House of Commons

Constitutional Affairs Committee

Constitutional Reform Bill [*Lords*]: the Government's proposals

Third Report of Session 2004–05

Volume I

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Report, together with formal minutes

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The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

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The Government's proposals and the text of the Bill have changed greatly since our First Report. We include two tables (Table A, page 33 and Table B, page 40) at the end of the Report which set out the most important changes.

Table A: sets out the recommendations for action in the Committee's First Report and action taken subsequently

Table B: sets out the principal amendments to the Constitutional Reform Bill [*Lords*]

1 Introduction

Background

1. On 12 June 2003 the Prime Minister announced a plan to establish a new Supreme Court, to abolish the office of Lord Chancellor and to reform the judicial appointments process in England and Wales. Lord Falconer replaced Lord Irvine as Lord Chancellor and the office of Secretary of State for Constitutional Affairs was created. In July 2003 the Department for Constitutional Affairs (DCA) published the consultation papers: "Constitutional Reform: A Supreme Court for the United Kingdom"[1] and "Constitutional Reform: A New Way of Appointing Judges"[2] and in September it published the consultation paper "Constitutional Reform: reforming the office of the Lord Chancellor".[3]

2. Between October 2003 and February 2004 we inquired into the DCA's proposals leading to publication of our report "Judicial appointments and a Supreme Court (court of final appeal)".[4] The Government introduced the Constitutional Reform Bill [*Lords*] in the House of Lords on 24 February. On the 19 April the Government responded to our Report.[5] Subsequently we took evidence from the witnesses listed on page 46. The purpose of this Report is to update our previous Report in the light of the continuing debate on the proposals since February 2004, in particular changes in Government policy.

3. There have been two main developments since we took evidence in preparation for our First Report: a Concordat between the Lord Chief Justice, on behalf of the judiciary of England and Wales, and the Government; and the legislative process in the House of Lords which has submitted the Constitutional Reform Bill [*Lords*]to unusually extensive scrutiny.

Concordat

4. On 26 January 2004 the Government announced the outcome of negotiations between the Lord Chancellor and the Lord Chief Justice of England and Wales about the transfer of functions following the abolition of office of Lord Chancellor. The product of these negotiations—usually referred to as the Concordat (officially 'The Lord Chancellor's Judiciary-Related Functions: Proposals')[6]—was announced shortly before our First Report was published (on 10 February 2004). In essence, it is a set of principles for allocating responsibilities between the Lord Chief Justice (who under the Bill becomes Head of the Judiciary in England and Wales) and the Minister with responsibility for judiciary related matters. It settles many of the issues relating to the appointment of judges and the independence of the judiciary in England and Wales. Although the Concordat was

1 DCA Consultation Paper, CP 11/03

2 DCA Consultation Paper, CP 10/03

3 DCA Consultation Paper, CP 13/03

4 *Judicial appointments a and a Supreme Court (court of final appeal), First Report of the Constitutional Affairs Committee, Session 2003–04,* HC 48-I and II

5 *Judicial appointments and a Supreme Court (court of final appeal): The Government's response to the report of the Constitutional Affairs Committee*, Cm 6150

6 The text is published at House of Lords, Report of the Select Committee on the Constitutional Reform Bill [HL], Session 2003–04, HL Paper 125, pp 202–224 (Appendix 6)

negotiated and drafted on the assumption that the Minister responsible for judiciary-related matters would be a Secretary of State (who might be a non-lawyer and a Member of the House of Commons), its principles are equally applicable to the continued existence of the office of Lord Chancellor, albeit in modified form.

5. **We welcome the Concordat. It settles some of the outstanding issues of detail which were not fully addressed in the Government's consultation papers.**

6. On behalf of the Judges' Council, Dame Mary Arden has argued that the Concordat should be given some special recognition, even entrenchment, in the Bill. While agreeing that the Concordat was a constitutionally significant document, the House of Lords Select Committee on the Bill did not believe that entrenchment was necessary.[7]

7. **We agree: many of the principles set out in the Concordat are reflected in the Bill. Further recognition, even entrenchment, is unnecessary. The Concordat will remain a document of constitutional importance.**

Legislative process

8. After the introduction of the Constitutional Reform Bill [*Lords*] into the House of Lords there was a series of statements and debates on the proposals in the Bill. From February to October the Bill was debated extensively in the House of Lords. This included the highly unusual step of referral of the Bill to a Select Committee, which reported on 2 July 2004 with an amended Bill. The amended Bill was given extensive examination during subsequent stages on the floor of the House. As part of the arrangements for scrutiny, the House of Lords agreed to carry over the Bill into the next Session.[8]

9. The House of Lords Select Committee approached their task of considering the Bill in a consensual way, without taking votes. Many Government amendments to the Bill were agreed to. It was clear from the outset that on three of the main planks of the Bill—abolition of the office of Lord Chancellor, establishment of a Supreme Court and disqualification of judges from sitting and voting in the Upper House (then Clause 94)—there was a division of opinion. On these three issues the report of the Lords Select Committee on Bill sets out the rival arguments based on the written and oral evidence received. There was broad agreement that a Judicial Appointments Commission for England and Wales was desirable.

10. Despite disagreement over the formal qualifications and characteristics of the minister responsible for judiciary related matters (should he be called 'Lord Chancellor', be a senior lawyer and a member of the Upper House—or be a mainstream Secretary of State?), there was broad acceptance that the minister should no longer be head of the judiciary in England and Wales, or sit as a judge, and that the terms of the Concordat should be fulfilled

7 *ibid*, para 85; and see *ibid* Qq 713, 726

8 HL Deb, 22 March 2004, col 472; the debate about the reforms has also been informed by recent academic literature, including Andrew Le Sueur (ed) *Building the UK's New Supreme Court: National and Comparative Perspectives* (OUP, 2004) and Derek Morgan (ed) *Constitutional Innovation: the Creation of a Supreme Court for the United Kingdom: Domestic, Comparative and International Reflections* (LexisNexis 2004) (also published as a special issue of the journal *Legal Studies*, vol 24, March 2004)

11. There was significant debate and comment on the Bill outside the House of Lords. There was a further debate on 27 March 2004 in Westminster Hall on this Committee's Report. Between March and May the Justice 2 Committee of the Scottish Parliament conducted an inquiry into the Bill and published a Report.[9] On 1 July 2004 the Commission for Judicial Appointments published a review of the High Court 2003 competition. On 13 October 2004 DCA published a consultation paper: "Increasing Diversity in the Judiciary" (responses were requested by 21 January 2005).[10]

12. In our First Report we emphasised that the way in which these complex and fundamental proposals were announced, as a part of a Cabinet reshuffle and without consultation or advice, had created anxieties amongst the most senior members of the judiciary and was felt by some supporters of the changes to have been unhelpful in presenting the case in favour of them.[11] The consultation process had been too short and the legislative timetable as originally planned was too restrictive to deal with changes which were so far reaching in their effects. We recommended that the Government proceed with the Constitutional Reform Bill on the basis of its being draft legislation—in particular in respect of the proposals for a new court of final appeal. [12]

13. **We believe that our previous inquiry, the Lords Select Committee and the Carry Over procedure have ensured that there has, after all, been proper examination of the Government's proposals set out in the Bill. In practical terms these processes gave the Bill the scrutiny that a draft Bill would expect to receive.**

14. **The Bill was introduced into the House of Commons on 21 December 2004 and received its Second Reading on 17 January. This interval did not allow us sufficient time to report to the House in time for the Second Reading debate, which is regrettable.**

Amendments in the Lords

15. The Bill has been extensively amended since its introduction in the House of Lords. The Select Committee agreed to over 400 amendments to the Bill—all moved by the Government. The principal changes to the Bill which were made by the House of Lords are set out in the Table below (see Table B).

16. Debate concentrated on several important issues:

- whether the office of Lord Chancellor should be retained in some form; and if so whether the holder must be a senior lawyer and member of the Upper House
- how Ministers' responsibility to uphold the rule of law should be expressed
- the principle of whether a Supreme Court should be established
- resourcing and administration of the Supreme Court.

9 Justice 2 Committee, Fourth Report, 2004

10 DCA Consultation Paper, CP 25/04

11 *op cit*, paras 14 and 15

12 *op cit*, paras 188 and 193

17. We discuss the outstanding issues in detail below.

2 Office of the Lord Chancellor

18. We said in our First Report:

> "Whoever carries out the functions of the office of Lord Chancellor will be in charge of the Court Service and will play a central role in the administration of justice. Part of that role is the protection of the judiciary from political pressure in Cabinet and, when necessary, in public. There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet and who is usually at the end of his career (and thus without temptations associated with possible advancement) and on the other hand a minister who is a full-time politician, who is not bound by any judicial oath and who may be a middle-ranking or junior member of the Cabinet with hopes of future promotion".[13]

19. The Select Committee in the House of Lords was evenly divided between those who supported retention of the office of Lord Chancellor in modified form and those who wish to abolish the office entirely. When the Bill was recommitted to a Committee of the whole House, the Government suffered a significant defeat. After a wide-ranging debate on the question of whether the office of Lord Chancellor should be retained or not, the House voted to retain the office by 240 votes to 208. Further consequential amendments to leave out 'Secretary of State for Constitutional Affairs' and insert 'Lord Chancellor' were agreed to. On Report, the Government brought forward amendments to give effect to the decision of the House of Lords that the office of Lord Chancellor should be retained.

