer being able to claim expenses and allowances available to peers. Even assuming there was a deprivation of a possession for the purposes of Article 1 of Protocol 1, such a deprivation could be justified on the basis that it is in the public interest and subject to conditions provided by law.

446. It may be argued that Article 14 is engaged on the basis that the provisions do not apply to Lords Spiritual. Even if another Convention right was engaged, it is difficult to identify a prohibited ground in this case, although a life peer subjected to the disqualification or expulsion provisions may seek to argue that there is discrimination on the grounds of religion. The justification for this difference in treatment is that the Lords Spiritual are members *ex officio*. Any reputational damage caused by a

Lord Spiritual falling into one of the categories where a life peer would be removed would be primarily to the Church and not the House of Lords. In addition, the Church has in place a range of measures to deal with disciplinary issues among the archbishops and bishops.

447. It may be argued that the operation of the expulsion and suspension provisions in *clause 28* engage Article 6 on the basis that, as far as those provisions affect membership of the House, they result in the determination of a civil right. However, the Government considers that for the reasons above concerning the other removal provisions, the contrary view is the better one.

448. Even assuming that expulsion or suspension is regarded as the determination of a civil right or obligation and Article 6 is engaged there are good arguments that the proposals would be compatible with that Convention right. In particular, members of the House of Lords whose conduct is impugned are accorded procedural safeguards. Members subject to these proceedings are judged against a Code of Conduct which has been in place since 2002, and was designed with ECHR compliance in mind. Investigations are conducted by a Sub-Committee of the Committee for Privileges – a cross-party committee of five members appointed by the Committee for Privileges – and are carried out in accordance with procedures in paragraph 19 of the Code of Conduct, which provides that "Members of the House have the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies". To this end, impugned members have a right of appeal to the Committee of Privileges, a body which includes four Lords of Appeal.

Part 4 – Public Order

449. Part 4 contains provisions which repeal sections 132 to 138 of the Serious Organised Crime and Police Act 2005 ("SOCPA").

450. The repeal of sections 132 to 136 means that the statutory regime governing public assemblies in the vicinity of Parliament will be the same as that which applies in the rest of the country, being that which applied in the vicinity of Parliament prior to SOCPA. Under section 14 of the Public Order Act 1986 no advance notice or authorisation is required for public assemblies, only limited conditions may be imposed by the police and the restrictions only apply in respect of assemblies of 2 or more people.

451. The regime under section 14 has already been deemed compatible with the ECHR most recently in the case of *R (on the application of Louise Brehony) v Chief Constable of Greater Manchester* [2005] EWHC 640 (Admin). Conditions may be imposed on such an assembly only where they are reasonably believed to be necessary to prevent serious public disorder, serious damage to property, serious disruption to the life of the community or unjust intimidation. Insofar as the conditions may only pertain to the place of the demonstration, its maximum duration and the maximum number of persons who may constitute it, they are proportionate in respect of legitimate aims. These conditions may only be imposed by the police who are themselves bound to act compatibly with the ECHR as a public authority under the Human Rights Act.

452. Schedule 4 inserts three provisions into Part 2 of the Public Order Act 1986 with application in the area around Parliament.

453. New section 14ZA of the 1986 Act permits the police to impose such directions in relation to public processions and public assemblies that are reasonably believed to be necessary to maintain access to and from the Palace of Westminster in accordance with requirements specified by the Secretary of State by order. Directions relating to public assemblies may only include conditions as to the place of the demonstration, its maximum duration and the maximum number of persons who may constitute it. The range of directions that can be imposed relating to public processions are not limited in that way. All directions are limited to those that, in the officer's reasonable opinion, are necessary to meet the specified requirements of maintaining access to and from the Palace of Westminster. Section 14ZA(4) sets out requirements that may be included in the Secretary of State's order, but this is not an exhaustive list.

454. Both Articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the ECHR are potentially engaged by this clause. However the requirements under SOCPA to obtain prior authorisation (section 134) for any demonstration in the vicinity of Parliament, and the corresponding criminal offences (section 132) were not found to be incompatible with the ECHR in *Blum, Shaer, Evans, Rai v DPP, CPS and the Secretary of State for the Home Department* [2006] EWHC 3209 (Admin). The directions that can be made under section 14ZA are much more limited than those permissible under the SOCPA regime. This clause allows directions to be given for only one reason – the maintenance of access to and from the Palace of Westminster. The Government considers that this is a legitimate aim, namely the proper and secure functioning of Parliament. Since directions are limited in scope and in geographical effect (section 14ZB), the Government's view is that they are a proportionate interference with individual rights. These conditions may only be imposed by the police who are themselves bound to act compatibly with the ECHR as a public authority under the Human Rights Act.