20. The mover of the motion upon which the debate was based, Lord Kingsland (Conservative frontbench spokesman on legal affairs), made clear that the amendment was not designed to return to an 'old-style' Lord Chancellorship in terms of the functions performed by the holder of that office. The Conservatives accepted "the new architecture of the Bill". In other words, it has become common ground between the three main political parties that the Lord Chancellor should no longer hold judicial office or be head of the judiciary of England and Wales, that his relationship with the judiciary of England and Wales would be governed by the Concordat, and that the new Judicial Appointments Commission would have responsibilities in relation to the appointment of judges.

21. On 11 October Lord Falconer said:

> "… we will ensure that the Bill is amended as follows: the Lord Chancellor will perform those functions that the Bill in its present form currently allocates to the Secretary of State for Constitutional Affairs; the Great Seal will remain with the Lord Chancellor; the Lord Chancellor will retain the current pension and salary arrangements of his office. In bringing forward such amendments our purpose is to ensure that the Bill gives effect to the will of this place. But, of course, that does not preclude the Government from seeking to restore the position of the Secretary of State for Constitutional Affairs in another place".[14]

13 *op cit*, para 13

14 HL Deb, 11 October 2004, col 12

22. When we asked him to set out Government policy relating to this clause—and in particular, whether the Government would seek to reverse this change—the Lord Chancellor said:

> "The comments I made on 11 October were in the context of having been defeated at the committee stage. It is necessary, in parliamentary terms, to respect the effect of what has been decided. The clear intention of the House of Lords in that vote was to say that the office of the Lord Chancellor should not be abolished. We must respect that in an amendment we are bringing forward for the purposes of the House of Lords. Will we seek to reverse it in the Commons? Plainly, that is a matter for the Commons. The aim is to seek to deliver the reforms that were outlined in June 2003. Those reforms are about the Lord Chancellor no longer sitting as a judge, the Lord Chancellor no longer being the head of the judiciary, the concordat with the judges, the Judicial Appointments Commission and the Supreme Court. We believed that the best way to deal with that was by the abolition of the role of Lord Chancellor. That may remain the best way to do it, but if there are alternatives which can deliver the reforms sought, which I have just outlined, obviously we would consider them".[15]

At Second Reading the Government did not signal an intention to reverse the Lords' decision to retain the office of Lord Chancellor, albeit in modified form.

23. In the light of these amendments, the remaining stages of the Bill in the Lords have proceeded on the basis that the minister responsible for judiciary related matters will be the Lord Chancellor rather than a Secretary of State.

The new role of the Lord Chancellor

24. Whether the minister responsible for judiciary related matters is to be called the Lord Chancellor or a Secretary of State, it is clear that his functions will in several important respects be different from those formerly carried out by Lord Chancellors. He will no longer be a judge or be Head of the Judiciary in England and Wales. In relation to appointments, his powers will be far more circumscribed than before as the Judicial Appointments Commission will have the principal responsibility for selecting candidates for the bench (though the minister will retain a power to reject a selection, or to ask the Commission to reconsider their choice, in some circumstances). In other important respects, however, there will be a continuity of functions. The minister will remain the ministerial head of a major Department and a member of the Cabinet. He will retain a role (shared with the Lord Chief Justice of England and Wales) in relation to judicial discipline. He will continue to be the "constitutional conscience" of Government: the Bill imposes an express duty to have regard to the need to defend the independence of the judiciary (and not just to uphold it, as other ministers are bound to do); and it recognises "the Lord Chancellor's existing constitutional role" in relation to the rule of law (a matter discussed below). And although the minister will no longer be a judge at the Cabinet table, representing the views of the judiciary to his fellow ministers, nevertheless the Bill places upon the minister an express duty to have regard to "the need for the public interest in

15 Q 277

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

The name of the office

25. There was strong support in the House of Lords for retention of the name of Lord Chancellor. Such an approach has the advantage of familiarity in underlining the role of the holder of the office and serves to differentiate the Lord Chancellor from other Cabinet members.[16]

Qualifications for the office

26. Two qualifications for holding the office of Lord Chancellor have been included in the Bill: that the Lord Chancellor should have been the holder of high judicial office or have been a practising lawyer for at least 15 years[17]; and that "No person is qualified to be Lord Chancellor unless he is a member of the House of Lords".[18]

A member of the Lords

27. The Select Committee of the House of Lords reported a division of opinion on the question of whether the Minister responsible for judiciary-related matters should be a member of the House of Lords or, at the discretion of the Prime Minister, of either the Commons or the Lords.[19] This question is essentially about two different types of vision for what the office will entail. Is there to be a politician who is a Minister like any other and who will have responsibility for administration of the court system? The size and budget of the DCA (now over £3 billion) has grown considerably in recent years and it might be thought desirable that its Minister be answerable to the House which controls supply. Or is there to be a figure who is at one remove from mainstream political life, who can act as a liaison between the judiciary and the Government and seek to uphold certain key constitutional principles at the core of Government (including judicial independence and the rule of law)? This goes to the heart of what the duties of the office holder will be.

28. **Assuming that the House retains the Bill to an extent in the format in which it arrived from the House of Lords, on balance we prefer to keep the office of Lord Chancellor and its distinctive status, different from that of all other members of the Cabinet, because as we said in our earlier report when contrasting the role of the Lord Chancellor with other ministers, the Lord Chancellor "has a special constitutional importance enjoyed by no other member of the cabinet and … is usually at the end of his career (and thus without the temptations associated with possible advancement)".**[20] **Although it may be more likely that someone in the House of Lords as at present constituted has the seniority and lack of aspiration towards further office which we**

16 Although some Members of the House of Lords Select Committee were also attracted to the title Minister of Justice; *op cit*, para 46

17 Clause 3; and see HL Deb, 11 October, col 34; HL Deb, 7 December, col 779

18 Clause 2; and see HL Deb, 7 December, col 748

19 *op cit*, para 428

20 *op cit*, para 13

considered desirable, it is by no means certain, and there will be suitable candidates for the post in both Houses. There does not, therefore, seem to be a compelling argument for insisting that the Lord Chancellor must be a member of the Upper House.[21]

A lawyer

29. The Select Committee of the House of Lords also reported a division of opinion on the question of whether the Minister should be a senior lawyer and those who considered that there was no need for the office-holder to hold a legal qualification. Accordingly, it made no recommendation.[22]

30. **The Lord Chancellor will have key roles in relation to the judiciary and in judicial independence, the rule of law, judicial appointments and discipline. The principal responsibility for judicial appointments will be with the Judicial Appointments Commission and for judicial discipline with the Lord Chief Justice. It may be an advantage for the holder of the post of Lord Chancellor to be a senior lawyer.**

Debate on the rule of law

31. One consequence of the decision that the Lord Chancellor will no longer sit as a judge or be head of the judiciary is that it ceases to be appropriate for him to take the judicial oath. The House of Lords decided that an alternative form of oath should be taken and accordingly the Promissory Oaths Act 1868 will be amended to insert a new oath to be sworn by Lord Chancellor.[23] Although this provides some guarantee that the Lord Chancellor will act as keeper of the Government's constitutional conscience, the House of Lords was strongly of the opinion that more was needed.

32. The Select Committee of the House of Lords unanimously agreed "without difficulty" that it was desirable for the Bill to make reference to the rule of law. It also agreed that the reference to the rule of law should "replicate, as far as possible, the responsibilities in regard to the rule of law currently discharged by the Lord Chancellor" and that he should continue to have a special role in relation to the rule of law within the Cabinet as a result of his responsibility for the justice system.[24] However, there was some difficulty with finding a suitable form of words on which members of the House of Lords could agree. The essential aim was to give statutory expression to basic constitutional principles of the British constitution. A form of words, agreed following cross-party negotiations, was eventually inserted as Clause 1 of the Bill: "This Act does not adversely affect—(a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle".

21 Nothing in the use of the word "Lord" necessarily indicates membership of the House of Lords: eg. Lord President of the Council and Lord Privy Seal have frequently been members of the House of Commons

22 *op cit*, para 425

23 HL Deb, 7 December, col 802

24 *op cit*, para 429

Speakership of the House of Lords

33. One of the main duties of the Lord Chancellor is to provide over sittings of the House of Lords. The House of Lords is discussing the appointment of a new office holder to preside over its proceedings. The Constitutional Reform Bill makes no reference to this aspect of the Lord Chancellor's duties (apart from a tangential reference to allow any changes in the duties of the Lord Chancellor as the person who presides over the House of Lords to take effect easily).[25] The Select Committee of the House of Lords made no comment about this subject on the basis that it was "not a statutory matter".[26] **We consider it to be for the House of Lords to decide who should sit in the Woolsack, but that it is reasonable to assume that, if the Bill is passed, the Lord Chancellor, who has responsibility for running a large government department, should not have that role.**

Amendments to the Bill

34. The Lord Chancellor may by order make provision for the transfer, modification or abolition of functions of the Lord Chancellor.[27]

35. The Delegated Powers and Regulatory Reform Committee has commented on this amendment:

> The Committee observes that the power, though limited as respects the functions which it may affect ("existing functions"), is not limited as to the time of its exercise; it could be used in the future for purposes other than those arising out of the current redistribution of the Lord Chancellor's functions. It appears therefore to go wider than may be necessary to address the difficulties described in the memorandum. The Committee realises that the affirmative procedure will apply to an order abolishing an existing function conferred by an Act, but the negative procedure would apply to the abolition of functions conferred by other instruments (including by statutory instrument subject to affirmative procedure).[28]

36. **We agree that the provisions to allow amendment of the primary legislation by statutory instrument are undesirable, and we hope and expect that the Government will bring forward further amendments in the House of Commons to remedy this point.**

25 See Clause 15 and Schedule 5

26 *op cit*, para 437

27 HL Deb, 20 December, col 1544 and Clause 16

28 House of Lords Fifth Report of the Select Committee on Delegated Powers and Regulatory Reform, Session 2004–05, *Constitutional Reform Bill [HL]—Government amendments for Third Reading*, HL Paper 20, para 3

3 New Supreme Court

37. In our First Report, we said that both those in favour of the change and those against were united in emphasising that the present system was one which worked. The arguments for change were about principle and perception.[29]

38. There has been much debate about the principle of whether there should be a new Supreme Court. In the end, the House of Lords agreed that there should be a new Supreme Court. This House has given the Bill a Second Reading and so we refrain from commenting on the principle behind the Bill but confine ourselves to observations about practical arrangements for the new court.

Jurisdiction of the new court

39. In our First Report we said that the legislation will need to make clear the jurisdiction of the new court. It will need to establish the extent to which it is a United Kingdom court and the extent to which it is a final court of appeal serving each of the United Kingdom's three jurisdictions. It has been pointed out that the Treaty of Union specifically precludes appeals from a Scottish court to an English court. This point was not properly examined in the Government's consultation paper.[30]

40. The Government fulfilled a commitment made to the House of Lords Select Committee, and underlined in the recommendation at paragraph 283 of the Select Committee's report, to bring forward an amendment to safeguard the separate jurisdictions to be exercised by the Supreme Court in respect of Scottish, Northern Irish and English law. The concern which the amendment is designed to meet is that the establishment of the Supreme Court would set off a process of erosion of the distinctions between the separate and quite distinctive legal systems of England and Wales, of Scotland and of Northern Ireland—with the possible effect of making the smaller jurisdictions' traditions more like those of England and Wales. The new clause (Clause 38) introduced by this amendment sets out to forestall any such possibility.

41. **Clause 38 (1) is a clear statement that nothing in this part of the Bill is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.** Subsection (2) states that a decision of the Supreme Court on appeal from a decision of a court of any part of the United Kingdom is to be regarded as the decision of a court of that part of the United Kingdom, except in relation to a devolution matter, which is dealt with in subsection (3).[31] **This entirely satisfies the concern expressed by us in paragraph 27 of our First Report.**

42. In paragraphs 29 to 32 of our First Report we discussed the potential difficulty relating to the treatment of devolution matters by the new Supreme Court. We noted the objection of the Law Lords to the extension of the jurisdiction of the Supreme Court, making it the

29 *op cit*, para 23

30 *op cit*, para 27

31 See HL Deb, 20 December, col 1597; and House of Lords, Report of the Select Committee on the Constitutional Reform Bill [HL], Session 2003–04, HL Paper 125, para 279

final arbiter of devolution issues arising in the devolved jurisdiction. The debate has developed since we wrote our Report and it now appears that there is consensus that devolution matters should be dealt with by the Supreme Court. **The Select Committee in the House of Lords agreed with a proposal to transfer jurisdiction in devolution matters from the Privy Council to the Supreme Court.**[32] **We are content that the new Supreme Court should exercise this jurisdiction.**

43. Replicating the current jurisdiction of the Appellate Committee of the House of Lords, the Supreme Court will hear civil appeals from the Court of Session but will not deal with Scottish criminal appeals: the High Court of Justiciary will remain the highest court for Scottish criminal cases. Some commentators point out that these arrangements contain anomalies. Appellants in Scottish civil cases will be able to bring appeals to the Supreme Court without needing to seek permission of either the Court of Session or the Supreme Court itself (unlike their counterparts who are involved in civil claims in England and Wales or Northern Ireland). In Scottish criminal cases defendants will have no possibility of appeal to the Supreme Court, unless the appeal raises a "devolution issue" (usually in the form of an allegation that the prosecution process was not conducted in a way that is compatible with Convention rights), in which case the Supreme Court can deal with the matter. In the debates about the Supreme Court's jurisdiction there has, however, been little appetite for change. The House of Lords Select Committee concurred with the views of the Justice 2 Committee of the Scottish Parliament that no leave requirement should be imposed on Scottish civil appeals to the Supreme Court, and saw no need to confer upon the new court a general jurisdiction over Scottish criminal matters. Indeed, many view these issues as significant to the maintenance of Scottish law as a distinct entity.[33] They were not addressed when the Government first announced its proposals and we wanted the timetable for decisions on the Supreme Court to allow for proper resolution and discussion of them in the Scottish Parliament. **The Scottish Parliament has now had a full opportunity to debate the proposals contained in the Bill. The new Clause, which we describe above, protects the position of Scots law.**

Membership of the House of Lords

44. In our First Report we said:

> "From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers".[34]

In its Response to the Report the Government said:

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32 *op cit*, para 456

33 See *Judicial appointments and a Supreme Court (court of final appeal)*, First Report of the Constitutional Affairs Committee, Session 2003–04, HC 48, para 39

34 *op cit*, para 80

> "The Government agrees with the Committee's recommendations that all Justices of the Supreme Court should be appointed to the House of Lords upon retirement".[35]

We note that the Government has agreed with us on this question.

Selection and appointment of members of the court

45. The procedures under which members of the Supreme Court will be appointed are set out in Clauses 22 to 28; Schedule 7 defines who will sit on the selection commission to appoint judges to the Supreme Court. The selection and appointment of members to the new Supreme Court is an issue of overwhelming importance. The reputation of the new court, like its predecessor, will rest on the calibre of the judges who serve on it. We said in our First Report that the Constitutional Reform Bill will need to make clear provision for the arrangements relating to representation of the various parts of the United Kingdom. It will need to set out clearly the principles under which members of the new court are appointed.[36] Although the new court is likely to hear relatively few cases from Scotland and Northern Ireland, it will need expertise in the laws and understanding of the society in all parts of the United Kingdom; there must be an equal sense of ownership of the new court in all parts of the United Kingdom. The Bill does not expressly provide that there be two (or three) judges with experience of Scots law and one judge with experience of Northern Ireland law among the 12 members of the court. Clause 24(8) provides that "In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom". **We agree with the House of Lords Select Committee on the Bill that "It should remain a convention that … at least two Supreme Court Justices should have been Scottish judges".**[37]

46. In our First Report, we drew attention to arrangements needed to enable the Supreme Court selection commission (which will meet only sporadically) to have continuity of practice and to develop recruitment policy.[38] In his evidence to us, **the Lord Chancellor told us that "It is envisaged that one or more of the commissions in the three jurisdictions will be asked to supply secretarial and other support on an ad hoc basis when a vacancy is to be filled".**[39] **We found this to be "an insufficient answer" in February 2004, and twelve months later the picture is no clearer.** The matter was not discussed in any detail in the report of the House of Lords Select Committee on the Bill or subsequently on the floor of the House of Lords.

47. In other respects, the proposed selection arrangements have changed significantly since the Bill was first introduced. The House of Lords Select Committee on the Bill made amendments (moved by the Government) designed to elucidate the respective roles of the selection commission, the Lord Chancellor, the devolved institutions and the senior

35 *op cit*, para 22

36 *op cit*, para 47

37 *op cit*, para 171

38 *op cit*, para 56

39 HC 48–II, Ev 108, para 3(b)

judiciary. The arrangements in the Bill as introduced to the House of Commons provide for the following steps:

a) When a vacancy arises, the Minister will convene a "selection commission".

b) The selection commission will have five members: generally, the President of the Supreme Court (who will normally be its chair); the Deputy President; and one member from each of the judicial appointment commissions in England & Wales, Scotland and Northern Ireland nominated by the Minister on the recommendation of the relevant commission. One of the members drawn from the appointments commissions must be non-legally qualified. The Bill as originally introduced did not guarantee any lay involvement in the process.

c) The selection commission determines the process to be applied.

d) Selection must be on merit. Regard must also be had to the need for the Supreme Court to have knowledge and practical experience of each of the legal systems and to any guidance given by the Minister.

e) The selection commission must prepare a report for the Minister, stating among other things the name of the person who has been selected.

f) In a selection process, there will be two rounds of consultation. First, by the selection commission and second (after a candidate has been recommended) by the Minister. Those to be consulted include members of the senior judiciary and the heads of the devolved administrations.

g) The Minister may notify the selection to the Prime Minister, reject the selection, or require the commission to reconsider its selection. The Prime Minister transmits the name of the selected judge to the Queen, who makes the formal appointment.

48. One of the most significant changes to the Bill was a change to the number of candidates to be selected by the commission (and, consequently, the breadth of discretion left to the Minister to choose who should be appointed). In its original form, Clause 21 (3) (a) of the Bill provided for the selection committee to prepare a list of names for the Minister which "must consist of at least 2 and no more than 5 candidates." An amendment was announced by the Government at a very early stage, following consultations with senior members of the judiciary, that only a single name should be selected by the commission. Views differ as to whether in any appointment round it is possible confidently to identify a person who is objectively "the best" candidate—or whether there will more likely be several candidates all of whom meet the criteria of excellence.

49. An alternative approach to the stark choice between a shortlist or a single name would be for the selection commission to decide for itself, having surveyed the field of potential candidates for each vacancy, whether to provide the Minister with one or more names. This would recognise that in relation to some vacancies there may clearly be just one person who is singularly well-qualified (this may be particularly so where the commission is seeking to appoint a person from the smaller jurisdictions of Northern Ireland and Scotland). In other cases there may well be two or more equally appointable candidates and

here it might be thought appropriate for the Executive branch of government to have a real involvement in the choice.