455. New section 14ZB provides that the area around Parliament is to be specified by the Secretary of State by order. The section states that no point in the area may be more than 250 metres in a straight line from Parliament Square. This section reflects similar provisions in section 138 of SOCPA, however this clause provides for a much smaller area (section 138 specified a one kilometre line). This section has the effect of strictly limiting the geographical area in which conditions may be imposed under sections 14ZA and therefore is one of the tools helping to ensure that any restriction of rights under Articles 10 and 11 is proportionate.

456. New section 14ZC provides that the Secretary of State can make a similar order to that under section 14ZB in relation to another building, outside the Palace of Westminster, should one or both Houses be relocated for the purposes of conducting its meetings or those of its committees. This may happen should the Palace of Westminster undergo large-scale refurbishment works. This provision mirrors the geographical limitations of 250 metres from the relevant building. It is considered that this section raises the same ECHR issues as sections 14ZA and 14ZB and for the same reasons, the Government believes that it is proportionate.

457. The Government therefore considers that these provisions are compatible with the ECHR.

458. The repeal of section 137 of SOCPA removes those restrictions on the operation of loudspeakers within the designated area around Parliament. The use of loudspeakers will continue to be governed by section 62 of the Control of Pollution Act 1974 ("the 1974 Act") and section 8 of the Noise and Statutory Nuisance Act 1993 ("the 1993 Act"). The clause also makes consequential amendment to the 1993 Act.

459. By removing the provisions of SOCPA which regulate demonstrations and the use of loudspeakers in the vicinity of Parliament these matters will be regulated in a less restrictive way. Both Articles 10 and 11 of the ECHR are engaged by this clause, notwithstanding that the intention of the clause is to bring about more proportionate regimes. However, any interference with these qualified rights would be justified and proportionate under Articles 10(2) and 11(2) in order to prevent these rights being abused and the rights of others suffering in consequence.

460. Regarding the loudspeaker regime, section 62 of the 1974 Act imposes a restriction on the use of loudspeakers in streets at night and in the early hours of the morning. Such restriction is limited in its duration and targeted at the prevention of disorder and the protection of the rights of others. As such it pursues a legitimate aim and is a proportionate means of achieving it. Furthermore, under section 8 of the 1993 Act the local authority, another public authority bound to act compatibly with the ECHR, is able to consent to the use of loudspeakers (with conditions where appropriate) in its area in a way which would otherwise contravene the 1974 Act.

461. The Government considers that the effects of the repeals and the new clauses result in an ECHR compatible legal framework for managing protests in the vicinity of Parliament.

Part 5 – Human rights claims against devolved administrations

462. Article 6 and Article 1 of Protocol 1 of the Convention may be engaged by these clauses, which insert a one year time limit into the Northern Ireland Act 1998 (*clause 33*) and the Government of Wales Act 2006 (*clause 34*). The new time limit will apply to proceedings brought under those Acts in relation to executive acts of the Northern Ireland Ministers and Departments and the Welsh Ministers where a claim is brought on the ground that they have acted incompatibly with the Convention rights. The time limit mirrors that under section 7(5) of the Human Rights Act 1998, which applies to proceedings brought under that Act where it is alleged that a public authority has acted incompatibly with the Convention rights under section 6(1) of that Act. The intention is therefore to ensure that the same time limit will apply in relation to executive acts of the relevant devolved Ministers and Departments (though it will not apply to claims under the devolution Acts relating to the making, confirmation or approval of subordinate legislation), whether the proceedings are brought under the relevant devolution Act or the Human Rights Act 1998.

463. The time limits in *clauses 33 and 34* provide that proceedings must be brought within one year of the date on which the act complained of took place, which is

subject to such longer period as a court or tribunal considers equitable having regard to all the circumstances. This is further subject to any stricter time limit which governs the proceedings in question. In very many cases, proceedings are brought by way of judicial review and therefore as at present will continue in England, Wales and Northern Ireland to be subject to the rule that judicial review proceedings must generally be brought within 3 months. The time limit will apply to any proceedings brought after the clauses are commenced, whenever the act complained of took place. It will therefore operate on a partially retrospective basis, in that it will affect accrued rights and affect the legal consequences of events which occurred before commencement.