50. **We recommend that the Bill be amended to allow the selection commission, if it so chooses, to decide whether to provide the Minister with a choice of more than one name.** We said in our First Report:

> "The views of Judges on the role of the Supreme Court, approaches to broad questions of law, especially constitutional law and human rights and law reform are all matters of legitimate public interest. A constructive dialogue between Parliament and the UK's most senior judiciary need in no way undermine judicial independence. The Supreme Court itself has much to gain from such dialogue, especially if senior members of the judiciary cease to sit as peers in the House of Lords."[40]

The decisions of the House of Lords have created a Commission likely to be dominated by judges, which in our view makes parliamentary oversight even more important. We deal with this further in paragraph 77 below.

51. In our First Report, we said that vacancies in the new Court should be publicised and open to application in line with most other public service appointments, although it would still be necessary for some element of active searching for candidates to take place.[41] We regret that there is no provision for advertising appointments included in the Bill. **If such amendment is not made to the Bill, we hope that any selection commission appointed under the Bill will as a matter of course publicise and leave open to application posts on the Supreme Court bench.**

Court administration

52. Originally, the Government proposed that the Department for Constitutional Affairs should provide the secretariat and administrative support for the Supreme Court. In our First Report, we said:

> The Department for Constitutional Affairs is not the appropriate organization to run the new court because it is too associated with the England and Wales court system and because giving the Government control over the administration of the new court could offend against the principle of judicial independence.[42]

53. **We are pleased to see that the Bill has been amended to meet our concerns about the independence of the administration and budget of the Supreme Court.** As the Bill now stands, the Supreme Court will be an independent statutory body with its own estimate within the overall DCA departmental expenditure limit and, as a result of a separate Estimate, independent financing from the Consolidated Fund through the normal supply process. The Chief Executive of the Supreme Court will be a separate accounting officer in right of the court itself and not a sub-accounting officer under the DCA Permanent

40 *op cit*, para 86

41 *op cit*, para 64

42 *op cit*, para 100

Secretary. The Lord Chancellor will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it to the Treasury.[43]

54. This point is extremely important. We took a considerable amount of evidence on this from Professor I R Scott, the Chief Justice of New Zealand and other members of the recently established New Zealand Supreme Court and it featured as a major part of our inquiries during our visit to the Australian High Court and the new Supreme Court of New Zealand.

New court building

55. The new Supreme Court needs a building which is able to reflect the importance of the institution which it houses.[44] The proposal of the former Middlesex Guildhall as the location for the Supreme Court has the potential to meet this requirement. This has not been an easy decision because the choice of building involves many complex issues. We believe that these issues should continue to be the subject of the fullest consultation with the Law Lords. **We are confident that this building, if chosen, will have the potential to be an excellent base for the new court of final appeal for the United Kingdom providing that it is adapted to allow the new court to function as a modern appellate court, as the judges have urged.**

56. There are substantial extra capital and recurrent costs following the Government's decision to change the Supreme Court arrangements, but these are a necessary consequence of the creation of a Supreme Court which is separate from the legislature.

Interim arrangements until the building is ready

57. As things stand now, it seems certain that there will be considerable delay before the Supreme Court can move into its new premises; the Government anticipates that the court's first sitting will be in 2008.[45] In our First Report, we said that because the principal argument for establishing a Supreme Court was that the highest court should be seen to be separate from the legislature, it seemed perverse to implement the change in a way which leaves many of the same judges sitting in the House of Lords doing the same job in the same place, possibly with the same staff seconded by the House of Lords. We recommended that if more time was needed to establish the Court as a distinct body, the timing of its introduction should be adjusted accordingly. Such an important change should not be rushed.[46]

58. The Bill now says that Part 3 of the Bill shall not be brought into force unless the Lord Chancellor "is satisfied that the Supreme Court will at that time be provided with accommodation in accordance with written plans that he has approved" and he may "approve plans only if, having consulted the Lords of Appeal in Ordinary holding office at

43 See HL Deb, 14 December, col 1236; and see also House of Lords, Report of the Select Committee on the Constitutional Reform Bill [HL], Session 2003–04, HL Paper 125, para 256–268

44 See our remarks in para 112 of our First Report (*op cit*)

45 HC Deb, 14 December 2004 col WS71

46 *op cit*, paras 111 and 192

the time of the approval, he is satisfied that accommodation in accordance with the plans will be appropriate for the purposes of the Court".[47]

59. **We note with approval the acceptance of our recommendation that implementation of this part of the Bill should not take place until the new Supreme Court could sit in its own building, thereby making clear the separation between the highest court of appeal in the United Kingdom and the legislature.**

47 Clause 120; and see HL Deb, 14 December, col 1230; and also HC Deb, 14 December, col WS71

4 Judicial Appointments

60. Part 4 of the Bill, which relates to Judicial Appointments and Discipline, is the part of the Bill which has attracted the most widespread support in principle. Until recently the system of appointing judges was based on a "secret soundings" system which depended on private communications about possible appointees. The system, which is now a more formal consultative system, is no longer adequate. This is partly because the legal profession is too large for those who are normally consulted properly to know the full range of possible candidates. It is also wrong as a matter of principle for a system of such important appointments to depend on secrecy. The confidential consultation system is not open to any form of public accountability.

Diversity

61. If the judicial system is to retain the confidence of the public, then it must be seen to be open to all citizens of United Kingdom, whatever their background or personal circumstances. In our First Report we said:

> "The Government must make it a clear objective of the new Judicial appointments Commission to ensure that active efforts of the kind made by Lord Irvine to promote diversity will be continued in the future."[48]

62. We also said:

> "We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments."[49]

63. The Bill as originally introduced placed no statutory duty on the JAC to promote diversity. The issue was considered by the House of Lords Select Committee on the Bill. The Committee agreed that diversity among the judiciary should be promoted and that this could be achieved without diluting the principle of merit.[50] The Committee was however unable to agree on whether there should be an express statutory duty placed on the JAC to engage in a programme of action to promote diversity, in ways similar to that required of the Northern Ireland Judicial Appointments Commission by the Justice (Northern Ireland) Act 2002. As a compromise, the Committee amended the Bill so as to make express reference to the "encouragement of diversity in the range of persons available for selection" as one of the matters on which the Lord Chancellor may provide guidance to the JAC. This falls short of placing an express duty on the Judicial Appointments Commission to engage in a programme of action to promote diversity. **We believe that the Bill should place a duty on the Judicial Appointments Commission of England and Wales to encourage diversity in the range of persons available for selection. There is a**

48 *op cit*, para 125

49 *op cit*, para 146

50 *op cit*, para 346

precedent for this in the duties placed on the Northern Ireland Judicial Appointments Commission.

Merit

64. A successful approach to ensuring that there is a greater diversity in judicial appointments requires leadership. In the past, the Lord Chancellor has provided this, as we have acknowledged Lord Irvine did during his tenure of office.[51] The new Judicial Appointments Commission must provide this leadership by implementing strategies to widen the field of applicants for judicial office. Merit will remain the criterion for appointment, and it should be for the independent Commission, not the Minister, to define merit. (Paragraph 159)

65. **We note with approval that the Bill has been amended to remove the Minister's power to define merit**.[52]

Confidentiality

66. In our First Report , we noted that:

> ".. [any] system of appointment must be transparent and any discretion exercised by the Secretary of State will need to be open to challenge in the first instance by way of appeal to the Judicial Appointments and Conduct Referee. Under the current proposals the Secretary of State will be required to give reasons for any choice made. Although it is likely that these reasons will, in the first instance, be given in confidence to the Committee, they may well become public knowledge as a result of an appeal to the Referee. Although we do not regard this as a fatal objection to giving the Secretary of State a choice of names to appoint, it raises practical difficulties, mentioned by witnesses, relating to attracting good candidates who may be put off from applying by the prospect of too public a refusal."[53]

67. **Since the Bill now provides for only one name to be submitted to the Lord Chancellor and for greater confidentiality we regard this concern as having been dealt with by the Bill in its amended form**.[54]

Judicial Discipline

68. In our First Report we said:

> "We regard it as self-evident that any powers to discipline judges or decision to promote them should be within a system that the judiciary and public believe preserves judicial independence. The Lord Chancellor has always played a central role in reaching a compromise between the conflicting imperatives of maintenance of discipline and judicial independence. There is—and always has been—a clear

51 *op cit*, para 125

52 See Clause 57, from which the original ministerial power to define merit has been removed

53 *op cit*, para 132

54 See Clause 111; and see also HL Deb, 20 December, col 1603

> tension between the right of judges to hold office during good behaviour and the need to ensure proper standards are maintained. It is a reflection of the success of the system that up to now so few cases have caused serious controversy. Any new system of discipline will need to be firmly within the control of the judiciary in individual cases, and we believe that the Lord Chief Justice should be the person primarily responsible for it. The relevant provisions of the Bill will need to be very carefully examined."[55]

69. **We note that the Bill allocates dual responsibility for discipline to the Lord Chancellor and the Lord Chief Justice. We believe that the Concordat provides an appropriate framework for these responsibilities.**

Composition of the Commission

70. In the course of the inquiry which led up to our First Report we received a great deal of evidence relating to the composition of the Judicial Appointments Commission. Part of this evidence related to the involvement of both parts of the legal profession in the work of the Commission. We said:

> "We recognise that members of the Commission should not regard themselves as representing a narrow sectional interest. However, it would be strange if leading members of the two branches of the legal profession were not included among the Commission's members."[56]

71. We also received a good deal of evidence relating to the balance between members of the Commission who were judges and members who were lay people. There was no identifiable strand of generally agreed opinion on the precise balance between lay and judicial or legal members. We noted that the Appointments Commission in Scotland had worked successfully without a majority of judges or even of lawyers.[57]

72. Under the terms of the Bill as it now stands, there will be 15 members of the JAC (including the Chairman, who holds an office distinct from the other 14 Commissioners). There will be six non-lawyers (including the Chairman); five members who are professional judges; two members from the legal professions; a lay magistrate; and a tribunal chairman, tribunal member or arbitrator. The Bill has been amended to permit the Lord Chancellor by order, with the agreement of the Lord Chief Justice, to increase the number of Commissioners.

Chair of Commission

73. In our First Report, we said:

> "Notwithstanding the arguments in favour of a lay Chair, we believe that the Commission should be chaired by a judge." [58]

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55 *op cit*, para 165

56 *op cit*, para 175

57 *op cit*, para 182

58 *op cit*, para 185

74. **The Bill in its present form provides that the Judicial Appointments Commission will be chaired by a lay person. We understand that this provision has the support of the judiciary. Viewed in the context of the Concordat, which adequately preserves judicial independence, and of the strong judicial element in the Judicial Appointments Commission we now believe that a lay chair is acceptable.**

5 Relations between the judiciary and Parliament

75. One of the most important (although perhaps least thought through) effects of the proposed reforms contained in the Bill is the impact on the relations between the judiciary and those in political life of the change to the office of Lord Chancellor, the removal of the Law Lords' work to an institution outside Parliament, and the disqualification of all senior judges from speaking and voting and in the Upper House.[59] Some senior judges (including Lord Bingham, the Senior Law Lord) take the view that it is constitutionally inappropriate for them to take part in parliamentary debates. Others (including Lord Woolf, the Lord Chief Justice of England and Wales) have made important interventions in debates about the judiciary and the administration of justice.

76. Lord Woolf is clearly aware of the need for the judiciary to have access to Parliament and moved an amendment, in his name and that of Lord Cullen of Whitekirk (the head of the Scottish judiciary), to allow the chief justice of any part of the United Kingdom to lay before Parliament written representations on matters of importance relating to the judiciary or the administration of justice. This is now in Clause 6. **We regard the provisions of Clause 6 as a useful mechanism for senior judges to be able to communicate directly to Parliament.**

77. It is necessary for the operation of the courts in England and Wales and the new Supreme Court of the United Kingdom to be accountable to the public and Parliament in appropriate ways. Well-designed mechanisms of accountability need in no way impinge on the important principle of judicial independence. On the contrary, public confidence in the administration of justice is likely to be increased by parliamentary scrutiny and requirements that the courts provide timely and useful information to the public about their work. **We welcome the continued use of evidence sessions of our Committee as an opportunity for members of the judiciary at all levels to advise Parliament on the workings of the judicial system and on issues of policy.**

Supreme Court annual report

78. In our First Report we said in relation to the Supreme Court:

> "As a minimum we would expect the new court to provide an Annual Report to Parliament of the use of the money in its budget and a description of its work over the course of the year. If necessary, Parliament should be ready to hold hearings relating to the financial support required by the new court. The general work of the Judicial Appointments Commission responsible for recommending appointments to the new court will also fall to be examined by this Committee (though not normally its conduct in relation to specific appointments)."[60]

59 Among the senior judges who hold peerages, but are not Lords of Appeal in Ordinary, are Lord Woolf (Lord Chief Justice of England and Wales), Lord Phillips of Worth Matravers (Master of the Rolls), and Lord Cullen of Whitekirk (Lord President of the Court of Session and thus head of the Scottish judiciary). Sir Brian Kerr, who was appointed Lord Chief Justice of Northern Ireland in January 2004, does not hold a peerage

60 *op cit*, para 81

79. The original Bill, as introduced by the Government to the House of Lords, provided that the Minister would prepare an Annual Report for Parliament. **We note with approval the amended provision in Clause 51 under which it is the Supreme Court Chief Executive who must prepare an Annual Report, which the Minister will lay before Parliament**. Copies of the report will be sent formally to the devolved administrations. A well-written and informative Annual Report has the capacity not only to explain the work of the court to the public, but to make known any concerns that members of the Court may have relating to the operation of the court and perhaps also issues of broad legal policy and the general development of the law. **The Annual Report will provide the opportunity to invite members of the court and the Chief Executive to appear before a parliamentary select committee, and from time to time might be the subject of a debate on the floor of one of the Houses of Parliament. In these ways, a constructive dialogue between the court and Parliament may be developed.**

A parliamentary committee for judiciary-related matters

80. The Select Committee in the House of Lords said:

> "The Committee agrees that it is desirable for a committee of Parliament to act as a bridge between Parliament and the judiciary, particularly in the event of the senior judges being excluded from the House. Such a committee should not seek to hold individual judges to account."[61]

81. As the House of Lords Select Committee explained in their report, there are two basic ways of establishing such a committee: a statutory committee could be established by the Bill;[62] alternatively, Parliament itself could establish a committee (or an existing select committee could assume the role). The idea of creating a statutory committee has found favour in some quarters. Lord Mackay of Clashfern, the former Lord Chancellor, moved an amendment to this effect.[63] The advantages of a statutory committee were not, however, clear to the House of Lords Select Committee on the Bill, who in their report set out the relative advantages and disadvantages of both types of committee:[64]

> The advantages of a statutory committee is that its existence is protected by statute whereas a parliamentary committee has to be re-appointed by Parliament each Session and at each re-appointment its terms of reference, and very existence could be called into question. The powers of a statutory committee on the other hand can be enshrined in the Act. The disadvantage of a statutory committee is that its terms of reference and powers may be less flexible and therefore the development of its role is likely to be less fluid.

61 *op cit*, para 485

62 Examples of such committees are the Ecclesiastical Committee (established by the Church of England Assembly (Powers) Act 1919), which is a joint committee of both Houses, and the Speaker's Committee on the Electoral Commission (established by the Political Parties, Elections and Referendums Act 2000), a committee of Members of the House of Commons only

63 HL Deb, 7 December, col 809; the amendment was withdrawn after debate

64 *op cit*, paras 419–420; of course, this refers only to the position in the House of Lords. In the House of Commons Committees are appointed for the life of the Parliament

82. Another important decision is whether the committee responsible for oversight of judiciary-related matters should be a committee of the House of Commons, the House of Lords, or a joint committee of both Houses. A clear majority of the House of Lords Select Committee on the Bill preferred the option of a joint committee.[65]

83. **In general we agree with the House of Lords Select Committee on the importance of a continuing Committee with responsibility for judicial matters. We think that this Committee serves this function. It would be appropriate for both Houses to have their own Committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit. We do not see the necessity for inserting a provision to this effect in the Bill.**

65 *op cit*, para 420

6 Conclusion

84. Many of the points raised by us in our First Report have now been dealt with in the Bill, as amended. We are especially pleased that the new Supreme Court will not be established until proper accommodation has been found for it and that the arrangements for the administration and finance of the Supreme Court have been improved in ways which will strengthen its independence.

85. We welcome the acceptance of the Committee's proposal that, even if the role of the Lord Chancellor were to be changed as envisaged in the original bill, the title and status could be retained as a means of emphasising the particular responsibility of the holder of that office in upholding the rule of law and the independence of the judiciary.

86. Part 4 of the Bill relating to Judicial Appointments and Discipline will create greater transparency in the process of selecting judges. This part of the Bill is a long overdue reform which will preserve the long-term independence of the judiciary and enhance its standing with the public. We note that it has cross-party support.

87. As a result of most of the Bill's amendments in the Lords and the Concordat the Bill is now a more effective vehicle to achieve the Government's objectives of creating a Supreme Court outside the legislature and maintaining the independence of the judiciary.