464. In so far as the time limits engage the ECHR, the questions are whether the time limit pursues a legitimate aim, and complies with the principles of proportionality and legal certainty. There must also be a reasonable relationship between the means employed and the aim sought to be achieved. The legitimate aims in inserting this time limit into the devolution settlements are to prevent stale claims, promote legal certainty and to provide for a consistent time limit for proceedings in relation to executive acts whether brought under the Human Rights Act or the devolution settlements. In accordance with cases such as *Stubbings v UK* ((1997) 23 EHRR 213), the Government considers that the introduction of a one year time limit for Convention-based claims, consistent with that which already exists in the Human Rights Act 1998, is a proportionate measure. In so far as the time limit will apply to post-commencement proceedings but may affect pre-commencement actions, the Government considers that the power of courts and tribunals to extend the one year period for such longer period as is equitable in all the circumstances will operate to cure any residual unfairness to a litigant whose claim might otherwise be barred. The Government therefore considers that these clauses are proportionate measures and compatible with the Convention rights.

Part 6 – Courts and tribunals

465. *Paragraph 5* of Schedule 5 may raise issues under Article 8 of the ECHR. The paragraph amends section 96 of the Constitutional Reform Act 2005 ("CRA"). Section 96 of the CRA at present makes it a matter for the Judicial Appointments Commission ("the JAC") to perform health checks on successful candidates for appointment, if the Lord Chancellor requires, and to report the results to the Lord Chancellor. The amendments enable the Lord Chancellor to request a person who has been selected for appointment to provide information about his or her physical or mental condition. The Lord Chancellor may also request a candidate to undergo a medical assessment and for a report of that assessment to be made available to the Lord Chancellor.

466. The Lord Chancellor may decide not to proceed with an appointment if that person fails to supply information concerning their physical or mental condition or fails to undergo a medical assessment when requested to do so. The Lord Chancellor may also reject a candidate on the basis of a report supplied following a medical assessment. Before the Lord Chancellor decides not to proceed with an

appointment on these grounds he must consult the Lord Chief Justice (or Scottish or Northern Ireland equivalent as appropriate – as a result of the consequential amendment to section 97(1)(e)).

467. These changes are designed to permit a simplification of the current procedures for medical checks, and to reflect the split in roles between the JAC (responsible for the selection of a candidate) and the Lord Chancellor (responsible for appointment or recommendation of appointment).

468. The exercise of these powers by the Lord Chancellor will engage Article 8(1). The power to request information regarding the physical and medical condition of a candidate or that a candidate undergo a medical assessment may interfere with Article 8 rights. However, the Government considers that any interference can be justified under Article 8(2). It is considered that the measures are in accordance with the law. The provisions are clear in that medical checks will only take place after selection and specify what options the Lord Chancellor may take once he is in receipt of the information regarding the physical and mental condition of a candidate. In addition, the measures regarding medical checks are proportionate and in pursuit of a legitimate aim. The legitimate aim is to ensure that the candidate is physically and mentally able to perform the functions of the office for which he is selected. A candidate's ability to do so has a bearing on the protection of rights and freedoms of others, public safety, protection of disorder and crime and the economic well being of the country. The requests for information from a candidate regarding their physical and mental condition will be less of a burden for candidates than the requirement for a health check with a medical professional which usually takes place at present. The intention behind the amendments is that detailed medical assessments with a health professional will only take place if information supplied by the candidate reveals a cause for concern warranting further enquiry.

469. The Government considers that *paragraph 5* of Schedule 5 is compatible with Article 8.

470. Disclosure of confidential information under *paragraph 8* of Schedule 5 is likely to engage Article 8. *Paragraph 8* amends section 139 of the CRA. That section concerns confidential information relating to judicial appointments and discipline and sets out a limited number of circumstances in which such information can be disclosed. The amendment to section 139 would make clear that confidential information may be disclosed to the police for the purpose of preventing crime. Article 8 is likely to be engaged by such a provision because the information to be disclosed is likely to be personal information, provided in circumstances where the person who obtains the information has a duty of confidentiality. However, any interference with Article 8 is likely to be in pursuit of a legitimate aim, namely the prevention of crime and disorder. The exercise of the power to disclose will be subject to the safeguards of the operation of the Human Rights Act 1998 and the Data Protection Act 1998. The power to disclose is also limited to circumstances where a crime might be prevented, or for a criminal investigation or criminal proceedings or a decision whether to start such an investigation or proceedings. The Government therefore considers that any

interference arising from the disclosure of such information will be proportionate.