Conclusions and recommendations

Concordat

1. We welcome the Concordat. It settles some of the outstanding issues of detail which were not fully addressed in the Government's consultation papers. (Paragraph 5)

2. Many of the principles set out in the Concordat are reflected in the Bill. Further recognition, even entrenchment, is unnecessary. The Concordat will remain a document of constitutional importance. (Paragraph 7)

Legislative process

3. We believe that our previous inquiry, the Lords Select Committee and the Carry Over procedure have ensured that there has, after all, been proper examination of the Government's proposals set out in the Bill. In practical terms these processes gave the Bill the scrutiny that a draft Bill would expect to receive. (Paragraph 13)

4. The Bill was introduced into the House of Commons on 21 December 2004 and received its Second Reading on 17 January. This interval did not allow us sufficient time to report to the House in time for the Second Reading debate, which is regrettable. (Paragraph 14)

Qualifications for the office

5. Assuming that the House retains the Bill to an extent in the format in which it arrived from the House of Lords, on balance we prefer to keep the office of Lord Chancellor and its distinctive status, different from that of all other members of the Cabinet, because as we said in our earlier report when contrasting the role of the Lord Chancellor with other ministers, the Lord Chancellor "has a special constitutional importance enjoyed by no other member of the cabinet and … is usually at the end of his career (and thus without the temptations associated with possible advancement". Although it may be more likely that someone in the House of Lords as at present constituted has the seniority and lack of aspiration towards further office which we considered desirable, it is by no means certain, and there will be suitable candidates for the post in both Houses. There does not, therefore, seem to be a compelling argument for insisting that the Lord Chancellor must be a member of the Upper House. (Paragraph 28)

6. The Lord Chancellor will have key roles in relation to the judiciary and in judicial independence, the rule of law, judicial appointments and discipline. The principal responsibility for judicial appointments will be with the Judicial Appointments Commission and for judicial discipline with the Lord Chief Justice. It may be an advantage for the holder of the post of Lord Chancellor to be a senior lawyer. (Paragraph 30)

Speakership of the House of Lords

7. We consider it to be for the House of Lords to decide who should sit in the Woolsack, but that it is reasonable to assume that, if the Bill is passed, the Lord Chancellor, who has responsibility for running a large government department, should not have that role. (Paragraph 33)

Amendments to the Bill

8. We agree that the provisions to allow amendment of the primary legislation by statutory instrument are undesirable, and we hope and expect that the Government will bring forward further amendments in the House of Commons to remedy this point. (Paragraph 36)

Jurisdiction of the new court

9. Clause 38 (1) is a clear statement that nothing in part 3 of the Bill is to affect the distinctions between the separate legal systems of the parts of the United Kingdom. (Paragraph 41)

10. The provisions of Clause 38 that nothing in this part of the Bill is to affect the distinctions between the separate legal systems of the parts of the United Kingdom and that a decision of the Supreme Court on appeal from a decision of a court of any part of the United Kingdom is to be regarded as the decision of the court of that part of the United Kingdom, except in relation to a devolution matter, entirely satisfies the concern expressed by us in paragraph 27 of our First Report. (Paragraph 41)

11. The Select Committee in the House of Lords agreed with a proposal to transfer jurisdiction in devolution matters from the Privy Council to the Supreme Court. We are content that the new Supreme Court should exercise this jurisdiction. (Paragraph 42)

12. The Scottish Parliament has now had a full opportunity to debate the proposals contained in the Bill. Clause 38 protects the position of Scots law. (Paragraph 43)

Selection and appointment of members of the court

13. We agree with the House of Lords Select Committee on the Bill that "It should remain a convention that … at least two Supreme Court Justices should have been Scottish judges". (Paragraph 45)

14. The Lord Chancellor told us that "It is envisaged that one or more of the commissions in the three jurisdictions will be asked to supply secretarial and other support on an ad hoc basis when a vacancy is to be filled". We found this to be "an insufficient answer" in February 2004, and twelve months later the picture is no clearer. (Paragraph 46)

15. We recommend that the Bill be amended to allow the selection commission, if it so chooses, to decide whether to provide the Minister with a choice of more than one name. (Paragraph 50)

16. In our First Report, we said that vacancies in the new Court should be publicised and open to application in line with most other public service appointments, although it would still be necessary for some element of active searching for candidates to take place. We regret that there is no provision for advertising appointments included in the Bill. If such amendment is not made to the Bill, we hope that any selection commission appointed under the Bill will as a matter of course publicise and leave open to application posts on the Supreme Court bench. (Paragraph 51)

Court administration

17. We are pleased to see that the Bill has been amended to meet our concerns about the independence of the administration and budget of the Supreme Court. (Paragraph 53)

New court building

18. We are confident that the former Middlesex Guildhall, if chosen, will have the potential to be an excellent base for the new court of final appeal for the United Kingdom providing that it is adapted to allow the new court to function as a modern appellate court, as the judges have urged. (Paragraph 55)

19. We note with approval the acceptance of our recommendation that implementation of part 3 of the Bill should not take place until the new Supreme Court could sit in its own building, thereby making clear the separation between the highest court of appeal in the United Kingdom and the legislature. (Paragraph 59)

Diversity

20. We believe that the Bill should place a duty on the Judicial Appointments Commission of England and Wales to encourage diversity in the range of persons available for selection. There is a precedent for this in the duties placed on the Northern Ireland Judicial Appointments Commission. (Paragraph 63)

Merit

21. We note with approval that the Bill has been amended to remove the Minister's power to define merit. (Paragraph 65)

Confidentiality

22. Since the Bill now provides for only one name to be submitted to the Lord Chancellor and for greater confidentiality we regard our initial concern expressed in our First Report relating to confidentiality of applications for judicial appointments as having been dealt with by the Bill in its amended form. (Paragraph 67)

Judicial Discipline

23. We note that the Bill allocates dual responsibility for discipline to the Lord Chancellor and the Lord Chief Justice. We believe that the Concordat provides an appropriate framework for these responsibilities. (Paragraph 69)

Composition of the Commission

24. The Bill in its present form provides that the Judicial Appointments Commission will be chaired by a lay person. We understand that this provision has the support of the judiciary. Viewed in the context of the Concordat, which adequately preserves judicial independence, and of the strong judicial element in the Judicial Appointments Commission we now believe that a lay chair is acceptable. (Paragraph 74)

Relations between the judiciary and Parliament

25. We regard the provisions of Clause 6 as a useful mechanism for senior judges to be able to communicate directly to Parliament. (Paragraph 76)

26. We welcome the continued use of evidence sessions of our Committee as an opportunity for members of the judiciary at all levels to advise Parliament on the workings of the judicial system and on issues of policy. (Paragraph 77)

Supreme Court annual report

27. We note with approval the amended provision in Clause 51 under which it is the Supreme Court Chief Executive who must prepare an Annual Report, which the Minister will lay before Parliament. (Paragraph 79)

28. The Annual Report will provide the opportunity to invite members of the court and the Chief Executive to appear before a parliamentary select committee, and from time to time might be the subject of a debate on the floor of one of the Houses of Parliament. In these ways, a constructive dialogue between the court and Parliament may be developed. (Paragraph 79)

A parliamentary committee for judiciary-related matters

29. In general we agree with the House of Lords Select Committee on the importance of a continuing Committee with responsibility for judicial matters. We think that this Committee serves this function. It would be appropriate for both Houses to have their own Committees for maintaining a relationship with the judiciary which can meet jointly, if they see fit. We do not see the necessity for inserting a provision to this effect in the Bill. (Paragraph 83)

Table A: First Report—action taken

This table sets out the recommendations for action in the Committee's First Report and the action taken subsequently.

RECOMMENDATION IN FIRST REPORT	ACTION TAKEN SINCE FIRST REPORT
JURISDICTION/SCOTTISH APPEALS	
The legislation establishing the new court will need to make clear the jurisdiction of the court. It will need to establish the extent to which it is a United Kingdom court as opposed to a final court of appeal serving each of the United Kingdom's three jurisdictions. (Paragraph 27) The jurisdiction of the Supreme Court over Scottish appeals and any changes will require legislation or a resolution of the Scottish Parliament. These issues are significant to the maintenance of Scottish law as a distinct entity. They were not addressed when the Government first announced its proposals and the timetable for decisions on the Supreme Court needs to allow for proper resolution and discussion of them in the Scottish Parliament. (Paragraph 39)	Clause 38 (1) is a clear statement that nothing in part 3 of the Bill is to affect the distinctions between the separate legal systems of the parts of the United Kingdom. Subsection (2) states that a decision of the Supreme Court on appeal from a decision of a court of any part of the United Kingdom is to be regarded as the decision of a court of that part of the United Kingdom, except in relation to a devolution matter, which is dealt with in subsection (3) The Bill makes no significant change to the jurisdiction over appeals from Scotland, except in relation to devolution matters. This entirely satisfies the concern expressed by us in paragraphs 27 and 39 of our First Report.
MEMBERSHIP OF THE COURT	
There are two aspects which need to be kept in mind when discussing the membership of the new court. The first is the need for special expertise in the laws and understanding of the society in all parts of the United Kingdom—this is particularly true of the distinction between Scottish law and the law in the rest of the United Kingdom. The second is the need for there to be an equal sense of ownership of the new court in all parts of the United Kingdom. The Constitutional Reform Bill will need to make clear provision for the arrangements relating to representation of the various parts of the United Kingdom. It will need to set out clearly the principles under which members of the new court are appointed. (Paragraph 47)	The Bill does not expressly provide that there be two (or three) judges with experience of Scots law and one judge with experience of Northern Ireland law among the 12 members of the court. Clause 24(8) provides that "In making selections for the appointment of judges of the Court the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom". We agree with the House of Lords Select Committee on the Bill "It should remain a convention that … at least two Supreme Court Justices should have been Scottish judges".
SELECTION AND APPOINTMENT PROCESS	
In our First Report, we drew attention to arrangements needed to enable the Supreme Court	Twelve months later the picture is no clearer. The matter was not discussed in any detail in the report of

RECOMMENDATION IN FIRST REPORT	ACTION TAKEN SINCE FIRST REPORT
selection commission (which will meet only sporadically) to have continuity of practice and to develop recruitment policy. In his evidence to us, the Lord Chancellor told us that "It is envisaged that one or more of the commissions in the three jurisdictions will be asked to supply secretarial and other support on an ad hoc basis when a vacancy is to be filled". We found this to be "an insufficient answer" in February 2004. (Paragraph 56)	the House of Lords Select Committee on the Bill or subsequently on the floor of the House of Lords.
Vacancies in the new Court should be publicised and open to application in line with most other public service appointments. It will still be necessary for some element of active searching for candidates to take place. (Paragraph 64)	We regret that there is no provision for advertising appointments included in the Bill.
RELATIONSHIP BETWEEN SUPREME COURT AND PARLIAMENT	
From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers. (Paragraph 80)	In paragraph 22 of its Response to our First Report, the Government agreed with this recommendation.
From the point of view of preserving the reality and appearance of judicial independence, there are dangers in introducing a system which involves exercising patronage in favour of specific individual judges. On balance we would prefer all judges in the Supreme Court to be made peers upon retirement, subject to the question of further reform of the House of Lords. However, if that option is not followed, then none of them should be made peers. (Paragraph 80)	The Government agrees with the Committee's recommendations that all Justices of the Supreme Court should be appointed to the House of Lords upon retirement.
OPERATIONAL (AND OTHER) MATTERS	
The Department for Constitutional Affairs is not the appropriate organization to run the new court because it is too associated with the England and Wales court system and because giving the	The Bill has been amended to meet our concerns about the independence of the administration and budget of the Supreme Court. As the Bill now stands, the Supreme Court will be an independent statutory

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Government control over the administration of the new court could offend against the principle of judicial independence. (Paragraph 100)	body with its own estimate within the overall DCA departmental expenditure limit and, as a result of a separate Estimate, independent financing from the Consolidated Fund through the normal supply process. The Chief Executive of the Supreme Court will be a separate accounting officer in right of the court itself and not a sub-accounting officer under the DCA Permanent Secretary. The Lord Chancellor will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it to the Treasury.
As a minimum we would expect the new court to provide an Annual Report to Parliament of the use of the money in its budget and a description of its work over the course of the year. (Paragraph 81)	Clause 51 places a duty on the Chief Executive of the Supreme Court to make an Annual Report to Parliament.
ACCOMMODATION	
Delay in finding and making available … accommodation has raised the possibility that the new Court might continue to sit in the House of Lords. Given that the principal argument is that the highest court should be seen to be separate from the legislature, it seems perverse to implement the change in a way which leaves many of the same judges sitting in the House of Lords doing the same job in the same place, possibly with the same staff seconded by the House of Lords. If more time is needed to establish the Court as a distinct body, the timing of its introduction should be adjusted accordingly. Such an important change should not be rushed. (Paragraph 111) If the reform is inaugurated in the form of a Supreme Court which is still temporarily sitting in the House of Lords, looking much like its predecessor, it will not meet the desire of the Government and the supporters of reform to make the Court appear clearly separate from the legislature. (Paragraph 192)	The Bill now says that Part 3 of the Bill shall not be brought into force unless the Lord Chancellor "is satisfied that the Supreme Court will at that time be provided with accommodation in accordance with written plans that he has approved" and he may "approve plans only if, having consulted the Lords of Appeal in Ordinary holding office at the time of the approval, he is satisfied that accommodation in accordance with the plans will be appropriate for the purposes of the Court". We note with approval the acceptance of our recommendation that implementation of this part of the Bill should not take place until the new Supreme Court could sit in its own building, thereby making clear the separation between the highest court of appeal in the United Kingdom and the legislature.
In the nineteenth century the great reform of the courts system involved the removal of the courts from Westminster Hall, their historic home for centuries, to the Royal Courts of Justice in the Strand. The new court of final appeal for the United Kingdom requires a building which is functionally effective, but which also reflects its authority and	The final choice for a home for the new court still remains to be made, but the former Middlesex Guildhall is the Government's preferred option.

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significance. (Paragraph 112)	
JUDICIAL APPOINTMENTS	
The Government must make it a clear objective of the new Judicial appointments Commission to ensure that active efforts of the kind made by Lord Irvine to promote diversity will be continued in the future. (Paragraph 125)	The House of Lords Select Committee amended the Bill so as to make express reference to the "encouragement of diversity in the range of persons available for selection" as one of the matters on which the Lord Chancellor may provide guidance to the JAC. This falls short of placing an express duty on the Judicial Appointments Commission to engage in a programme of action to promote diversity. We believe that the Bill should place a duty on the Judicial Appointments Commission of England and Wales to encourage diversity in the range of persons available for selection. There is a precedent for this in the duties placed on the Northern Ireland Judicial Appointments Commission.
Any system of appointment must be transparent and any discretion exercised by the Secretary of State will need to be open to challenge in the first instance by way of appeal to the Judicial Appointments and Conduct Referee. Under the current proposals the Secretary of State will be required to give reasons for any choice made. Although it is likely that these reasons will, in the first instance, be given in confidence to the Committee, they may well become public knowledge as a result of an appeal to the Referee. Although we do not regard this as a fatal objection to giving the Secretary of State a choice of names to appoint, it raises practical difficulties, mentioned by witnesses, relating to attracting good candidates who may be put off from applying by the prospect of too public a refusal. (Paragraph 132)	The Bill now provides for only one name to be submitted to the Lord Chancellor and for greater confidentiality; therefore, we regard this concern as having been dealt with by the Bill in its amended form.
We accept that the judiciary as a whole will be improved by the recruitment of judges from a wider section of society. The problem relates to individual appointments, rather than how the judiciary as a whole should be composed. Any committed approach to increasing diversity will involve very much more than a new method of scrutinising appointments. (Paragraph 146)	The Bill has been amended to make express reference to the "encouragement of diversity in the range of persons available for selection" as one of the matters on which the Lord Chancellor may provide guidance to the JAC. This falls short of placing an express duty on the Judicial Appointments Commission to engage in a programme of action to promote diversity. We believe that the Bill should place a duty on the Judicial Appointments Commission of England and Wales to encourage diversity in the range of persons available for selection. There is a precedent for this in the duties placed on the Northern Ireland Judicial

RECOMMENDATION IN FIRST REPORT	ACTION TAKEN SINCE FIRST REPORT
	Appointments Commission.
The rule of law is fundamental in maintaining basic freedoms; considerable emphasis is placed on judicial independence in the constitutional system. Judges (especially in the junior ranks) who wish to be promoted but who may be dealing with cases in which the Government is a party must not be put in a position where their future professional prospects are—or may seem to be—open to influence as a result of decisions in particular cases. This might be the case if a continental system of career judges were adopted. We agree that such a system would not fit with the legal system in England and Wales. (Paragraph 157)	In paragraph 41 of its Response to our First Report, the Government agreed with this recommendation.
Flexibility in the system of selecting candidates and encouraging people to apply must not threaten—or seem to threaten—judicial independence. A career structure that involves an expectation of promotion makes it even more vital that the current freedom from partisan interference in appointing and promoting judges is maintained. (Paragraph 158)	In paragraph 42 of its Response to our First Report, the Government agreed with this recommendation.
A successful approach to ensuring that there is a greater diversity in judicial appointments requires leadership. In the past, the Lord Chancellor has provided this, as we acknowledge Lord Irvine did during his tenure of office (see paragraph 125 above). The new Judicial Appointments Commission must provide this leadership by implementing strategies to widen the field of applicants for judicial office. Merit will remain the key criterion for appointment. The new Commission should define "merit". (Paragraph 159)	We note with approval that the Bill has been amended to remove the Minister's power to define merit.
DISCIPLINARY POWERS	
We regard it as self-evident that any powers to discipline judges or decision to promote them should be within a system that the judiciary and public believe preserves judicial independence. The Lord Chancellor has always played a central role in reaching a compromise between the conflicting imperatives of maintenance of discipline and judicial independence. There is—and always has been—a clear tension between the right of judges to hold	We note that the Bill allocates dual responsibility for discipline to the Lord Chancellor and the Lord Chief Justice. We believe that the Concordat provides an appropriate framework for these responsibilities.

RECOMMENDATION IN FIRST REPORT	ACTION TAKEN SINCE FIRST REPORT
office during good behaviour and the need to ensure proper standards are maintained. It is a reflection of the success of the system that up to now so few cases have caused serious controversy. Any new system of discipline will need to be firmly within the control of the judiciary in individual cases, and we believe that the Lord Chief Justice should be the person primarily responsible for it. The relevant provisions of the Bill will need to be very carefully examined. (Paragraph 165)	
COMPOSITION OF THE JUDICIAL APPOINTMENTS COMMISSION	
We recognise that members of the Commission should not regard themselves as representing a narrow sectional interest. However, it would be strange if leading members of the two branches of the legal profession were not included among the Commission's members. (Paragraph 175)	Under the terms of the Bill as it now stands, there will be 15 members of the JAC (including the Chairman, who holds an office distinct from the other 14 Commissioners). There will be six non-lawyers (including the Chairman); five members who are professional judges; two members from the legal professions; a lay magistrate; and a tribunal chairman, tribunal member or arbitrator. The Bill has been amended to permit the Lord Chancellor by order, with the agreement of the Lord Chief Justice, to increase the number of Commissioners.
CHAIR OF THE JUDICIAL APPOINTMENTS COMMISSION	
Notwithstanding the arguments in favour of a lay Chair, we believe that the Judicial Appointments Commission should be chaired by a judge. (Paragraph 185)	The Bill in its present form provides that the Judicial Appointments Commission will be chaired by a lay person. We understand that this provision has the support of the judiciary. Viewed in the context of the Concordat, which adequately preserves judicial independence, and of the strong judicial element in the Judicial Appointments Commission we now believe that a lay chair is acceptable.
PROCESS OF DECISION MAKING	
The abolition of the office of Lord Chancellor should be delayed until the reforms are established. (Paragraph 191) The consultation process has been too short and the legislative timetable is too restrictive to deal with changes which are so far reaching in their effects. The reason for haste seems to be primarily political. In the light of the complex issues raised and the ambition	Our previous inquiry, the Lords Select Committee and the Carry Over procedure have ensured that there has, after all, been proper examination of the Government's proposals set out in the Bill. In practical terms these processes gave the Bill the scrutiny that a draft Bill would expect to receive.