Part 7 – National audit

471. *Clause 37(7)* states that the person appointed as the Comptroller and Auditor General ("C&AG") holds the office for a fixed term of ten years. Under the current arrangements, the C&AG is appointed for an unlimited term. At the time of commencement of this Bill, a new C&AG will have been appointed under the current provisions. The practical impact of this clause will be to change the C&AG's term of office from an unlimited term to a fixed ten-year term. *Paragraph 5(2)* of Schedule 8 provides as a transitional arrangement that the officeholder in post will serve a total of ten years from the date of appointment under the current provisions.

472. The change in the term of appointment of a serving C&AG may engage Article 1 of Protocol 1. If so, it is considered that any interference can be justified as being in the public interest of ensuring that the role of the office holder charged with the independent scrutiny of public accounts does not become too closely associated with the personality of a single person. Moreover, the balance between the interests of the state and the individual will be fairly struck because the affected C&AG will have known before appointment that the term of office was being changed to a fixed ten year term. The new C&AG has already given his agreement to the ten year term of his appointment.

473. *Clause 41* relates to the resignation or removal of the C&AG. *Clause 41(2)* provides that Her Majesty may remove the C&AG from office on an Address of each House of Parliament. In the event of this provision being used, it would be up to Parliament to devise a procedure that ensures that the removal of the C&AG from office is carried out fairly, and complies with Article 6 standards. This type of dismissal procedure can be found in other primary legislation, both old and new, including, for example, paragraph 2 of Schedule 8 to the Government of Wales Act 2006, in respect of the removal from office of the Auditor General for Wales. The power would need to be exercised in a manner which is human rights compliant, for which Parliament would need to design a procedure which offers appropriate safeguards. This has parallels with other areas in which Parliament could be said to determine civil rights, such as private bill and hybrid bill procedures. Establishing the details of a fair procedure is properly a matter for Parliament.

474. *Clause 42* sets out provisions that control or restrict the future employment of a former C&AG. Consideration has been given to whether this provision engages Article 1 of Protocol 1. The Government not consider that an employment restriction would engage Article 1 of Protocol 1. Article 1 of Protocol 1 has been applied restrictively, and the future employment prospects of a former C&AG are not considered likely to fall within the category of protected property rights (*R (Countryside Alliance) v Her Majesty's Attorney General* [2007] UKHL 52). In respect of whether Article 8 is engaged, the European Court of Human Rights has held that there is no right to work in a particular profession (see the *Countryside Alliance* case cited above) and therefore the prospects of a claim under this head are not considered to be strong. It is arguable that the restrictions might have a sufficient impact on a former C&AG's ability to establish, develop and maintain

relationships, particularly with public sector workers, such that it would fall within the ambit of Article 8 (see *R (Wright) v Secretary of State for Health* [2009] UKHL 3). The limited extent and duration of the ban, however, and its automatic application (which is therefore without stigma) would significantly moderate any impact.

475. With regard to Article 14, even if a claimant were able to persuade a court that the ban did fall within the ambit of either of Article 1 of Protocol 1 or Article 8 then it would still be necessary to establish that there was a difference of treatment contrary to a prohibited ground. Although it may be argued that the ban is likely to impact on younger applicants because their employment opportunities would be restricted for a longer period than would those of older applicants, it would still be necessary to establish that age is a prohibited ground within Article 14. In any event, the Government considers that a restriction lasting two years could be objectively justified, due to the importance of preserving the visible independence of the C&AG by limiting the scope for conflicts of interest between a former C&AG's work as C&AG and any future employment.

476. While the requirement of *clause 42(2)* has no fixed duration, it is similarly considered to be objectively justifiable and proportionate. The obligation is merely to consult the specified person. That person will be able to provide advice on the propriety of taking up the contemplated office, but will not be able to insist that it is acted on.

477. *Paragraph 10(1)* of Part 2 to Schedule 6 states that Her Majesty may terminate the appointment of the chair of the National Audit Office on an Address of each House of Parliament. As with the power to terminate the C&AG's appointment (see *clause 41(2)*), in the event of this provision being used, it would be for Parliament to devise a procedure that ensures that the removal of the chair from office is carried out fairly, and complies with Article 6 standards. The procedure would need to offer appropriate safeguards. Establishing the details of that fair procedure is properly a matter for Parliament.

CONSTITUTIONAL REFORM AND GOVERNANCE BILL

EXPLANATORY NOTES

These notes refer to the Constitutional Reform and Governance Bill as introduced in the House of Commons on 20 July 2009 [Bill 142]

Ordered, by The House of Commons,
to be Printed, 20 *July* 2009.

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON - THE STATIONERY OFFICE
Printed in the United Kingdom by
The Stationery Office Limited

£x.00

Bill 142–EN 54/4