RECOMMENDATION IN FIRST REPORT	ACTION TAKEN SINCE FIRST REPORT
on the part of the Government to create a new settlement for a final court of appeal for the United Kingdom we recommend that the Government proceed with the Constitutional Reform Bill on the basis of its being draft legislation—in particular in respect of the proposals for a new court of final appeal. If this course of action is followed, it is likely that many of the arrangements could be agreed on a consensual basis. If the plan is to create a court to last for centuries, then this must be an objective worth spending some time on. (Paragraph 193)	

Table B: Principal amendments to the Constitutional Reform Bill [*Lords*]

This table sets out the principal amendments made to the Constitutional Reform Bill [*Lords*] during its passage through the House of Lords (including those made by the Select Committee on the Bill in accordance with its report HL Paper 125–I).

	The Bill as introduced to the House of Lords (HL Bill 30)	**Bill as sent to House of Commons**
OFFICE OF LORD CHANCELLOR		
Rule of Law	No express statement relating to the rule of law	"This Act does not adversely affect—(a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle" (7 December, col 738; 20 December, col 1538; see also HL Paper 125–I, para 67)
Office of Lord Chancellor	Office is abolished	Office is retained (13 July, col 1142). A large number of amendments were brought forward by the Government at Report and Third Reading to give effect to a commitment to bring the Bill into conformity with the decision of the House of Lords on 13 July 2004 to retain the office of Lord Chancellor
Qualifications for appointment as Lord Chancellor	—	• Holder of high judicial officer or been a practising lawyer for at least 15 years (11 October, col 34; 7 December, col 779) • "No person is qualified to be Lord Chancellor unless he is a member of the House of Lords" (7 December, col 748)
Oath	—	Promissory Oaths Act 1868 amended to insert a new oath to be sworn by Lord Chancellor (7 December, col 802)
The Great Seal	—	The Lord Chancellor will retain the keepership of the Great Seal (7 December, col 884)
Senior judiciary communications to Parliament	No express provision in the bill	The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters of importance relating to the judiciary or the administration of justice (7 December, col 809)
Henry VIII clause	—	The Lord Chancellor may by order make provision for the transfer, modification or

	The Bill as introduced to the House of Lords (HL Bill 30)	Bill as sent to House of Commons
		abolition of functions of the Lord Chancellor (20 December, col 1544). The Delegated Powers and Regulatory Reform Committee have commented on this amendment (5th Report, HL 20, 20 December 2004) and the Government will bring forward further amendments in the House of Commons
THE SUPREME COURT OF THE UNITED KINGDOM:		
Supreme Court selection commission	Possible for all 5 members of the commission to be judges and lawyers	At least one member of the selection commission must be lay—drawn from the separate judicial appointment commissions in England & Wales, Northern Ireland, and Scotland) (HL Paper 125–I, para 179)
Consultation by the selection commission		Selection commission to consult senior judges etc (14 December, col 1223)
Number of candidates put forward to minister for appointment to the Supreme Court	Supreme Court selection commission to give the minister 2 to 5 names of potential appointees	Commission to recommend only one name to the minister (along with details of others considered) (HL Paper 125–I, para 185)
Supreme Court rule making powers	Minister has power to allow or disallow rules submitted to him by the President	President of the Supreme Court responsible for rule making (HL Paper 125–I, para 245)
Governance of the Supreme Court – financial and administrative autonomy	—	"The Supreme Court is an independent statutory body with its own estimate within the overall DCA departmental expenditure limit and, as a result of a separate estimate, independent financing from the Consolidated Fund through the normal supply process. The chief executive of the Supreme Court will be a separate accounting office in right of the court itself and not a sub-accounting officer under the DCA Permanent Secretary". The Lord Chancellor will simply be a conduit for the Supreme Court bid and will not be able to alter it before passing it to the Treasury. (14 December, col 1236; and see also HL Paper 125–I, para 256–268)
Sunrise clause	—	Part 2 of the Bill shall not be brought into force unless the Lord Chancellor "is satisfied that the Supreme Court will at that time be provided with accommodation in accordance with written plans that he has approved" and he may "approve plans only if, having consulted the Lords of Appeal in Ordinary

	The Bill as introduced to the House of Lords (HL Bill 30)	Bill as sent to House of Commons
		holding office at the time of the approval, he is satisfied that accommodation in accordance with the plans will be appropriate for the purposes of the Court" (14 December, col 1230; and see also Written Statement on Supreme Court Building, 14 December, col WS71)
The UK's three jurisdictions	—	Clause to safeguard the separate identities of Scots and Northern Irish law (20 December, col 1597)
Composition of panels to hear appeals	—	A panel must never consist "wholly or predominantly" of non-permanent judges (14 December, col 1233)
Annual report	Minister to prepare annual report	Chief executive of Supreme Court to prepare annual report (14 December, col 1277)
Separate legal systems	—	Nothing in Part 2 "is to affect the distinctions between the separate legal systems of the United Kingdom" and "a decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom" (20 December, col 1597; and see HL Paper 125–I, para 279)
JUDICIAL APPOINTMENTS IN ENGLAND AND WALES		
Number of Commissioners	Fixed at 15 (including chairman)	Minister, with agreement of LCJ, may increase, but not decrease, number (HL Paper 125–I, para 301)
Eligibility for membership of JAC	A person may not be appointed as a Commissioner if he is a member of the House of Lords	This restriction is removed so that Cross-Bencher peers may be appointed to the JAC (14 December, col 1279)
Ministerial guidance to JAC	JAC must have regard to any guidance issued by the minister (cl 52)	LCJ must be consulted about any guidance before it is made; and guidance to be in the form of a statutory instrument subject to affirmative resolution (HL Paper 125–I, para 335)
Merit	"Selection must be on merit". (cl 51(3))	"Selection must be solely on merit" (14 December, col 1288; HL Paper 125–I, para 323)
Diversity	No express reference to	Minister's guidance to JAC to include

	The Bill as introduced to the House of Lords (HL Bill 30)	Bill as sent to House of Commons
	increasing diversity on the face of the Bill	"encouragement of diversity in the range of persons available for selection" (HL Paper 125–I, para 336)
Minister's power to reject name recommended by JAC, or require the JAC to reconsider its selection	No express criteria	Minister may reject a selection only if he considers that the selected candidate is unsuitable; reconsideration of selection may be ordered only if the minister considers that the candidate is not the best for the post; minister must give reasons in writing to the JAC (HL Paper 125–I, para 347)
Assistance with other appointments	—	The Lord Chancellor may request assistance from the JAC for the making by him or by another Minister of the Crown of an appointment or recommendation for judicial appointment not otherwise mentioned in the Bill, e.g. appointments to the European Court of Justice or the European Court of Human Rights (14 December, col 1306)
Confidentiality		New clause with stronger protection against disclosure of confidential information relating to judicial appointments (20 December, col 1603)

Formal Minutes

Tuesday 25 January 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley	Mr Hilton Dawson
Mr James Clappison	Keith Vaz
Ross Cranston	Dr Alan Whitehead
Mrs Ann Cryer	

The Committee deliberated.

Draft Report [Constitutional Reform Bill [*Lords*]: the Government's proposals], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 54 read and agreed to.

Paragraph 55 read, as follows:

The new Supreme Court needs a building which is able to reflect the importance of the institution which it houses. The proposal of the former Middlesex Guildhall as the location for the Supreme Court has the potential to meet this requirement. This has not been an easy decision because the choice of building involves many complex issues. We believe that these issues should continue to be the subject of the fullest consultation with the Law Lords. We are confident that this building, if chosen, will have the potential to be an excellent base for the new court of final appeal for the United Kingdom providing that it is adapted to allow the new court to function as a modern appellate court, as the judges have urged.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 5	Noes, 2
Ross Cranston	Peter Bottomley
Mrs Ann Cryer	Mr James Clappison
Mr Hilton Dawson	
Keith Vaz	
Dr Alan Whitehead	

Paragraph 55 read and agreed to.

A paragraph—(*Peter Bottomley*)—brought up and read, as follows:

There are substantial extra capital and recurrent costs following the Government's decision to change the Supreme Court arrangements.

Question put, That the paragraph be read a second time.

Amendment proposed, in line 2, after the word "arrangements" to insert the words "but these are a necessary consequence of the creation of a Supreme Court which is separate form the legislature".—(*Keith Vaz.*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 5	Noes, 2
Ross Cranston	Peter Bottomley
Mrs Ann Cryer	Mr James Clappison
Mr Hilton Dawson	
Keith Vaz	
Dr Alan Whitehead	

Paragraph, as amended, inserted (now paragraph 56).

Paragraphs 56 to 86 (now paragraphs 57 to 87) read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report, as amended, be the Third Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till this day at 2.00pm

Witnesses

(See Volume II)

Tuesday 25 May 2004

Tuesday 8 June 2004

Tuesday 16 November 2004

List of written evidence

(See Volume II)

Reports from the Constitutional Affairs Committee

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal)	HC 48
	Government response	*Cm 6150*
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals	HC 211
	Government response	*Cm 6236*
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision	HC 391
	Government response	*Cm 6367*
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868
Fifth Report	Draft Criminal Defence Service Bill	HC 746
	Government response	*Cm 6410*

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
Second Report	Work of the Committee in 2004	HC 207